HOUSE OF LORDS

EUROPEAN UNION COMMITTEE

HOME AFFAIRS, HEALTH AND EDUCATION SUB-COMMITTEE

EU Data Protection law: a 'right to be forgotten'?

Evidence

Contents

Neil Cameron, Director, Neil Cameron Consulting Group, Jim Killock, Executive Director, Open Rights Group, Chris Scott, Partner, Schillings, and Jennie Sumpster, Senior Associate, Schillings—Oral Evidence (QQ 1-12)

Evidence Session No. 1 *Heard in Public* *Questions 1 - 12*

WEDNESDAY 2 JULY 2014

Members present

Baroness Prashar (Chairman)
Baroness Benjamin
Lord Blencathra
Viscount Bridgeman
Lord Faulkner of Worcester
Lord Jay of Ewelme
Lord Judd
Lord Morris of Handsworth
Lord Sharkey
Lord Wasserman

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Examination of Witnesses

Neil Cameron, Director, Neil Cameron Consulting Group, **Jim Killock**, Executive Director, Open Rights Group, **Chris Scott**, Partner, Schillings, and **Jennie Sumpster**, Senior Associate, Schillings

Q1 The Chairman: Welcome and good morning. I understand that Jim Killock is going to be five minutes late, but we can start. By way of introduction, I just want to say that is an open session. A webcast of the session goes out live as an audio transmission and is subsequently accessible via the parliamentary website. A verbatim transcript of the evidence will be taken and put on the parliamentary website. A few days after the session you will be sent a copy of the transcript to check for accuracy. It would be helpful if you could advise us of any corrections as quickly as possible. If, after giving evidence, you wish to clarify or amplify any points made, or have any additional points that you wish to make, you are of course welcome to submit supplementary evidence to us. Maybe you can start by introducing yourselves and saying a little about yourselves. We will start with you, Mr Cameron.

Neil Cameron: My name is Neil Cameron. I am a former barrister and management consultant advising law firms on IT issues. I also write a blog on the issues affecting IT.

Jennie Sumpster: I am Jennie Sumpster, a senior associate at Schillings, doing media work predominantly. My background is in data protection and commercial compliance with data protection legislation. Within the firm, I practise that in the media context.

Neil Cameron, Director, Neil Cameron Consulting Group, Jim Killock, Executive Director, Open Rights Group, Chris Scott, Partner, Schillings, and Jennie Sumpster, Senior Associate, Schillings—Oral Evidence (QQ 1-12)

Chris Scott: I am Chris Scott, a partner at Schillings. I advise businesses and prominent individuals on protecting their reputations and privacy. I also do some pro bono work with children's charities, helping young people to understand the consequences of how they use social media and create content on the internet.

The Chairman: I can now welcome Mr Killock. Once you have settled down, please introduce yourself.

Jim Killock: I am Jim Killock, executive director of the Open Rights Group. We work on digital and free-speech issues from the point of view of a citizen. I am particularly interested in the impact of digital technology on human rights.

Q2 The Chairman: Thank you. To start with the first question, do you agree with the court's ruling that Google or other search engines can be classed as data controllers? Who would like to start?

Chris Scott: I am happy to start. We view that the term is accurately applied to Google. The definition is, "a person who … determines the purposes for which and the manner in which any personal data are … processed". Our view is that Google does not merely passively deliver information. Google sculpts the results. It is in a competitive environment and its objective is to help users find precisely what they want when they are dealing with competition for users. Therefore, in the course of that, its algorithms perform a function that helps to determine the manner and the purposes for which the data are being processed. We certainly agree that it should be classed as a data controller.

Neil Cameron: My view is the opposite. I believe that search engines are not data controllers under the meaning of the directives. I agree with the logic expounded by Advocate-General Jääskinen in his opinion to the court. I go along with his logic and I will not expand on that.

Jim Killock: It seems fair enough to us that Google should be classed as a data controller. It operates in Europe and is a European company. It has offices in Spain and Britain as well as southern Ireland. It processes the data of Europeans and has legal entities here, so as a processor of the data of Europeans it should be subject to data protection considerations. In particular, we should be afforded those protections.

Q3 Lord Sharkey: The question put by the Spanish court to the ECJ referred to the data subject wishing to have information consigned to oblivion, but is not the true position that the information removed from Google and other search engines will always continue to exist; it simply will not be so easily accessible. Is it not the case, for example, that all the original links that may be removed by Google will still be available on google.com?

Chris Scott: Yes.

Neil Cameron: For me, therein lies the problem. The court has just been trying to get slightly pregnant. It is trying to say, "Because we can only incompetently enforce this law, let's go ahead and do it because the original stuff can still be found if you know where it is". That amounts, in the words of the Advocate-General Jääskinen, to a falsification of history. It is a fundamental problem in going after Google. We should be going after the people who published the original material that appears on Google and, if necessary, removing those

materials, and then, if further necessary, enforcing the absence of those links against Google thereafter.

The way the court has done it has denied anyone consideration of the journalistic exception to the data protection principles and the right to be forgotten. Fundamentally, Google cannot claim the right of journalistic defence because it is not a news organisation and does not purport to be. Essentially, in the course of the discussion, the ability to make that argument has been removed because we have not proceeded against the people we should have proceeded against, namely the newspapers.

Lord Sharkey: Would any of you care to comment on the fact that these links will still be universally and easily available, and on the bearing that has on the judgment and the effect on Google itself?

Chris Scott: I would look at this from the perspective of people who complain about online content and the context in which they come to be complaining. It is absolutely right that, where possible, challenging the underlying content is the best route, but we are concerned here with content that causes unwarranted damage or distress. You have to look at where that damage and distress is caused. For most people, that will come from how it appears in their Google search results. It will probably come as no surprise to members of the Committee that before appearing today I googled all of you to find out a little about you all. That is the process by which a lot of people conduct their due diligence these days. Where people are concerned, the underlying cause of harm might be the article that has been published, but the particular element that is causing the harm is the prominence with which that information appears in the search. That is why the complaints against Google are being made.

Viscount Bridgeman: Is it true to say that your case for including Google is based on its location, rather than its modus operandi?

Jim Killock: At the moment it is very difficult for Europe. If you are a similar business in America, to a certain degree, with no ties and no business in Europe, it is very difficult to argue that you are subject to European law.

I am not saying that they should not be giving us the same rights of privacy or that we should not have enforceability, but it is very difficult at the moment to make that argument. I am not suggesting that American companies should not be respectful of our privacy, but at this point it is very difficult to make that happen.

Q4 Baroness Benjamin: I am glad to hear you talking about young people and protecting them. I am sure you saw the news item this morning about revenge porn. A lot of young people are filming each other having sex and then putting it online. We can demand that that original material be taken down, but what happens if it goes viral? What is the situation then? How can we protect children, and what do you feel Google should be doing to protect them?

Chris Scott: The answer is that it is one of the intractable problems that we have in the move from narrower forms of publication to wider, mass forms of publication. You see it in other areas as well, such as how the rehabilitation of offenders will be treated by social media. Parliament's policy is that certain offences should be forgotten after a while, but Google does not forget.

On issues such as revenge porn and all such content, you are most effective when you get to it at the source and can act very quickly. Hence a lot of this is about awareness-raising before things get the opportunity to go viral. You have to be a bit practical over how the law is used. After that, you end up with two courses, one of which involves going directly to everywhere where the information is published and demanding that it be taken down. That is an enormous and time-consuming process. You may find that some hosts are not particularly amenable. They may be in a jurisdiction where it is very hard to enforce the element of the law that applies here.

The other route is just to make the material harder to find. What is causing the pain is the fact that it is visible in a search. When those people are searched biographically in the future, that is where the content will be found. I am afraid there is no easy answer. It is a question of trying to patch the best together.

Baroness Benjamin: Interestingly, someone put something on my Twitter account, and before I could blink it was gone. Is Twitter policing the site to know whether certain things come up? Should Google be doing something like that so that when something comes up, there is someone who can click immediately so that it does not go viral? Do you think that is feasible?

Chris Scott: It is beyond my technological expertise to say how feasible it is. Google certainly has processes in relation to child pornography, copyright material and such issues, so that it is able to take content down very quickly and make it harder for it to be posted online. However, as for all search engines, the challenge is the extent to which commercial power and technological ability can keep pace with what we as a society want to be able to do.

Lord Wasserman: I think you have to be very careful about language. You said that the law says that certain offences should be forgotten after a time. It does not say that; it simply says that the offence cannot be taken into account or used. Victims will not forget; the person who did it will not forget. So you have to be very careful in the use of terms such as "forgotten" and so on. They have a meaning and we are in a very technical area here of the internet and all the rest of it. That is all: it was just a little point about language.

Jim Killock: I think the points that are being touched on are exactly right in this case. This is not a right to be forgotten; it is more of a right for people to assert that their search results are relevant. The court's words were that things might be taken down if they are "inadequate, irrelevant or no longer relevant, or excessive". It is talking about a very narrow class of problems.

In both this and the case of the European directives, the right to erasure, which I think we shall come to later, is perhaps better than the right to be forgotten, which is too strong and not really what any of this is attempting to achieve.

In relation to the kind of complaints that Google is getting at the moment, as a result of this judgment we find that most relate to things such as defamation or other illegal, or potentially illegal, activity that has very little or nothing to do with this judgment and the kind of things it might resolve.

Lord Sharkey: But Google has rejected a lot of the applications made to it to have the links removed. It has rejected them on the grounds that it is forced to make a judgment. Is it appropriate that these commercial enterprises make judgments on the basis that you have just outlined?

Jim Killock: That is a real problem, and I would like to know what the lawyers thing about this. I am deeply uncomfortable with that. Part of the problem here is that these companies are increasingly asked to make these judgments. There is pressure on Twitter to remove material that is bullying and harassing. Much of the time, it might need to do that. However, there comes the classic problem whereby it is simply not entitled to do that because the material is, for instance, offensive but not actually illegal.

Neil Cameron: Offensive to whom?

Jim Killock: Offensive to whom? If I am offensive to the UK Government, rather than to an individual, or about certain things—for example, the Gulf War or soldiers in general? These cases have happened. Am I really breaking the law in those circumstances? Is it really the right of companies to censor what I am saying at that point? In these cases, where the material may not be relevant or may no longer be relevant, those are quite difficult judgments to make. We need to hear from the Information Commissioners at what point they think these judgments should be referred to them. How much are they prepared to handle? When should people be talking to those who have some ability to deal with this impartially rather than to companies, who will inevitably be risk-averse?

Jennie Sumpster: At this point, it is worth going back to basics. Commercial enterprises as data controllers generally will always have to adhere to the data protection principles, which require data to be adequate and relevant. These kinds of judgments are, or should be, made by these commercial enterprises anyway; this is nothing new. It may be a different context within which they are discussing them, but such decisions should already be being made under the existing legislation from before the judgment was made. So I do not think it is inappropriate that they should make some kind of call around these requests.

Chris Scott: One further point is that asking them to make that call is a first step. If they make the call and the user is still dissatisfied, they still have the right to escalate that complaint to an independent arbitrator such as the ICO.

Neil Cameron: We could be about to invent the biggest bureaucracy that the world has ever seen.

The Chairman: Absolutely.

Q5 Lord Faulkner of Worcester: I want to ask about what appears to be a contradiction in the court's ruling relating to the right to privacy. It was said that this consideration overrides the right to receive information, but it does not apply when the person involved is prominent in public life. Do you think it is practical to make that sort of distinction, and what do you understand by it?

Chris Scott: I suppose our starting point is that the order of priorities starts with specific search engines and might then be extended to other forms of business such as social media by analogy in the future. However, this is a case about the way search engines operate. The point that the court is making is that interference with a fundamental right—to privacy—cannot be justified solely by Google's economic interest in selling advertising or a general public interest in being able to find that information. The interference could be justified by a specific public interest, which could include the role that the individual plays in public life. It might also be to do with the nature of the information. I am sure there will be numerous cases where a specific public interest will tip the balance in favour of the information being

found. It comes down to the operation of the specific circumstances of this case. Obviously there is no competing right engaged so there has been no argument about freedom of expression or Article 10.

Lord Faulkner of Worcester: But how will it be done on a case-by-case basis? For example, Lord Jay is prominent in public life but I am not, therefore he does not have the protection that I do. Is it that sort of consideration?

Chris Scott: I do not think it would be as general as that. You could be in public life and still have protection for certain types of information. It will be no surprise that our firm works a lot on privacy law. In a lot of the tests around it, you are carrying out a balancing act between the right to privacy and the right to freedom of expression. A lot of the factors that come into play there relate to one's role in public life, but that is not an absolute to being able to assert privacy rights. Again, it can come down to matters such as whether there is an element of hypocrisy or genuine public interest engaged by the nature of the information or the nature of the person. None of this makes it any easier for the person carrying out the balancing test and looking at the analysis, but there is a well trodden path of how such analyses are made.

Neil Cameron: We should not be looking at the role played by any particular data subject; we should be looking at whether the human race has a right to know what has happened. That is not necessarily relevant to the person's role in society or whether they have held themselves up as being of high moral value. We are talking about a system that is now one of our primary records of the history of the human race. We cannot go around rewriting it as and when we feel like it. It is bad enough at the moment. Humanity always forgets to read the minutes of the last meeting. We need somewhere we can go to find out what happened—the history of the mankind. That is why I am really interested in the journalistic purpose of this defence, which is not covered in the consideration of this . That would be applied according not just to whether people play a role in public life but to whether the event reported ought to be on the record.

Lord Jay of Ewelme: We are not really talking about what has happened, are we? We are talking about what someone might think about something that may or may not be true or relevant. That takes you from a factual basis into a very difficult question of judgment, does it not?

Neil Cameron: Then the journalistic defence would fall flat, but that is the one that I shall fundamentally rely on for having something on the record. I do not want to have to go after Google for that; I want to go after the sources, which perhaps reflects that judgment.

Lord Sharkey: May I just ask a question related to that, following Lord Jay's question? I understood that the Costeja case was about a matter of record—a matter of fact—rather than a matter of opinion.

Neil Cameron: Yes.

Q6 Lord Jay of Ewelme: I want to follow that up, but there is a question of practicality, which we have touched. The question is really whether it is practical for Google to comply with the judgement. On the one hand, I gather that about 10,000 people a day are applying to have their stuff removed. That sounds an enormous amount, but I gather that Google's

transparency report suggests that last month it received requests to remove 26 million URLs from its search results. How on earth does anyone do this? Are we in the realms of the practical here?

Neil Cameron: I do not think that we are because I think it will mushroom. The problem is that a lot of this work cannot be automated. It has to be done by humans. We could generate a massive bureaucracy, and we have no idea of how big it could get.

Lord Jay of Ewelme: Do you all share that view?

Chris Scott: I would probably refer back to a couple of points made already. There are already systems in place for certain types of content. It is primarily a commercial question of whether Google, other search engines or others caught by this would be able to invest the time and resources in a system that was compatible with the EU regulation, or whether it will just blanketly accept requests to be removed.

That said, Google is in no better or worse a position than anyone else who is a data controller under EU law. When people deal with these issues, it is on an ongoing basis.

Jim Killock: Google strives to provide relevant results. Its whole purpose is to give you information that is meaningful, useful and up to date, so the court has identified a circumstance that, according to Google's business model, ought to be very rare. Obviously it does arise sometimes, but I wonder about the circumstances of this person. The fact that something from 10 or 15 years ago was appearing at the top of his Google search results means that presumably there was not a lot of information about him, or perhaps he had a fairly unique name or set of circumstances, so it became easy to find something about him that was extraordinarily old and no longer relevant to his current circumstances. For most people that is not going to be the case, and a similar piece of information might appear only on page 10 to 15 of their results. By that point it is not prominent or excessive, and it then becomes difficult for someone to argue that it should be removed. This right ought to be exercised only in very narrow circumstances.

The question is a little about public expectation at this point. The press have talked about this as the right to be forgotten, and everyone now thinks that they have some sort of veto over Google's search results. They do not, and we will see how that is handled. Obviously there is the question of proportionality, but Google is a big company with deep pockets. It is making money out of the fact that it presents search results about people and serves advertising on that. It has a revenue stream to deal with the problems, so one would hope that it is able to cope with it. At the same time, if the public keep being told that this is a right to be forgotten and Google kind of helps to fuel that, it will create a problem for itself through raising expectations in a way that is not realistic.

The Chairman: Does Google still use some kind of discretion in this area? Do you know what kind of criteria it uses at this point in time?

Jim Killock: The Google forms say the same as the European judgment: that is, "irrelevant", "no longer relevant", "excessive" or "inadequate".

Neil Cameron: I would certainly trust Google to exercise that judgment even less than the European Court of Justice, and that is saying something, given my view of that court.

Lord Sharkey: Google is very rich and can afford to do the sort of processing that we are talking about. However, if a young start-up company operating out of a garage in Shoreditch

has what it thinks is a better search algorithm, it will not be able to afford any of this. We can look at the judgment as an action in restraint of trade, and certainly in restraint of innovation. Would you have a view about that?

Chris Scott: I suppose it depends on the environment in which you want to foster innovation. If one of the parameters being set is that you must innovate with an inherent respect for the private nature of the data and information of European citizens, you could see this in one sense as a restraint but in another as the parameter for how you build businesses rather than trying to retrofit the ability to comply with the regulations once the business is off the ground.

Jennie Sumpster: We have one eye on the legislative reforms in data protection in Europe that we hope will come through in the next couple of years. One of the fundamental pillars of those reforms is privacy by design. When you innovate, you must bear in mind the impact that whatever technology and business methods you employ will have on the privacy of individuals. Even at the start-up stage, organisations will have to take privacy into account in a much more detailed and thorough way than perhaps previously. I suppose that that is another example of why we need this legislation to come in. The Data Protection Act is 16 years old and does not contemplate the proliferation of data and the use of social media in the way that has come to pass. It will be a necessity going forward that privacy by design becomes inherent and ingrained in all organisations.

Viscount Bridgeman: Lord Chairman, I hope this is not too much of a red herring, but is Wikipedia going to be brought into this? Will it be affected by this judgment? I ask that because Wikipedia is extremely subjective.

Neil Cameron: There are journalistic exemptions. Does what it produces have to be true? That is the question

Chris Scott: That is a very good question. Wikipedia is more of a traditional publisher in the sense that it hosts content, but obviously it is edited by a vast group of people, not by its employees. It is a very different beast from search engines. Google has at no stage asserted that it is a publisher, because to do so would create consequences in other areas of law that I suspect it would not be enormously keen on. I think that Wikipedia is probably in a very different category. Some of the data principles might apply to it, but I suspect that there may well be certain journalistic exemptions that are available to it, as well as other freedom of information and freedom of expression balances.

Lord Jay of Ewelme: I just want to follow up on a question with Mr Cameron. You were slightly disobliging towards Google when you said that you would trust it less than you would trust the European Court of Justice, although I suppose that is a relative point. Would you not trust Google to do this because you think it is so complicated that it will get things wrong, or do you not trust Google's judgment in carrying out its obligations under the law?

Neil Cameron: Probably all of the above. I certainly do not trust Google's judgment, and I do not think it is geared up for this. Google is primarily an American corporation that does not really understand what personal data protection means anyway. You might have imagined that I am here to defend Google, but I am not; I am here to defend the history of the human race, which is very important. I do not have a lot of time for Google and I do not think it is an appropriate place to put the onus of the judgment as to whether something reported is in the public interest or not.

Q7 Lord Morris of Handsworth: It is perhaps true to say that compliance with the court's decision has generated as much debate as the issue of substance in the first instance. What do you consider to be a reasonable length of time needed for companies to put in place acceptable responses to the ruling?

Neil Cameron: That would depend on how many links we are talking about. It may be something very specific that comes up on Google that is relatively easy to identify, but if it is coming up in millions of places, obviously the companies will need longer to deal with it. Also, if the actual determination is very complex as to whether the information should be removed, it could take months.

Lord Morris of Handsworth: The judgment will be ultimately on whether they comply. There can be a debate about the methodology and so on, but the debate so far seems to be coalescing around implementing the court's ruling.

Jim Killock: Google has in fact moved very swiftly. It put up the pages to allow people to make complaints within days, and having done that it has been taking URLs down very swiftly. The reason for that is that Google is a business and it is going to get a load of complaints. There will be a certain volume of things to deal with, so if it did not move swiftly it would have even more trouble than if it just allows people to file complaints in a more orderly fashion. I would guess that the question is a little more for the Information Commissioner. The Information Commissioner needs to sort out guidance, work with companies that are not Google and help them if they need to handle these kinds of complaints. As has been said, smaller companies might need that kind of help. If, at the end of the day, this judgment is a good one and is helpful, it needs to be enforceable. But that has been the big problem with data protection in general in this country. Enforcement has not been very hard and people are not necessarily aware of their obligations in the area of data protection.

Lord Wasserman: I am worried about the word "compliance", because in the end it is only the courts that can actually decide whether Google or anyone else has complied. Companies can take requests and cut some things in or cut others out, but then there is another stage. The people who are unhappy will go to the courts. The word "compliance" assumes that companies can comply. They can go through the motions and do something, but whether they actually comply is for the courts to decide. I am concerned about that, because we are opening up a whole new stage. I am not going to allow them to do this no matter how much they take off my information. I would take it to a higher level if I could afford it. I would appeal and appeal again until I had exhausted all the avenues. That is what is going to happen if we are talking about people who have real money and lawyers to help them.

Neil Cameron: I agree.

The Chairman: What do the lawyers think?

Chris Scott: It is quite an iterative process. I would compare it again by looking at how the law around privacy has been treated by the courts. Businesses operate by using the common law as a guide to where the grey line sits. Let us look at how over the past 10 years privacy issues have been litigated in France, in the UK and more widely across Europe, where increasing expertise has led to increasing respect for the way it has been dealt with. The grey line has gradually become narrower, so what might have started with a wide margin of uncertainty about what is and is not acceptable has narrowed down to something much

thinner. It is a gradual process. The leading cases that you have described help to form the basis on which everyone can develop a stronger feeling for where their rights lie. From the commercial perspective, while I will avoid using the word "compliance" it makes it easier for companies to manage the risk of taking mis-steps and mishandling complaints. They have a stronger understanding of how they will be treated by the ICO or some other tribunal.

Jim Killock: I would like to echo that statement. This is the area that is of most concern to us. If Google or any other company thinks that the best thing to do when they receive a complaint is to remove the data because that gets rid of the pain, we will have a problem. Again, that is very much for the Information Commissioner to comment on and to explain how the commission wants to see this develop. Rights must be balanced appropriately so that we do not see a free-expression deficit.

Q8 Viscount Bridgeman: I think there is no dispute that the EU data protection regulation gives data subjects an even stronger right to be forgotten. Do you think that the UK Government are likely to oppose this?

Jim Killock: No, and I think they are being somewhat disingenuous and a bit irresponsible. First, the main objection to the right to erasure, as it is now called, which is the right to ask a company to remove data that it may hold about you, is that this is going to be complicated for companies to do. That is the main objection that has been made. Facebook, for instance, might not know where it has put all of someone's personal data and who has been handling it, so why should we put this kind of business burden on that company? It is not a free-expression objection that is being made, it is one of business organisation. At the same time, the UK Government have been quite foresighted in creating a program called mydata, which is all about giving back to individuals personal data on things such as gas bills, energy consumption or any number of other things that might contain personal information that is of value by helping people to make better economic judgments. The UK Government's approach in mydata is to allow you to get data back from these companies and then use them to make, for instance, price comparisons so that you can get better deals. They are saying that it will increase competition and help individuals to make better judgments. That is great, but if you do not accompany that with the right of an individual to say, "I no longer trust this company and I want it to get rid of the information it has on me", you are allowing a situation to arise where personal information just proliferates and there is very little control over where it goes and how it is used. You will have to make sure that you have read the contracts so that you understand precisely what agreements you are making, otherwise you lose control of the situation. That is what a right to erasure is about. The idea is to give individuals more of a balance when dealing with companies. If companies are holding personal information about you but you are no longer satisfied with what they are doing, you can tell them that you do not trust them any more and you want everything to be deleted. That could be Facebook, British Gas or whoever.

Chris Scott: I echo that. I go back to who we are looking to protect with data protection and these rights, and why. You have raised the example of people looking at terms and conditions. I always find it extraordinary the number of start-up applications that, in a lot of cases, hoover up enormous amounts of personal data. No one really flicks through 64 closely typed pages of text on a mobile phone screen to see what exactly they are agreeing to have done with their data. As to the consequences of that, there was a good example this week of

why people start to feel discombobulated or discomfited by how corporations use their data.

You will probably be familiar with the case involving Facebook this week. It has encountered controversy over a study it carried out with its users' data, which has got the Information Commissioner's attention today. To give a short account, without any announcement or the informed involvement of members, Facebook conducted a study in which it positively influenced the information feeds of friends' news that people saw and found that this resulted in users posting more positive information. Then, when it negatively influenced that feed, it discovered that it resulted in negative reaction from users, which it described as emotional contagion but which you and I might call empathy.

One way of looking at that is to say that one of the large American technology companies has publicly announced that it has discovered a way of controlling the moods of its 1.3 billion users without necessarily informing them that it is doing so. I wonder how many people understood that the terms and conditions allow that. In the context of such things being carried out, I would be very much in favour of stronger rights for citizens in terms of how their data are used and being able to have those data deleted if they want.

Neil Cameron: I have a slightly different view; I think we should pause and reflect before going any further. It is worth while thinking about how far we have come in two years. In January 2012, Viviane Reding, the EU Justice Commissioner, said about the regulations: "I want to explicitly clarify that people shall have the right—and not only the 'possibility'—to withdraw their consent to the processing of the personal data they have given out themselves". Journalists at the time commented that that provision was key. It was primarily supposed to be about people controlling data that they put online, not references in the media or anywhere else.

That was two years ago. Two years later, with that being the original purpose, we now have an enforcement against Google and against news stories that are factual. If we can come that far in two years, we need to pause and think about what we are doing before we go any further. I am quite happy about that provisional statement—that people should have a right to control personal data that they have given out themselves—but we have somersaulted so far in so short a time that we should stop and think about it. In particular, we need some kind of judgment from the European Court of Justice about how far the journalistic defence will be allowed.

Q9 Baroness Benjamin: People in the public eye who are involved in the media and the creative industries are often referred to as selling their souls. They are seen as fair game, purely because of the profession they have chosen. I am not talking about so-called celebrities—people who have chosen to be celebrities. The issue that we are discussing this morning is very important, not just to them but to thousands of people across society. How do you think an acceptable balance can be achieved at EU level between the public's right to know and the right to privacy?

Neil Cameron: I do not think this is an internet problem or a Google problem; it is a legal problem. There is a way of drawing that balance and we strive to do so. The problem with doing it at an EU level is that each member state has a very different idea about what constitutes the public's right to know and what constitutes the right to privacy. At one end of the scale you may have Germany or France, and at the other end of the scale you have

the UK. That is the fundamental problem. Again, I counsel pausing for breath before charging off to do anything, until we have some kind of mechanism for consolidating the overall view of the EU's different countries, and their national laws, as to what that balance should be and how it should be regulated.

Chris Scott: Whenever we get into questions of privacy, it is always tempting to look at high-profile people and the impact on them. When looking at how this rule comes into effect, it is wise to look at how it works for people at large. Take an average 15 or 16 year-old, who generates all sorts of information on their social media platforms. If we are balancing there, do they have a right to reflect later in life that it may not have been so sensible to record something indelibly and move on, as opposed to the public having some general right to know what someone did when they were 15 and had a wild night out? I think the balance should come down firmly in favour of the individual.

About three or four years ago, Eric Schmidt of Google made the point to the *Wall Street Journal* that future generations would have to change their names to escape an indelible online past. A far more workable way of doing that is to let them assert their privacy rights, and where they have personal information that could threaten harm to them it is right that their rights should prevail over the general interest of members of the public in being able to find that information.

Baroness Benjamin: It is funny, because when I tried to persuade people to have online protection against children watching pornography, they said to me, "If I have to put my name down for age-verification to be able to access pornography, it will mean that my employers may know that I watch pornography and I don't want them to know that". That was one of the cases where people would not agree to having age-verification to protect children from online pornography. This is what I am talking about: do they then have the right to that kind of privacy? If we can say that people are not allowed to know that, perhaps they would agree to age-verification for online pornography. That is the kind of simple case that I bring up. It is spread wide and is not just about well known people; it goes much deeper. Then there is what you were saying about what young people put on the internet with their future years ahead of them and people not wanting their employers to know too much about them. That is something that we need to think about. What are your views are on this?

Jim Killock: For me, the question of privacy is about control and self-determination. When faced with companies and other groups who, one way or the other, have a lot of information about us, you have to remember that that information represents some kind of power and those groups' ability to make judgments—to decide who you are, to market to you in certain ways, to deny you certain services and to price things up or down accordingly. If that is not threatening, it certainly impacts on people and they wish to have some control over it. That is why privacy is important to people. It is not just about feeling uncomfortable, although that is part of it; it is also about having some control over our lives and the relationships we form with commercial entities.

That perspective is quite different from the one that people have when thinking about celebrities or certain facts about them being exposed in the press, appropriately or inappropriately. That is a very different kind of privacy problem from the sort that we deal with more often, which is that of relationships between individuals and large companies and the Government and so on. That is far more a question about having power over those

individuals and how comfortable they feel in society. We ignore that at our peril at this point because the amount of information that is held and created will proliferate. If we are not thinking about the rights people need to control that, we will have serious social problems in the future.

One thing I wanted to say about young people is that there are fairly mixed views among them about their sense of their privacy. A lot of people assume that they have no sense of privacy or that they in some way do not understand the value of privacy. I think that is very untrue. It is one of the major things that comes up when young people are surveyed about what concerns them online. They say bullying and privacy, rather than, for instance, sexual content. Those are the two things that worry young people the most.

When you look at the services that young people choose—their behaviour when they are online—they use Facebook, for example, less because they do not consider it to have the level of privacy they want. They move to things such as Snapchat, which they like because it has ephemeral properties. That is to say, you post pictures and they get deleted after a certain time. So you can send pictures of people being drunk without them being there for ever—at least, that is the promise that the platform made, although it got found out a little on that. However, that was why people started using that platform. It shows that young people do have a sense of privacy. In some ways, they might be more aware of the problems than older people and have more of a sense of where the problems with the technology might lie.

Q10 Lord Wasserman: I want to come back to the fact that material is still accessible via .com rather than .co.uk. That worries me very much. We have not pursued this. I can foresee a day when the courts say that you cannot access .com sites from this country. If you want to do so, you will have to go abroad and then it will be very difficult. Will it be an offence to access material from abroad if you already know about it? It is really very tricky. I am not sure what you think about the whole idea that something is not allowed on .co.uk but is allowed on .com, so we shall have to control it. Is that not where it will lead?

Jennie Sumpster: It is an interesting question, which the new regulation will try to address in the different rules regarding territorial scope. One of the most surprising and interesting aspects of the judgment is the fact that it brought Google Inc within the scope of European data protection legislation at all. With the changes in the new regulations, any company that is targeting its products and services or monitoring the behaviour of EU citizens will be brought within scope. In that instance, it will be easier to see an arguable case that, for example, google.com links should be removed as well.

Lord Sharkey: May I follow this up quickly? Google.com is protected by the first amendment. We cannot do anything about it. Is that not the case?

Jim Killock: There have been cases where this sort of thing has happened. Yahoo was asked in France a number of years ago to remove links to Nazi memorabilia that were on sale there. I believe Yahoo dealt with that by using IP addresses to identify where people were posting from and then blocked people whom it ascertained were in France. I was slightly surprised in the Google case that that was not the approach Google took. Perhaps that is a huge technological shift and not something it wants to do.

I agree with Lord Wasserman that there is some danger that rules fragment people's experience of the internet. At the same time, there is some inevitability of that because

Governments push for it, judgments are made in different countries, and something is liable in one country but not in another. There has to be some pragmatic way of dealing with it. It is better, though, that the companies are asked to handle that as best they can. IP blocking is one way of doing it and it is better to do that than to erect the great firewall of Europe and say that anything that is a threat to privacy should not get through. There are pragmatic and less pragmatic ways of dealing with this.

Neil Cameron: It is another example of trying to implement supranational laws on an internet that knows no boundaries in a world that has countries with different laws. The Americans guard their first amendment rights extremely jealously. I can only imagine what might happen if a US federal judge came up against a European judge with fundamentally different opinions about the same issue. We shall see.

Q11 Lord Blencathra: I think one of the panel said that people could change their names. One of the advantages that many of us in the House of Lords have is that we can take an assumed name. Are we just making too much of this? First, we all agree that there is no right to be forgotten—that is a gross exaggeration. As I understand it, Google will already remove the person's name and other links to a story. To take a very recent bad example, the Rolf Harris case is quite relevant and up to date. There is no way Google would remove his name, but hypothetically, if it removed the name "Rolf Harris" but one typed in "sexual abuse BBC entertainer Australian with a beard", a million links would pop up with all the Rolf Harris stories. Why are we so worried about just the name being removed? I do not think it makes much difference.

Chris Scott: I think it comes back again to the point about where people are harmed. The sort of phone calls that we get, increasingly of late, come from people who, every time they apply for a job, apply for finance or meet new people, find that there is one piece of biographical information that ranks very highly when their name is searched on. It might be irrelevant, excessive, out of date or inaccurate, but it has a damaging and unwarranted effect on them. I agree entirely with your point. There might be other ways of getting to the information if you are particularly searching for it, and it may be right that there should be ways to get to that information. However, in terms of where the harm is being caused and trying to get the proportionality right, it is about the impact on people when search engine results—I shall spare Google being the example for once—act as a de facto CV for people.

Jennie Sumpster: It is worth bearing in mind that Google saying that it will remove only the name may not be in strict compliance with the data protection legislation in any event. That is because the definition of personal data is any data that can identify a living individual, either alone or in combination with another piece of information. It does not necessarily have to be a name. It could, for example, be a description of someone. "An Australian with a beard" could identify a great number of people in some contexts, but in this specific context could indeed identify Rolf Harris. It is arguable that it should be wider than just the name. If you do not use Google's form, and by no means do you have to use it because there are various mechanisms within the legislation for you to make direct contact and put your case exactly as you want to you could argue that Google should remove links that are yielded by a number of different search terms and which could be considered to be personal data.

Viscount Bridgeman: You mentioned that Google Inc was named in the judgment. Is that right? Is there any reason to believe that the court had any idea that all the problems we have been talking about with regard to a .com would occur?

Jennie Sumpster: I think what we are quite rightly identifying is the huge disparity, the almost philosophical disagreement, between those on both sides of the Atlantic. We have seen this in the context of, for example, the implementation of SOX-compliant whistleblowing hotlines. Those are mandatory for American corporations, but in countries such as France and Germany there are real philosophical difficulties with what they might consider to be a sort of shop-your-neighbour culture. What we have here is another example of the philosophical difference between a very strong freedom of expression first amendment right over in the States and the closely and jealously guarded privacy concept within the EU. I am not sure that at this stage anyone is ready to take it on.

Neil Cameron: But we are on a collision course for this. Something will come to a head and cause a problem when two different national courts purport to decide on the same issue.

Q12 Lord Judd: I am sorry that I was unable to be here at the beginning of this meeting. While listening to this fascinating exchange, I cannot help drawing a comparison with the press. There is an argument over whether we should have internal regulation within the press media or whether it should be external regulation. I happen strongly to favour external regulation. But there is a danger that I would like you to comment on: it is that the industry will then say, "It is the responsibility of the regulators", and fails to have a constant and vigorous debate with itself about its own ethics and responsibilities. What I am interested in is whether you have any hope at all of such vigorous debate being conducted and sustained within this new cutthroat industry.

Neil Cameron: I believe that it is the same debate and that we are just talking about a delivery mechanism when we should be going to the heart of the matter. We should not be concentrating on the delivery mechanism itself.

Jim Killock: I think that the industry does have various ethical debates. There is a difference between the cultures of Europe and the EU, and there are some significant problems with their business models. Internet businesses in particular, at least currently, seem to thrive on brand awareness, user base and access to vast amounts of personal data. That is rather different from, say, the IT industry of 10 or 20 years ago when it was more about the user base—who has bought and used your software. That is not how it works now; it is about how many people have signed up with an e-mail address to your account. It means that while Google is able to launch new products as it likes, it is rather difficult for other people to do quite the same thing. Google has a distinct advantage as a result of the data it holds.

Also, the fact that the US has virtually no real data protection legislation gives us a problem. We have some standards in Europe on these matters, but in the US they have taken the view that if you hand data over to a company, the only thing that really governs them is the contract that you signed. You do not have any further entitlement to that data and the company can use it or sell it as it likes within the terms of the contract. That is a very different way of viewing how personal data should be used. At the moment, over here you can get it all back, or at the very least you can find out what is being held about you. You can get it corrected and so on, so you have some controls, and hopefully the data protection regulation will increase those controls. But I do not think that data protection is something

that people in the US are in any hurry to contemplate. It means that their businesses are working within a very different set of parameters and have different internal values.

Perhaps I may raise another issue that the Committee might want to consider. There is talk of many of these regulations and trade relationships being harmonised across Europe and the United States through TTIP. You might find the data protection equivalences being further weakened, in particular since the Safe Harbour framework is proving to be very difficult to improve upon. It is currently felt to be very inadequate. It is not well policed and nobody enforces it properly. It is essentially a system of self-certification.

Chris Scott: I want to comment briefly on the point about internal or external regulation. The commonality of this is the two extremes that exist in both, and the comparison with the media can be drawn across. Any organisation will try to manage its legal risk and avoid the possibility of becoming involved in long drawn-out court cases. It is a sort of balancing act. Companies will try to regulate internally and some commercial pressures will come to bear on that. Similarly, some legal analysis will come to bear on it. At the furthest extreme, as with the press, people can be dragged through the courts if they get that analysis wrong. The question arises about what you should do in between. There is a question over whether there should be some form of voluntary tribunal or an imposed tribunal that could get involved, but I am afraid that starting a debate on that is far above my pay grade. The principles are by and large the same. People do not want to be sued, so from a closed and internal perspective they will already be making those analyses anyway.

The Chairman: Thank you very much indeed for your time this morning and we are most grateful to you for responding so openly.

Professor Luciano Floridi, Professor of Philosophy and Ethics of Information, Oxford Internet Institute, University of Oxford—Written Evidence

Disclaimer: Prof Floridi has been appointed as one of the external and independent members of Google Advisory Council on "the right to be forgotten".[1]

1. Do you agree with the Court's ruling that Google (and other search engines) can be classed as a data controller?

Only partially. The problem is that the definition of "data controller" in the EU Data Protection Directive (Directive 95/46/EC), is based on a definition of data processing (Article 2) that is so inclusive and general that it cannot fail to support the Court's ruling:

> *(b) 'processing of personal data' ('processing') shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;*

The Information Commissioner's Office had to issue a 20-page guidance in order to "explain the difference between a data controller and a data processor".[2] The guidance rightly concluded that, according to the Directive, basically anyone doing anything with data is processing the data, and hence can qualify as a data controller. The Directive (adopted in 1995), which predates Google (founded in 1998) and the world of Social Media, does not appear to distinguish between *formatting* data, e.g. in terms of a barcode, *retrieving* data, e.g. by a scanner reading the barcode, *transmitting* data, e.g. by an electronic cashier sending the retrieved barcode data to a database, and *processing* data, e.g. by a computer that collects many retrieved barcode data and builds the profile of a customer. Data processing should be something much more specific that merely doing anything to or with data and/or information (another important distinction[3] underestimated by the Directive) but, at the moment, such specificity is lost in the Directive. My disappointment is that the Court of Justice of the European Union (CJEU) could have followed the advice of the Advocate General, Niilo Jääskinen, who recommended that "In his opinion, the internet search engine provider cannot in law or in fact fulfil the obligations of the controller provided in the Directive in relation to personal data on source web pages hosted on third party servers".[4] The CJEU could and should have interpreted the Directive much more stringently, concluding that a link to some legally available information does not process the information in question. The definitions of "data controller" and "data processor" themselves should be improved.

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[1] Google, Google advisory council. http://www.google.com/advisorycouncil/, 2014.

[2] Information Commissioners Office: *Data Controllers and Data Processors: What the difference is and What the Governance implications are - Data Protection Act*. http://ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Data_Protection/Detailed_specialist_guides/data-controllers-and-data-processors-dp-guidance.pdf.

[3] Floridi, L., *Information, A Very Short Introduction.* 2010, Oxford: Oxford University Press

[4] CJEU, *Press Release No 77/13* (Advocate General's Opinion in Case C-131/12). 25 June 2013

2. The question put by the Spanish court to the Court of Justice referred to the data subject wishing to have information "consigned to oblivion". Isn't the true position that information removed from websites will always continue to exist, but will simply not be so easily accessible?

Yes. However, what is in question is not "information removed from websites" but links to information on websites that are removed from search engines results. This is an important difference, for instance between removing an article from the BBC website (a search engine cannot do this, in a technical sense of "cannot", not just in a legal sense of "may not"), and removing a link to that article (a search engine technically can and may be legally required to do this). Furthermore, we should be careful in using the word "always". "Always" is a long time. The truth is that our digital technologies are very fragile, much more fragile that analogue ones (papyrus, stone, parchment, paper, even magnetic tape). Malware, hackers, short-lived material supports (e.g., CD and DVDs are usually no longer readable after ca. 10 years) technical problems (e.g., a power outage), the shortage of memory (since 2007 the world produces more data than memory support, so something has to be never recorded in the first place or erased to make room for new data, e.g. new emails replace old emails), and simple rewritability (e.g., most websites do not save old versions, they are simply updated; think of "save this file" in terms of "delete the old version of this file") means that our memory is expanding immensely (part of the meaning of "big data") but is also immensely more at risk of being lost.[5] The Agencia Española de Protección de Datos (the Spanish data protection authority) could not have easily removed the original two announcements regarding the forced sale of properties arising from social security debts of Mr Mario Costeja González because they were printed on paper (on the order of the Spanish Ministry of Labour and Social Affairs), in thousands of physical issues of *La Vanguardia*. Had they been recorded just in digital format they could have been deleted at the stroke of a key. Amnesia is just a click away in the information society, so I would not use "always".

3. The Court has ruled that the data subject's fundamental right to privacy "as a rule" overrides the right to receive information, but that this will not be the case if there is a public interest in "the role played by the data subject in public life". Do you agree with this order of priorities? Can it in practice be implemented?

Only partially. *In general*, informational privacy – especially when understood as a matter of an individual's informational wholeness and well-being – may seem more important than communication ("right to receive information"), yet the tricky word here is precisely "in general". There are so many exceptions, in terms of security, safety, public interest, relevance, timeliness, roles of the people concerned (e.g. journalists) or involved (e.g. minors), social circumstances (e.g. a former married couple), nature of the information in question (wilfully shared, secretly recorded, publicly available etc.) and so forth, that seeking to establish some fixed order of priority is the wrong strategy. The world of rights is two-dimensional: they all lie on the same straight line. Placing them in some sort of hierarchical order reminds one of those archaic grammatical rules that begin by establishing how some linguistic feature is supposed to work, but then go on admitting so many counterexamples (cases in which the rule does not apply, or has exceptions, or is customarily not followed, or has evolved into a different rule, or is overridden by another rule), that one is better off by

[5] Floridi, L. *The Fourth Revolution: How the Infosphere is Reshaping Human Reality.* 2014, Oxford: Oxford University Press.

saying that it depends on specific instances, contexts and practices, and there is no useful, general way of establishing a priori what comes first and what comes later, but only intelligent and wise discernment.

4. Do you think it is in practice possible for Google to comply with the Court's ruling?

Yes. A comparison could be made with the way Google deals with millions of requests from copyright owners "to remove search results that link to material that allegedly infringes copyrights"[6] in connection with the Digital Millennium Copyright Act. Feasibility is not the real issue here.

5. What do you consider to be a 'reasonable time' for companies to put in place an acceptable response to the CJEU's ruling?

It is difficut to answer this question informatively. I would expect a very flexible time. It significantly depends on some unpredictable variables (especially number and nature of requests), on some difficult decisions (e.g. about the degree of automatization of the whole process), on available resources that can be devoted to the task, and on whether further legal advice needs to be sought case by case.

6. The proposed new EU Data Protection Regulation would give data subjects an even stronger 'right to be forgotten'. Do you think the UK Government is right to oppose this?

Yes. The current approach has a commendable and shareable goal, namely the desire to see digital information sediment in time, to let bygones be bygones as popular culture teaches us, not unlike analogue information does. The past does not need to be constantly rehearsed. However, the means used to purse the goal are unsatisfactory. Removing links from the results obtained by using a search engine like Google within Europe, even assuming it is the correct decision, does not work – anyone interested in knowing the past of someone only needs to use www.google.com, indeed adding or removing Mr in front of "Mario Costeja González" in www.google.uk already gives access to different links – and is prone to abuse (if wrong links are removed) and discrimination (if only some people may have the skills or resources to have links removed). We need to find a better solution. In particular, we should consider carefully on what grounds we would like to see offline and online availability of, and accessibility to information removed. Relevance is not a satisfactory criterion, because it is too context- and purpose-dependent: any information can be relevant at some point in time, in some circumstances, for some purpose, to someone. Taken seriously, relevance would justify exactly the opposite course of action: we should never remove any access to any legally available information precisely because it may be or become relevant. Harm is a much better defined and much less relative criterion of justification. Of course, we should work on understanding better what harm means in an information society (take porn revenge, for example), but a harm-based approach is preferable. Closure with the past – which I like to define as remembering without recalling[7] – needs some information sedimentation. I hope the UK Government will support a better approach than mere "delinking".

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[6] Google Transparency Report – Urls Requested to be Removed http://www.google.com/transparencyreport/removals/copyright/, 2014

[7] Floridi, L, Google Ethics Advisor: The Law Needs Bold Ideas to Address the Digital Age. *The Guardian,* 4 June 2014. http://www.theguardian.com/technology/2014/jun/04/google-ethics-law-right-to-be-forgotten-luciano-floridi

7. How do you think an acceptable balance can be achieved at EU level between the public's right to know, and the right to privacy?

Not through this ruling. As I mentioned above, the definition ("data processing"), the justification (relevance), and the efficacy of the ruling are unsatisfactory, and the balance requires an equal consideration, not a hierarchy of "rights", based on harm. We are facing a new problem: today the availability (here, now) and the accessibility (anywhere, anytime) of information have been decoupled. The temptation is to solve problems concerning availability online by tackling accessibility in terms of links, on the basis of personal approaches to relevance understood in a merely chronological sense. We should resist it by looking with fresh eyes to the challenge of how we are going to manage one of the most important resources in our society. We must do better.

Information Commissioner's Office—Oral Evidence (QQ 13-26)

Evidence Session No. 2 *Heard in Public* *Questions 13 – 26*

WEDNESDAY 2 JULY 2014

Members present

Baroness Prashar (Chairman)
Baroness Benjamin
Lord Blencathra
Viscount Bridgeman
Lord Faulkner of Worcester
Lord Jay of Ewelme
Lord Judd
Lord Morris of Handsworth
Lord Sharkey
Lord Wasserman

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Examination of Witness

Steve Wood, Head of Policy Delivery, Information Commissioner's Office

Q13 The Chairman: Good morning, Mr Wood. Thank you very much indeed for your time this morning. Just by way of introduction, I want to let you know that this session is open to the public and a webcast is being broadcast live with the audio transmission and will subsequently be accessible via the parliamentary website. A verbatim transcript is being taken of the evidence and will be put on the website. A few days after the session you will be sent a copy of the transcript for you to check its accuracy. It would be helpful if you could advise of any corrections as quickly as possible. If you wish to clarify or amplify any points made during your evidence or have any additional points to make, you are welcome to submit supplementary evidence. Perhaps you can start by introducing yourself and telling us a little about your job, please.

Steve Wood: I am Steve Wood, head of the policy delivery department at the Information Commissioner's Office. We are the regulator of the Data Protection Act and the Freedom of Information Act. My role is overseeing a department that produces all our external guidance, policy lines, research and positions on the legislation.

The Chairman: I should like to start by asking about the Supreme Court ruling. Do you agree with the ruling that Google or other search engines can be classed as data controllers?

Steve Wood: Yes, we agree with the court ruling. It was a position we had reached ourselves, and we were hopeful that the court was going to reach that position. We were looking at how search engines had evolved in terms of the way in which the technology was working, the way it interacted with personal information, and we did not agree with the analogy of a search engine as a mere conduit, if you like, of the information just passing through it. Given the level of interaction a search engine has and the interest it takes using algorithms when it is interacting with personal information and spidering the internet, we felt that the way in which the court advanced that issue was correct. The outcome of that for a citizen in the UK or the EU is that they are now interacting with an online service—for example, a search engine such as Google. The citizen has some way of understanding how their data protection rights are covered by this service. We think that it is, overall, a beneficial outcome. At least it gets the issues to the starting block, if you like. Yes, the search engines are data controllers, and some complex issues flow from that, which I am sure we will get to later. As a starting point, we agree with the ruling.

Q14 Lord Wasserman: I have spent my life as a civil servant, so I like practical details on how things are actually going to work, rather than the theory. The theory is fine but you know, for example, that although the courts talked about assigning information to oblivion, forgetting it and so on, that is not possible. The information is out there. They will have to take only the link down if it is on Google.co.uk. However, if I went to Google.com, or I were in America, or I asked my daughter to look it up for me—she lives in New York—then of course I could see it all, could I not? It is all there. Somehow I am not quite sure how this thing is going to work. Have we not gotten ourselves into some confusion? The courts would like the information to be assigned to oblivion; or they could have said that it should not be available in English but only in some language that very few people speak—that would be another way around it. It seems to me that this way round it is not terribly satisfactory. What do you think about that?

Steve Wood: I think that is a fair point that "the right to be forgotten" is quite a loaded term and has a number of implications. People will pick up on that and have certain expectations. It is a concern that we have to some extent but, obviously, members of the public will start coming to us as the regulator and have an expectation of what we can do, when in reality we cannot do it. So I think that the terms "the right to be forgotten" or "consigning to oblivion" perhaps do not fully reflect the judgment. As you said, a sort of stepping down of the availability of the information is perhaps the more correct way to describe it—but I think that it can have a beneficial impact for an individual if they can demonstrate how something is infringing their data protection rights. Essentially, reducing the availability of the information can have a practical beneficial impact for them in terms of at least reducing the availability of that information. It is obviously important that people understand the extent of that. The judgment itself, I think, has been misunderstood. A lot of the reporting has been around suggestions that it will lead to a rewriting of history, concern over what the impact on the media will be, whether it will lead to the deletion of articles published by newspapers, and so on—whereas the judgment is focused only on search engines. There is a specific exemption under the Data Protection Act that media organisations can rely on through what are called special purposes relating to journalism, which would lead to different considerations in the context of a media outlet. We are also preparing guidelines following the Leveson inquiry. So we are aware of these issues and there is probably an important public education exercise that we will have to take a role in. We will need to work

with others on making sure that the public understand the extent of the judgment and what it means for them. We think that the ruling can operate in practice, although we need to work through quite a number of difficult things. Indeed, what you mentioned about .co.uk or .com is still a legal issue, and we are taking advice on to what extent the judgment would be able to interact with the .com domains.

Lord Wasserman: How could it begin to do that unless we said that people in this country could not access .com sites? Might that be the case?

Steve Wood: The legal issue over any enforcement that a data protection authority such as the ICO could take—the ability to specify to Google that they must remove the search results from both the .co.uk and the .com domain—comes down to some gaps in the judgment which we are still interpreting, regarding to what extent Google Inc is covered by the judgment, as opposed to Google UK. That is something that we are still taking legal advice on, and we are working with European colleagues on the position on it. So there is a potential gap there on the issue you alluded to.

Lord Wasserman: We will come back to that.

Steve Wood: It is fairly early stages and we have not worked through all the implications yet.

Q15 Lord Sharkey: The ECJ ruled that the data subject's fundamental right to privacy, as a rule, overrides the right to receive information, but that that right will not apply if there is a public interest in the role played by the data subject in public life. Do you agree that that is the right order of priority? Can it in practice be implemented? If it can, is it right that it should be Google that makes these kinds of judgments?

Steve Wood: In terms of the position on overriding the right to privacy, it is perhaps unfortunate that the court judgment did not really explore some of the other issues relating to freedom of expression and is therefore fairly silent on Article 10 of the human rights convention, and is fairly silent on Article 11 of the fundamental rights charter. In a way, we are left with working out a little bit more about how we are going to read in and deal with some of the issues regarding where the public's right to know will come in and how much weight we can give to it. It is obviously still important, but that is reflected in any approach we take. The issue about search engines is that the scope of information they can index is so wide, and they can potentially gather a lot of information about an individual. If you put a search against your name or my name you can see the information returned. It is widespread. That is why the court reached this position of saying that it is important that if privacy rights are infringed, and if the data protection legislation is essentially engaged because there is an infringement of that law, the starting point is that the privacy rights are there and you have to find something reasonably specific in order to override them. It is perhaps difficult that we were not given more guidance about the freedom of expression aspects. However, we as the regulator are perhaps in the lucky position, compared to some of our European colleagues, that we regulate the Data Protection Act and the Freedom of Information Act. We are therefore very aware of the importance of freedom of information as well. We can see the benefits of the judgment in the data protection area and allowing people to control their personal information. We are equally aware of freedom of expression issues particularly because of the work we are doing on data protection, post-Leveson. We also are working with the media on making sure that we do not construe freedom of expression too narrowly in terms of the public's right to know.

Lord Sharkey: The third part of my question was: do you think it is right for Google to make the judgment about where the balance lies?

Steve Wood: It is right that Google should make the judgment in the first instance, but that is obviously not the end of the matter. If the citizen disagrees with Google's refusal to take a link down from the search results, the citizen can then come to us as the regulator and complain. That would be the same across Europe, and all the independent data protection authorities would come to a view. We will also issue guidance and criteria so that Google understands the approach that the data protection regulators want it to take.

Lord Sharkey: I think other DPAs may issue different guidelines.

Steve Wood: We are planning to work closely in Europe. There is a group of data protection authorities called the Article 29 Working Party, and we are meeting in a couple of weeks' time to start to work out the common areas. We are keen to be as consistent as possible across Europe without seeking to make sure that every outcome is the same, because clearly there are different cultural and constitutional issues in each member state about how freedom of expression is approached.

Q16 Lord Morris of Handsworth: In the end, our consideration is to explore the implementation of the court's decision. Can you tell us in your own words and experience what the practical issues and difficulties are that face Google?

Steve Wood: It certainly poses practical difficulties for search engines in general, not just Google, although Google obviously has the largest percentage of the UK and the worldwide market. It is challenging for them, but we believe it is possible. We will give them a reasonable amount of time, and we know that they have started work in preparation for dealing with the requests. Google has already put a form in place on its website for people to be able to specify what information they wish to have removed, so it has got that part of the process in place.

We also understand that Google are starting to think about a criterion approach that they will take to their decision-making, and they are considering what additional staff they need to have in place in each European office. So we are aware that they are starting to consider the practical issues. Clearly there will be some difficult and very borderline cases where they might find it hard to make a decision. That is where we hope the criteria that we will provide as a data protection authority will assist them.

I think one of the concerns for the search engines and for us as the regulator is the volume. We do not have exact details from Google; we are pressing them on this at the moment. But in the realm of 50,000 requests across Europe have already been made to all Google's European outlets to remove information, and that could clearly translate into a reasonably high number for the UK as a large-country percentage. They have to be geared up to deal with those volumes, but we expect that the volumes will reach a peak as the awareness reaches a high level among members of the public. Over time it will become more routine.

In terms of Google's approach, it will be important for them to work closely with data protection authorities. We seek to make sure that everyone understands their role after the judgment, so that things are right first time, but clearly there will be some difficult cases, which will be contested.

Lord Sharkey: Will the ICO audit be about compliance with the search engines, or will you just respond to complaints?

Steve Wood: We certainly might consider an audit that looks at their general procedures and practices. We are already asking for that information from them at the moment to understand their general approach. What we do not have currently in the UK is a power of compulsory audit, so we do not have the power to demand to go in and audit Google in that way; we only have the power of compulsory audit for central government departments. We would seek to do that in a consensual way if we needed to, but would do so as well as the complaints.

Lord Sharkey: Just to make sure that I understand this, you are considering audits, not just responses to complaints, but it would have to be on a voluntary basis. Is that correct?

Steve Wood: Yes.

Lord Sharkey: If it were not available to you on a voluntary basis, would you seek to take powers to make it compulsory?

Steve Wood: It is certainly something that we would ask for. If the proposed data protection regulation goes through, which is under negotiation in Brussels at the moment that would be more likely to give us broader powers to audit in those circumstances.

Lord Wasserman: I can see a manifesto commitment coming: introducing legislation to allow audits of Google.

Q17 Lord Faulkner of Worcester: Mr Wood, what would you consider to be a reasonable time to allow companies to comply?

Steve Wood: We are giving them a period of maybe a few months to start to get their systems in place, but equally we are pressing them to make sure that they get the basics in place, which they have done, which is an online form that people can fill out. We are equally aware that a lot of pent-up demand could cause a lot of problems longer term and might lead to frustration on the part of people. Equally, it would be difficult for us to manage within our own resources a big backlog of cases that build up. So we are giving them several months, but we have already been in contact with Google and have a number of meetings planned to start to understand what they are putting in place. We are not saying that everything has to be ready now, but we want to make sure that they have started the work.

Lord Faulkner of Worcester: You are satisfied that they are on the case and getting on with it.

Steve Wood: Their reaction to the judgment was that they did not like it, and they have been quite clear about that publicly, but they have decided to accept it and get on with it. They are obviously working through the detail of how they are going to do that.

Q18 The Chairman: What are the implications for Google being a data collector as opposed to a search engine? What does that mean in practical terms in responding to the judgment?

Steve Wood: In practical terms it means that they have a responsibility to process the data in accordance with the Data Protection Act, which means that they have to adhere to the eight data protection principles in the legislation. The first one is that they have to process data fairly, which obviously could come into play if someone complained about one of the links

being in a search result against their name. That means that Google then has an obligation to consider data protection rights.

Q19 Viscount Bridgeman: Mr Wood, I think you have already answered the question about the volume of work that you will be faced with. Can you confirm that the first line of appeal, in effect, to somebody who disagrees with Google's refusal to take their data off their site is you, the ICO?

Steve Wood: There are actually two routes. If someone wished, they could immediately take their case to the courts themselves, but we are the first, available and free route that members of the public can use, so we expect that most people will come to us first. If they wished to spend the money and felt perhaps that the matter was so important that they could go to the courts themselves that would be a different option.

Viscount Bridgeman: If they come to you, it will be a serious addition to your workload.

Steve Wood: Yes. It is something we are concerned about and we are doing some modelling in the office to work out what the impact could be. Will have to have a little specialist team of complaints officers who become skilled in dealing with these complaints. How many cases might be challenged and appealed on, which then means that we have to defend ourselves in the courts as well? There are potential financial implications for our office.

The Chairman: And huge bureaucracy.

Steve Wood: Yes, potentially. We are keen to make sure that Google gets it right first time as much as possible, so only really difficult cases will come through to us, but that still requires quite a lot of work on guidance.

Viscount Bridgeman: Can I ask a supplementary question? You talked about the new regulation being subject to the procedures in Brussels. What is the likely timetable for that?

Steve Wood: The data protection regulation is still under negotiation. Parliament has actually voted on the text, so Parliament's part of the process is essentially complete. The main difficulty is that the Council negotiations between member states are still ongoing. I think it is proving very difficult to reach agreement. It is hoped that the trialogue process might be able to start by the end of the year, but that timescale is optimistic.

Lord Sharkey: The sense is that the target is 2015.

Steve Wood: Yes, 2015 is more likely, which might mean that the agreement comes under the Latvian presidency. If the regulation is then agreed, we then have two years, so it will come into force in 2017 in the UK. But there is still an awful lot of work to do in Brussels to get that agreement.

Q20 Lord Jay of Ewelme: Could you say whether the Article 29 Working Party, which I understand is a group of EU data protection authorities, will issue guidance to data subjects and search engines on how to make applications and how to handle them? Could you also say something about how different European countries and jurisdictions are likely to respond to this judgment?

Steve Wood: Certainly, we will seek to work at Article 29 level to provide general guidance and at least a framework of key criteria. It may be better that information to data subjects and members of the public will come directly from our office. Each member state's DPA will want to do that in their own language and in their own way but we will agree the general

framework. As I said earlier, we want to work together to achieve some consistency at the European level without needing to harmonise the approach to every individual case. Hopefully, there will still be some scope for different approaches and different emphasis on freedom of expression, which is not a harmonised issue across the European Union.

There is no doubt that there will be different views and issues across the European member states. I think that that goes back culturally and historically in terms of issues about why the right to forget is different. It has different implications because of historical issues in the member states. Certain member states perhaps have a slightly greater emphasis on a right to privacy compared to freedom of expression. We are committed to working through that to try to get a reasonable level of consistency.

Lord Jay of Ewelme: If you are an individual and, say, a British national but living in another country, whose jurisdiction would you go to if it is not removed in the way in which you would like it to be and you want to appeal to someone? Will you have a choice as to whose jurisdiction you can go to?

Steve Wood: The starting point would be that the individual would go to the national office of the search engine—their home, if you like, where they are actually living. The approach that Google is likely to take is, if it removes a link from search results, it would not just remove it from co.uk; it would remove it from all European domains in one go to do a blanket compliance. That is the potential solution but there are still further issues to work through about how that will happen.

Q21 Baroness Benjamin: The proposed new regulation would give data subjects an even stronger right to be forgotten. That is terribly important for a lot of people. It is a major issue for people, especially if they are in the public eye. Do you think that the Government are right to oppose this?

Steve Wood: It is certainly our view that we support the concept behind the right to be forgotten. We think it is important that individuals, particularly in a digital age where their information can be processed in many different ways and can proliferate easily, have a way of trying to control that. Our concern is that the practical aspects work for individuals, so we do not want to set expectations which cannot be met. Going beyond the idea of a search engine, if information is so proliferated on the internet, how would it be practical to remove all that information? As a regulator, we only want to enforce things in a way where we can achieve the end results. We are supportive of the concept being in the regulation. However, we would say to the Government, "Let's think about ways to make this practical and workable".

I know that the question was raised earlier about the term "right to be forgotten". We are not really wedded to that term; it is more the practicality of erasing the information which lies behind it. Therefore, a right to erasure, which is more what the European Parliament is focused on now, is fine with us.

Equally, we accept that it is important that the right exceptions to the right to be forgotten need to be there for reasons of perhaps research or expression. It is important that the right is there but that a balance needs to be achieved. Our advice to the Government has been to seek that balance.

Baroness Benjamin: In a lot of cases something goes viral. I find that if someone mentions drug-taking on "Play School", it is the first thing referred to by every single person who

comes to me for an article, even though I was not associated with it. It is about how you get your name off that. Because my name is in an article, it comes up. It is that kind of grey area of how to protect the person who is innocent. At the same time, there are people who need to remain there. Who makes that judgment and what do you do about a case like that? If it goes viral, you have no control over that either.

Steve Wood: As much as possible, it is to get people to understand in the first instance, even before they publish the information, their responsibilities but that clearly can be difficult. It is a matter of making sure that we have the right balance. Ultimately, there is evidence and there are cases where the right is important to people, but we do have to have something.

Baroness Benjamin: Who will make that judgment?

Steve Wood: The judgment can be made by the ICO or the courts. It will not just be left to the data controller; for example, the search engine or the social network site. There is that authority and oversight. Ultimately, we can issue an enforcement notice on the data controller if it refuses to comply with a recommendation. We may approach them informally first but if they refuse to remove information we can serve an enforcement notice.

Baroness Benjamin: How soon would that be put into practice?

Steve Wood: If the relationship with the body we are regulating is good, they may be happy just to accept our view. If we say to them that the initial view we have reached on looking at a case is that the link should be removed, they may say, "Okay, you're the expert regulator and you have looked at it carefully. We will accept your view". However, they may say, "No, we fundamentally disagree with you, Information Commissioner, and we are not going to remove it". If we want to push it and really enforce it, we have the power to issue a formal enforcement notice, which the data controller either has to appeal or to comply with.

Baroness Benjamin: In the meantime, it has gone viral.

Steve Wood: Yes, that is the difficulty and the challenge of the internet. We use our tools as effectively as we can. We recognise that the Data Protection Act cannot solve all these problems. There are wider issues of defamation and libel. There are interactions with other pieces of law. Sometimes there are issues around harassment in terms of the interaction. We would not try to say that the Data Protection Act can solve all these problems. It probably needs a combination of approaches. Ultimately, it is a bit of a societal question about how we deal with this and how we teach young people in schools. We have been doing quite a lot of work on that as well. There is a mixed approach. The law cannot solve everything and, probably, education has a role as well.

Q22 Lord Wasserman: You say that you do not like the term "right to be forgotten" and that you prefer "erasure" to be used as the term. But we are erasing only the link; we are not erasing the actual fact. When you are talking about a right to erasure, it is about erasing the link.

Steve Wood: Yes

Lord Wasserman: You are not talking erasing any information. One of our colleagues said that it is like going to the British Library and it does not let you use the index cards. You can access anything you want but it will not tell you where anything is. Is that the kind of thing? That is removing by erasure. You are not getting to the information; you are going to erase the link.

Steve Wood: In terms of thinking about the implications of the judgment, the focus is on search engines removing the link. In the general right to be forgotten, the proposed regulation would not cover just search engines, it would cover everything. That is why I was responding generally.

Q23 Viscount Bridgeman: You mentioned that you wear two hats, which I found very interesting—freedom of information and data protection. Are you confident that you will be able to bring to your Article 29 colleagues the much-wider dual concept that they may not necessarily share because they do not have the two hats?

Steve Wood: I think it will be a challenge and that there will be some debate. We are prepared to lead strongly, to put effort into articulating our views and will play a leading role in the working party during the work. I also think that it may take further court cases. There may be further disputes, which may need further guidance from the courts when search engines disagree with our judgments or other people seek to challenge the views that we have reached.

I think there are some gaps in the judgment and it may mean that we need to get further clarification from the courts. I would not say that we are very confident because it feels like a challenge to us. It is a different type of work probably. It is something that we have not done in such a routine way before. We are not overly confident but we are prepared to tackle it. We are aware of the important responsibility. There is a responsibility to help the citizen when they have a data protection problem but there is a responsibility relating to freedom of information, which is as important.

Q24 Lord Judd: I have immense admiration for your office and I wish you well in all your tasks. As with all regulation, how do you avoid a situation which encourages those in the industry to abandon the debate about ethics and responsibilities by saying, "It is up to the whistleblower to decide. We're getting on with profit and power"? Do you see a situation where there might be complementary roles for an in-industry council and yourselves? Do you envisage an arrangement where you will not just be working with Google on how it implements the court ruling, but rather as this whole business evolves—evolution is a gentle concept, but I see all this as a pretty terrifying prospect—and moves forward, you will be in consultation with the industry about the new challenges that are coming up and what will be demanded in terms of performance and responsibility?

Steve Wood: A co-regulatory approach is often useful in these scenarios and it is something we will pursue in terms of the ongoing general dialogue with the industry, along with dealing with specific issues and cases. It is also something which, having reflected on it, we can probably do better at the Article 29 level in Europe. We will work with industry and listen to what it says, but that does not mean that we have to accept everything. There is a consulting aspect to this. Further, sometimes it can be difficult for us to understand how the technologies are evolving. One thing we have done is try to invest in more technology resources in our office to ensure that we are not being left behind in terms of the role of technology. However, it is a fair point. We will always seek to work closely with industry and understand the realities of it, and that would include consulting and working with trade associations and so on.

Lord Judd: Do you think that the industry has in place arrangements which help to facilitate that task?

Steve Wood: We work better with some industries than others depending on how organised they are. I would say that the internet search industry or the internet online company industry is quite diverse and large, and does not have a trade body that is easy to work with as compared with some other sectors. However, there are opportunities to get the same kinds of people in the room. It is a big industry and obviously a lot of the companies are based in California—there are a lot of US interests. We are also working closely with the Federal Trade Commission on data protection issues in more general terms—not yet on the right to be forgotten, but we seek generally to work globally with other regulators.

Q25 Lord Sharkey: The ISDS provisions in TTIP may have profound implications for data control and privacy. Has the ICO been consulted by Government on the TTIP and ISDS negotiations?

Steve Wood: I have not been closely involved in that, so I am afraid that I cannot answer the question. If you would like me to, I will follow it up and respond after the session.

Q26 The Chairman: That would be very helpful if you can. I will ask a final question, Mr Wood. How do you think an acceptable balance can be achieved at the EU level between the public's right to know and the right to privacy?

Steve Wood: In terms of how the balance is achieved, it is a matter of understanding how the rights actually work in practice. It is a matter of explaining them and educating the data controllers who have to do the actual work of implementing the judgment. There will be some work to do to dispel the myths that we have talked about today. As I have said, it is about people understanding the important impacts of intrusions on privacy which can arise from the way search engines process personal data. The unique role that search engines play must be recognised, not as actual expressers of information like a newspaper, but connected in some way with freedom of expression. It is a question of seeking to understand and develop that role as well.

The Chairman: Do you think that that debate can take place at the EU level?

Steve Wood: I think it can, but I would not disagree with the notion that it is a challenge, given the divergence of view across the member states. It is not about seeking to harmonise everything in terms of outcome, rather it concerns making sure that we are reasonably consistent on the key principles. That is what has started at the EU level. In tackling a global company like Google, it is almost inevitable that we will have to try to work at that level because otherwise it will not be workable in terms of the divergent outcomes we might see. We would not achieve the effect that we want to see.

The Chairman: Thank you for your time and for responding so clearly to our questions. We look forward to receiving your supplementary notes on TTIP.

Morrison & Foerster LLP—Written Evidence

Morrison & Foerster LLP is a global law firm with 17 offices located in key technology and financial centers in the United States, Asia, and Europe. Our clients include some of the largest financial institutions, Fortune 100 companies, and leading technology and life sciences companies. Morrison & Foerster LLP has one of the largest privacy and data security practices in the world representing global organizations in virtually every jurisdiction in the world. We represent multinational organizations as they seek to comply with the myriad data protection laws and thus have significant insight into the issues faced by organizations working within Europe, the Americans, Asia and Africa.

If you have any questions regarding our responses or if you would like to have further input from us, please do not hesitate ask.

1. What is Morrison and Foerster's overall view of the Court of Justice's decision on the "right to be forgotten"?

The Court of Justice's decision in Google Spain v. Gonzalez [2014] EUEJ C-131/12[8] ("Decision") has significant implications not only for operators of search engines in general, but also for other organizations operating in the United Kingdom and elsewhere in the EU.

Operators of search engines for users in the EU will likely be inundated with requests that data be removed from search results (Google received requests at the rate of approximately 10,000 per day after it released its form for making such requests on 29 May 2014). Each request will need to be reviewed to determine whether data are: (i) inaccurate; (ii) inadequate, irrelevant or excessive in relation to the purposes for which they are processed; (iii) not kept up to date; or (iv) kept for longer than is necessary, unless they are required to be kept for historical, statistical or scientific purposes.[9] If the search engine operator determines that data do fall within one or more of these categories then those data should be removed from search results, regardless of whether the inclusion of those data in the results causes any prejudice to the individual making the request.[10] However, if a search engine determines that the data are not out of date or irrelevant or if the individual making the request is a public figure, then the search engine is obligated to reject the request.[11]

Not only will this review process take significant resources from the search engines, but the search engine will be required to make a difficult and necessarily subjective judgment weighing the rights and interests of the individual against the public's right to know and be informed. This is a very unusual role for private companies. If a search engine operator does not accede to an individual's request for data to be removed then that individual can apply either to the relevant data protection authority or the courts. Just as with the search

[8] Available at http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=req&docid=152065&occ=first&dir=&cid=257118.
[9] See paragraph 92 of the Decision.
[10] See paragraph 96 of the Decision.
[11] See paragraph 97 of the Decision.

engines, these requests will likely stretch the resources of data protection authorities and also take up valuable court time. Data Protection Authorities are already under resourced and underfunded. Many Data Protection Authorities already are unable to meet the basic demands of statutory obligations such as reviewing registrations/notifications in a timely matter, and thus they do not have the resources to review a flood of new requests from individuals. In addition, Data Protection Authorities are charged with protecting personal information, not with weighing the interests of the public to be informed. Requiring Data Protection Authorities to balance these interests of the public against the interests of individual's right to keep information private will create an inherent conflict for the Data Protection Authorities because their role as an advocate for the right to privacy will put them in an untenable position.

While the press reports to date have focused on the requests sent to Google, it is self-evident that an individual will have to go to each search engine separately and make the same request. Thus simply making the request of Google will not cause the information to be removed from Bing.com, Yahoo.com or Ask.com. Because each search engine will be obligated to make its own determination regarding relevance, age, and the public nature of the requestor, different search engines may reach different conclusions. As a result, individuals may simply search multiple platforms or smaller platforms in order to find the data in which they are interested.

Finally it has been fairly widely reported that the search engines intend to honor the ECJ ruling by: 1) limiting the results returned only to European users and 2) indicating when information has been removed at the request of the user. (See www.engadget.com/2014/06/26/google-pulls-right-to-be-forgotten-results) Thus, the result will be that users in Europe have access to less information than users in every other region of the world. Moreover, because the underlying source that is pulled in response to a search request will in most cases remain publicly available, the individual searching for information will simply have to change his/her search criteria in order to find the missing information.

However, the implications of the Decision are potentially much broader than simply changes to search engine results. The Court of Justice held that Google's search engine is subject to EU data protection legislation, even though Google Spain (against whom the initial complaint was made) does not carry out any activity directly linked to the indexing or storing of data. Please see our response to question 3 below.

2. To what extent, if at all, do you agree with the Court's ruling that Google (and other search engines) can be classed as a data controller?

The Court's finding that search engines are data controllers in relation to processing of personal data (i.e., its retrieving, recording and organising of personal data which are stored on servers and disclosed to users in the form of lists of results) has broad implications. The court appears to be suggesting that any company that aggregates publicly available data is a data controller. Thus if a company publishes a telephone directory, it would be responsible for complying with all of the data protection obligations relating to that data. While the court appeared to balance the right of the public to be informed by allowing the underlying

webpages to continue to publish information, the decision seems to ignore the fact that the search engines cannot control the webpages from which data are pulled and seems to discount that the third party publishers are the data controllers of the content of such webpages.

3. Have you any comments on the Court's ruling that, although the processing of data is carried out outside the EU, the Directive applies because Google has an establishment in Spain whose job is to make the service offered by Google profitable?

The implications of the Decision are potentially much broader than simply changes to search engine results. The Court of Justice held that Google's search engine is subject to EU data protection legislation, even though Google Spain (against whom the initial complaint was made) does not process any data or carry out any activity directly linked to the indexing or storing of data. Applying Article 4.1(a) of the Data Protection Directive[12], the Court of Justice held that Google Spain was a stable establishment of Google Inc., and that Google Spain's selling of advertising space was closely related to Google Inc.'s processing. This is a very broad interpretation of the jurisdictional reach of EU data protection legislation to cover not only organisations in the EU but also those outside the EU who have operations in the EU. Accordingly, if an EU subsidiary is sufficiently connected with the goals and purposes of a foreign parent company, and if the foreign parent company profits from the acts of a subsidiary in any way, the decision could be read to hold that EU law may apply to the non-EU entity. This is a very broad interpretation of the Directive's territorial reach and has little basis in the current wording of Article 4.1.

While this interpretation of the jurisdictional reach of the EU Data Protection Authorities and Courts is somewhat akin to the jurisdictional provisions in the proposed draft EU Data Protection Regulation, it is not currently in the Directive. Moreover, if the draft EU Data Protection Regulation contains a penalty provision of a similar magnitude to the current proposal (5% of annual gross turn over) it is likely that many companies will reconsider establishing subsidiaries in the EU or offering services to EU residents.

4. Do you think the EU's recent initiatives on data protection, such as pushing for a review of the EU-US Safe Harbor agreement, and the Court's recent decision on the 'right to be forgotten', make Europe a more, or less, competitive region globally for IT companies to do business?

For the reasons discussed above (broad jurisdictional reach of EU data protection rules and high compliance costs), the Court's decision on the right to be forgotten will make Europe a less attractive market and European users will have less access to information compared to their counterparts around the world.

Similarly, efforts to suspend the US-EU Safe Harbor program will only further disadvantage European consumers by shutting out U.S. companies and reducing competition and choice within the European market. Despite efforts to link the Safe Harbor to government surveillance, the former has no bearing on the latter.

[12] Directive 2002/58/EC.

Public scrutiny of government surveillance and demands that such activities be curtailed are legitimate; however, because the U.S.-EU Safe Harbor program does not facilitate NSA surveillance any more than do other existing cross border transfers mechanisms (such as Standard Contractual Clauses or Binding Corporate Rules), eliminating or imposing stricter conditions on the use of the Safe Harbor will not address or lessen the problem. The fact is that none of these cross border transfer mechanisms, offer any protection against government surveillance. Moreover, because the European authorities also avail themselves of their own national security, public interest and law enforcement exceptions, processing personal data in Europe is equally vulnerable to government surveillance. Therefore, the current push to impose harsher conditions on US companies that rely on the Safe Harbor creates a double standard. Restricting U.S. companies in this way may appeal to market protectionists in the short term but in the end will only disadvantage European consumers and will make Europe a less attractive market for businesses.

The current focus on the Safe Harbor detracts from the larger and more important public debate that needs to take place between the United States and Europe about the appropriate balance between national security interests and the protection of civil liberties and data protection rights. Striking this balance will not be easy but the best way to accomplish this will be by engaging in high level government discussions that directly address these challenges, not by targeting the Safe Harbor.

5. Do you think it is in practice possible for Google to comply with the Court's ruling?

Given the number of requests it is reported that search engines (large and small) are receiving, in practice it may be very difficult for search engines, Data Protection Authorities and Courts to comply with the ruling. The real issue, however, is how the various constituents will apply the relevant criteria. How will a company or a Data Protection Authority assess whether personal data are: (i) inaccurate; (ii) inadequate, irrelevant or excessive in relation to the purposes for which they are processed; (iii) not kept up to date; or (iv) kept for longer than is necessary? What factors are legitimate to consider? Should one consider whether there is a possibility that an individual may become a public figure? What standard should be used to decide whether someone is a public figure? Should only data casting an individual in a bad light be removed or, if information that is negative regarding an individual is found to be out of data or irrelevant, should positive references to the individual also be removed? Who decides what is important for historical purposes or for research? If the search results include an opinion, who determines if it is "inaccurate"? Does the search engine or the Data Protection Authority have an obligation to do an investigation to determine whether data are factually accurate or "true"? These criteria are opaque and raise many questions. These questions are extraordinarily difficult and courts have been struggling with them for years. It seems an odd result that we now expect private companies to Data Protection Authorities to fill a role for which there is no right answer or any guidance.

6. Do you expect the Court's judgment to affect the profitability of Google, and other search engines?

As mentioned above, it cannot be credibly disputed that the Court's decision will require search engines, Data Protection Authorities and Courts to divert considerable resources to respond to the myriad requests that have been and will be received and to address the complicated balancing analysis required to meet the requirements of the decision.

Thank you again for the opportunity to contribute to this important discourse.

UK Government—Oral Evidence (QQ 27-45)

Evidence Session No. 3 *Heard in Public* *Questions 27 - 45*

WEDNESDAY 9 JULY 2014

Members present

Baroness Prashar (Chairman)
Lord Blencathra
Viscount Bridgeman
Lord Faulkner of Worcester
Lord Jay of Ewelme
Lord Judd
Lord Morris of Handsworth
Lord Sharkey
Lord Tomlinson
Lord Wasserman

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Examination of Witnesses

Rt Hon Simon Hughes MP, Minister for Justice and Civil Liberties, **Simon James,** Deputy Director, Information Rights and Devolution, Ministry of Justice, and **Tim Jewell,** Head of Information and Human Rights Law, Ministry of Justice

Q27 The Chairman: Hello and good morning, Minister. You are very welcome to the Committee. Thank you for your time this morning. As you know, this session is an open public session and a webcast of the session goes live for audio transmission and is subsequently accessible via the parliamentary website. A verbatim transcript will be taken of the evidence and will be put on the parliamentary website. A few days after the session, you will be sent a copy of the transcript to check it for accuracy. It would be helpful if your officials could advise us of any corrections as quickly as possible. If, after the evidence session, you wish to clarify or amplify any of the points made during your evidence or have any additional points to make, you are welcome to submit supplementary evidence to us. Minister, before we start with the questions, I have to say that the Committee were surprised and disappointed to see the article in the Daily Telegraph in which what you intend to say to the Committee is actually trailed. This is not good practice and I have to register our concern about it.

Simon Hughes: Shall I deal with that point? First, thank you very much for the invitation to appear before you and your colleagues. I am very pleased to appear with you in the Chair. Let me just deal with the concern about the article in the *Telegraph.* I gave a speech last week at a conference in Cambridge. Nothing that I saw reported this morning in the *Telegraph* differed from things I said publicly in that speech, which has also been reported

elsewhere. I hope you will accept that that was not intended to be prejudicing our conversation and your questions but was a reaffirmation of what I had said elsewhere a week ago.

The Chairman: Thank you for that explanation, but the article indicates that this was a trail of what will be said before the Lords Committee. I am sorry I have to begin on that particular note.

Simon Hughes: I apologise. It was an unintended discourtesy if that was the case.

Q28 The Chairman: Thank you. Maybe I can begin by asking the first question, which is really about the intervention by member states in the deliberations of the Court of Justice. Five member states intervened in proceedings before the Court of Justice, but the UK did not. Why was that the case, given that the Government says that it is opposed to the right to be forgotten?

Simon Hughes: Would it be helpful if I used the first answer to make a few general comments and then focus specifically on your question about our appearance or non-appearance in the court?

The Chairman: Yes, of course.

Simon Hughes: I am very conscious of the interest in this issue and welcome the fact that your Committee is taking evidence about it. I have responsibility both for data protection and freedom of information, so this is very much something that I and my team and colleagues in the Ministry of Justice wrestle with on a regular basis. Clearly, in the modern world that we are in, as we all know, there are many challenges about how you balance data protection and freedom. In many ways, you could say we are at a crossroads and the very fact that matters are taken to court and the European Court gives a judgment confirms that. We are clear as a Government that we want to strengthen privacy rights on the one hand and that we want to make sure we have economic growth and that is not hindered by people's fears about transmitting information or about information being revealed when it should not be. Therefore, the view we take—and things I hope I will be able to help you with, as a Government position—I hope will indicate where we want to go, given that the court judgment binds us all and we are governed by it.

Under the present law, individuals clearly do have the right—this is unchanged by the judgment—to request deletion of their personal data where it is irrelevant, outdated or inappropriate, but it is also clear from legislation that there will be a public interest sometimes in retaining that information in relation to questions that you may wish to ask me later. I am happy to elaborate on that.

There is no right given by the judgment for people to have their personal data deleted from search-engine results; there is no unfettered right; that is not a new right created by the judgment. That is very clear. The judgment was a very focused judgment on the specific bit of the processing of data. Therefore, the phraseology that has now surrounded the court case, which is that this is all about the right to be forgotten, is actually an inaccurate and unhelpful gloss on what happened. There is no right to be forgotten: not in the law of the United Kingdom, not in regulations, not in directives and not as found by the court.

There is the opportunity for somebody to apply to Google or any other search-engine company, setting out an argument as to why the links relating to their personal data in a

specific case should be removed. If they make that application, as you will have obviously heard in the evidence you have received already both in private and public session, the search-engine operator will need to assess whether they need to accede to that right. That is stage two. They have to look at whether the public interest justifies that, as part of that assessment, and the judgment is about that balancing exercise and makes conclusions on the basis of that.

I will link this to your question. When we were considering the case before it came for its judgment by the court, we were clear that there could be unintended consequences of the ruling, in the sense that people who have read general reports—not looked at the detail of the judgment or read all of the judgment—might think that they now have the right to come to Google or any other search engine and say, "I want this data removed."

There is also a further consequence. Clearly, there is a consequence—I have met with Google since the judgment—in that there has been a huge increase in the volume of applications. You have heard from the Information Commissioner's Office: there is inevitably going to be additional work going in their direction, because there may well be challenges to the decisions Google make. There may also be more tribunal appeals, so we are very conscious in the Ministry of Justice that suddenly a whole new work stream may open up as a result of the judgment, and has started to open up already.

Across the Channel in Brussels and in all EU countries, the data protection authorities are separately working out how they deal with this matter. They work together, as you know, and there is a working party that is seeking to establish the guidelines for how people should now respond across the 28 member states. They have started but not finished that work. This is all in the middle of a process that began a couple of years ago, which is to create a new European Union-wide law on this matter, which is intended to be completed by 2015. You may want to question me more about that and I am happy to answer about that. There is a much broader debate. The whole debate is not about the right to be forgotten; it is about how we get proper data protection regulations fit for the next year or 10 years. We were conscious of this when the court case was taken up by the Spanish citizen against Google.

We do not always intervene. The UK does not always intervene; indeed we intervene in a minority of cases. I asked to look at the figures and it is a small minority of the cases that come before the European Court of Justice where we formally intervene. We also have a system for deciding internally, in government, whether we should intervene. It is always a matter of judgment. Formally, if I can tell you and your colleagues, we look at the legal and practical points that are likely to arise; how they are likely to be argued; how well they are likely to be argued; and whether we can add value—because obviously it costs us money if we are going to contribute.

It was clear in this case that this was a case where private parties were involved, in the first instance, with the best understanding of the practical implications of how the interrelationship between an individual, a search engine, a website, the advertisers and so on might work, and they were clearly involved in the case by definition, because they were the subject of the action. We also considered whether other people were intervening and, therefore, whether we could add value. We took a view that there were other parties intervening; other member states had indicated that they wished to intervene and were going to do so. Lastly, we were conscious that we were still negotiating, as it were, the

regulation in Europe and therefore we did not have a final position on the broad issue, because the process had only just started. When the time came when we could have intervened, we were literally two months from the beginning of the process of negotiating the general data protection regulation, so we were, as it were, considering our own UK position. We thought other people with competence were doing the job. Other member states were there; we did not think it was needed.

A last point, if I may: the Advocate-General's advice to the court was something that we supported and thought was likely to be the judgment of the court. The court did not in the end follow his judgment in their judgment, and therefore, in a way, that was an unexpected development. Of course, the court does not always follow the advice given to it, but that was another reason that weighed in the balance. There were no alarm bells that rang as a result of the Advocate-General's advice.

The Chairman: It is normally followed.

Simon Hughes: It is normally followed. It is not always followed, but it is normally followed. In this case, they did not follow it, very clearly. It was a balanced view. We did what we more often than not do, which is not intervene, but we did not not consider it. We worked out whether it was in the UK's interest to do so and we therefore allowed the case to go without our participation.

The Chairman: Thank you for those introductory comments. Could you please introduce your colleagues? We were not expecting colleagues to be with you. It would be helpful if you could.

Simon Hughes: I beg your pardon. I have two colleagues from the department who lead on this issue. Simon James looks after information policy in the MoJ. Tim Jewell looks after legal matters for us.

Q29 Lord Blencathra: Briefly, Minister, do you agree with the court's ruling that Google and other search engines can be classed as data controllers?

Simon Hughes: The simple answer is yes. Technically, legally, the simple answer is yes. Your Lordship may be a huge expert in this area; I do not pretend to be. I am a layperson who is a user of these things rather than someone who understands the whole infrastructure behind them. However, my understanding is that controllers are more implicated by the directive in a way than other people, because they are the gateway to the systems. They generally decide whether to process personal data in the first place. It has always been plain that it is not a precondition to being a controller that you have sole responsibility for deciding on either the means of processing or the purpose of processing. You can either do it alone or you can do it with other people. The fact that you are only an intermediary—you are the gateway into the system—does not mean you are not a controller. The Advocate-General in his evidence set out how search engines work. It did not surprise us and, to be honest, with my lay knowledge, it did not surprise me that the judgment was, yes, Google can be a data controller.

Q30 Lord Wasserman: I was going to ask about the phrase "right to be forgotten", but you have already told us that you think it is unhelpful and inadequate. Clearly the information does not disappear; it is there somewhere. One colleague said that it is like a library, where you are in the library but there are no index cards and you have to find the information that

is somewhere in the library. We know the information is there, but it is your job to find it. What term would you use, then? You said, after all, you thought there was something here. How would you describe it? Is it a right to make it difficult to find something out about you? It is a matter of language, but it is terribly important, because people before us have talked about being forgotten and so on, but we know that is not so, because you can go to google.com and get the data. Is there any right there that needs protection?

Simon Hughes: There are lots of rights affected in terms of the articles and European law that come together. What I will do, if I may, is explain what we have done. We have tried to pull out from the judgment the logical sequence of what a citizen can do. It is very short. This is the legal basis. It is not me; it is the court put into lay language.

First, the court said that, as a general rule, a data subject has a right that will override both the economic interests of the search-engine operator and the interests of internet users. It starts from the point that the data subject has the first right. You—the searcher for something that you may not like about you on a search engine—have the first right to apply to say, "I want something done about that". Secondly, however, it is qualified. It is qualified specifically on criteria such as the sensitivity for the data subject's private life and the interest of the public in having it. That is where the balance comes, because you have a right to have things that are inappropriate or inaccurate removed on the one hand, but the public have a right to make sure they do not lose information that is in the public interest.

Let me try to give one practical example. That does not just mean, for example, a criminal conviction. There have been people applying who want their criminal records to be deleted; that is clearly unacceptable. We have a law that governs where you have to declare them and so on, and those should not be able to be deleted. However, it also covers things that may not be criminal, but may be highly relevant to the public interest. To take an example, if somebody standing for public office—an elected Member of either your Lordships' House or our House—had done something in the past that might be thought to render them inappropriate for public office, there would be public interest in knowing that, if that was factually correct.

Thirdly, therefore, there is a case where the public interest—this is what the Court said—outweighs the individual's rights. Lastly, that will only be so, they said, if the preponderant interest of the public in having the information justifies it—for example, because of the role played by the individual. There is a right to request that the information is removed, but there is no right to have that request complied with. In the end, it is a matter of judgment for the subject of the request. Obviously, in our country, if it goes to Google and Google decline the request, you can apply to the Information Commissioner's Office and, ultimately, to the tribunal.

That is a set of rights that are qualified and balanced. It is absolutely not a right to be forgotten. Perhaps I can say, as somebody who comes from a political pedigree, as a liberal and a Liberal Democrat, it seems to me that we should be—and one of my jobs is to do this—the guardians of the maximum freedom of information and information should only be withheld when it is clearly inappropriate for it to be in the public domain. We have to be very careful that we do not allow any interpretation to be made of the judgment that suggests that the right of freedom to publish and the right of the press to publish has been restricted. This is a new version of the press we are talking about: the online version of what in the past were newspapers published in a printed version. The freedom of the individual,

the freedom of the press, the freedom of the bloggers and the freedom of the commentariat to be able to know and say what is going on is clearly hugely important, and we must not see it as any restriction on that.

Q31 Lord Wasserman: I accept all of that and I agree with you. Terrible things, sometimes incorrect, are out there. However, I am simply concerned with a much narrower point. What we are saying here is, "We are not removing anything, but people have a right to make it difficult for others to find those things. If it says something about me in a library, the index card referring to me should be removed". Though you believe strongly, as I do, that there is freedom of expression and all the rest of it and people should publish things, we are not now talking about removing incorrect data. This is completely factually truthful. Somehow, we have a right to demand that search engines, which are a really new phenomenon that no one ever had before, should not always work as effectively as they might otherwise do: "In certain cases, they can get anything they want about me, but I would like there to be one or two things that should not be easy to get. People can find out: they can ask my friends or look through old records, but I want it to be difficult for them. I do not mind if it is published in another language, but I do not want it published in English". Why can we have a right to that—that anyone can have anything you want, but it cannot be accessed from this country and it must not be in simple terms? That is what I am concerned about. We are not getting rid of this information; we are simply making it difficult. We have to justify why, in certain circumstances, it should be difficult to find out—you can find it out, but it should be difficult; you have to work for it, or pay for it.

Simon Hughes: If I may say so respectfully, that is a very interesting and appropriate line of questioning, because—before I come back to the legal position and then I may ask my colleagues to add anything I have neglected—what is the clear consequence of this judgment? Let us take the example that probably most people know about. Two weeks ago, almost exactly, on my radio in the morning, I heard the BBC's economics correspondent.

The Chairman: Robert Peston.

Simon Hughes: Robert Peston. He was telling the listeners of the "Today" programme that he had been notified by Google that an entry in relation to him had been removed. It was absolutely clear that you could find the same information by going in other places, and in that sense it is a sort of a nonsense, because it does not prevent the discovery of the information. You used a very good example: it just prevents you from going to the shelf where you think it is or the shelf where you first would expect it to be and finding it there. You have to look in a different place in the index and think a bit laterally and so on. To be fair to the court, it was not seeking to pronounce on search engines and the directive as a whole. It was focusing on the specific case of whether a company based in the EU with a linked company based outside the EU should be subject to the directive, but you are quite right: the implication is not that the information disappears; the implication is that you may not be able to find it in a certain place.

May I then just read into the record what the articles say? At the end of the day, the court was interpreting the articles, which are part of the directive. They are Article 12(b) and 14(a). Article 12 says, "Member states shall guarantee every data subject the right to obtain from the controller: (a) without constraint at reasonable intervals and without excessive delay or expense: confirmation as to whether or not data relating to him are being processed and information at least as to the purposes of the processing, the categories of the data

concerned and the recipients or categories of recipients to whom the data are disclosed"—that is the entirely understandable position that you should know what is going on in terms of the information about you—and secondly, "communication to him in an intelligible form of the data undergoing processing and of any available information as to their source", and thirdly, "knowledge of the logic involved in any automatic processing of data concerning him at least in the case of the automated decisions referred to in Article 15(1)". Article 12(b) is: "(b) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this directive, in particular because of the incomplete or inaccurate nature of the data". It is very important if it is half-truth or misrepresentation. Thirdly, there is: "(c) notification to third parties to whom the data have been disclosed of any rectification, erasure or blocking carried out in compliance with (b), unless this proves impossible or involves a disproportionate effort". This is the Robert Peston case. He was notified that somebody had requested erasure. As it happened, as we all discovered, it was not about him; it was about somebody far more in the background.

Article 14 is headed: "The data subject's right to object". It says: "Member states shall grant the data subject the right: (a) at least in the cases referred to in Article 7(e) and (f), to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him, save where otherwise provided by national legislation. Where there is a justified objection, the processing instigated by the controller may no longer involve those data; (b) to object, on request and free of charge, to the processing of personal data relating to him which the controller anticipates being processed for the purposes of direct marketing, or to be informed before personal data are disclosed for the first time to third parties or used on their behalf for the purposes of direct marketing, and to be expressly offered the right to object free of charge to such disclosures or uses. Member states shall take the necessary measures to ensure that data subjects are aware of the existence of the right referred to in the first subparagraph of (b)".

That is very reasonable. It is about all of us being able to object to the fact that, when I joined the AA, I did not expect the information that I revealed to the AA to be suddenly transferred to another company who use it for phoning me up every two minutes at home or sending me letters about something else. That is the legal position, but it was a very tight judgment. It does not preclude access in other ways. It still does not mean that we should not want to defend the right of people to publish, in old-fashioned or modern ways, anything that is not libellous, defamatory and untrue, even if it is uncomfortable. In the present climate of the Home Secretary's inquiry this week, there may be lots of people who are finding and will find the next few weeks or months uncomfortable. That is not a reason that they should be entitled to apply to have information deleted. Could I ask my colleagues whether I have missed out any helpful to my Lord's question? I probably have.

Tim Jewell: There were just two small points, which may assist the Committee. If I might first take the library card analogy, the other point of context, in addition to that which the Minister has explained about this being a qualified right, is that it of course does not apply universally in the first place anyway. It is not every card in the index that is subject to this decision; it is just a selection of them. That is not a comment on the relative importance of those cards and the issues the Minister has explained, but it is a critical part of the legislative context. Neither the directive nor the Data Protection Act, with respect to their collective drafters, is the easiest piece of legislation to read. At their heart is a set of simple ideas,

which boil down to fairness in many cases. It is that balance, again, that the Minister has described.

The only other point, if I may, relates to the "making it difficult" point. That is intrinsic in the judgment, of course. The Advocate-General did not differ—and I make no policy comment—but, of course, one of the reasons that led the court to the conclusion it reached was the very indexing function that is provided by search engines. It is the very simplicity by which a catalogue in relation to an individual person can be found. That is an intrinsic part of the policy and the legislative question and the question, in individual cases, of how different rights might be balanced against each other. It perhaps illustrates the extent to which it is a 1995 directive and therefore would be the segue into the negotiations of the new rules.

Q32 Lord Faulkner of Worcester: I have a quick supplementary question, Minister. In your earlier answer, you talked about the public interest, which we understand. Who should arbitrate on what the public interest is?

Simon Hughes: Ultimately, the court will decide, whichever court it comes before. It will be the tribunal if it is a tribunal dealing with an Information Commissioner's decision. If a case goes to the European Court of Justice, they would arbitrate. However, the practical answer to your question is that it is a very difficult job, which Google now has to do. Google has to do the balancing operation itself and my understanding is that thousands of people have applied. They have not acceded to them all. They have acceded to some that they have then changed their view on. They obviously have a whole team of lawyers. When I met them 10 days ago, they had not started sending out their answers to people's requests. They clearly have now, but on some occasions they have changed their initial position, i.e. they have acceded to a request and then reviewed that. However, the public interest is left to each step in the hierarchy to decide. I do not think there is a definition in the directive of the "public interest". My legal lead is telling me I am right about that. It is left ultimately to the courts. We all know. In general terms, we all know, do we not, about the public interest? The public must have an interest in having information that is relevant about public activity, activities of public bodies and activities of public companies. One of our jobs as Government—we keep on saying, rightly, that we want to be the most transparent Government ever—is to make sure society and citizens have the maximum information at all times, and I would resist any reaction to this judgment that suggested we would be closing down opportunities for people to comment and a free press.

Q33 Lord Judd: Surely it is not, "This is in the public interest; this is not in the public interest". There is a huge grey area of judgment.

Simon Hughes: It varies depending on who the person who is the subject of the request is. This is the example I always try to give: I live in Bermondsey off the Old Kent Road. Behind me is a large local authority housing estate of people who are not generally in the public eye, as far as I know. One of them may have been a councillor once, but otherwise not. It is not in the public interest, it seems to me, that people who have never sought public office and who do not do a public job should have information that is irrelevant to anything of public concern in the public domain—i.e. something about activities that are not illegal or whatever. It is different, self-evidently, for your Lordship or for me or for other people. If these people—it has not happened; let me be clear—were rolling around on the pavement, having drunk too much, on a Friday night but had not been arrested, charged or convicted, it

might be in the public interest that people knew that was how an elected representative behaved, if that were the case. However, it does not apply in the same way if it is the man in the flats behind me.

Q34 Lord Sharkey: I wanted to follow up quickly on this index card metaphor. Is it not the case that, actually, when you go in this library, there are two boxes of index cards? There is a box marked "EU" and there is a box marked "the world". You can choose to go into the box marked "the world" and you can get all the information that exists that is being prevented—

The Chairman: You can get the information that is available on google.com.

Lord Sharkey: Yes, from google.com or google.eu. In that case, would you characterise this law as a good law?

Simon Hughes: I have to be a bit careful here, because it is the judgment of the European Court.

Lord Sharkey: Would it not be usual for a Minister to make judgments about whether we think the laws are right or appropriate?

Simon Hughes: Yes, of course. Let me try to answer. I know our Chairman is a bit concerned about this. The Government is currently negotiating with our 27 partners to get a new law, which is the new Regulation. The UK would not want what is currently in the draft, which is the right to be forgotten, to remain as part of that proposal. We want it to be removed. We think it is the wrong position. I do not think, both as an individual and a Minister, we want the law to develop in the way that is implied by this judgment, which is that you close down access to information in the EU that is open in the rest of the world.

I will tell you the obvious reason. I have fought for the rights of Tibetans, for example, over the years to be able to have their autonomy and practise their religion. We, both this Administration and all Administrations, have criticised the Government of China for closing down people's right to information. There are other countries that restrict information access. It is not a good position for the EU to be in to look as if it is countenancing restrictions in the access of the citizen to information, because it could be a very bad precedent.

Lord Sharkey: Could I follow that up? It is not a good position for any lawmaking authority to be in to pass a law that has no effect whatsoever, but I would also just ask, for the sake of clarity, Minister: does the ECJ judgment actually strike the right balance between freedom of speech and data protection?

Simon Hughes: First, to repeat, the judgment, although it has sent ripples and, indeed, waves, is a very narrowly focused judgment. The paradox is that it was a very specific question asked about a very specific arrangement between a company with a base here and links elsewhere. We have to go back to exactly what the judgment said, rather than what people think it says. It did not create a right to be forgotten. When we are negotiating the EU-wide legislation, which we hope will be in place by next year, we will not want to be closing down the right of access either to search engines or other things, other than in the sort of way that currently is permitted by law where, clearly, somebody needs to correct something that is factually inaccurate. The answer to Lord Sharkey's question is this: if I am trying to balance those, I am respectful of the need to protect data and I am respectful of the need to protect the privacy of the citizen, but I will also look to maximise freedom,

freedom of information and the sharing of that information in the EU as well as outside it. I hope that is a clear statement of the public interest, from the Government's point of view, is.

Q35 The Chairman: Could I ask about timing? I know the Italian presidency wants to complete this data directive by the end of this year. You said earlier about the timing. Are you intending to work with them to have this particular thing reformed and changed in the draft Regulation?

Simon Hughes: Yes. This has been work that has been going on for a couple of years. It has made progress recently under each of the different presidencies of the EU. The Italians have now just taken over at the beginning of July. I have said, since I have been in office, that I am very keen that we should seek to reach an agreement as soon as is practical. The European Council has set itself the target of 2015. The European Commission is replaced, as you know, by a new set of Commissioners in October, so it is not going to be finalised until the new Commission is in place. The new MEPs have just taken office and they have an interest. They have a draft. In reality, decisions will not be able to be made until the new Commission and Parliament can do their participatory work with the Council.

I have asked and encouraged officials to try to get a deal by the end of this year, allowing a bit of slippage. I am really keen to do this, it will not surprise you to know, in terms of political cycles. Unless some unexpected development occurs, there is to be a general election next May. I would like this to be done and finished before the general election, because it is in the interests of everybody that we have clear, new, EU-wide law. The Latvians, who take over the presidency in January, are very conscious, if it has not been delivered by December, to try to get it delivered in the first part of next year. Yes, we are working very hard, but we absolutely do not agree with the present text. It includes the right to be forgotten, as I said before, and we want to change that. Could I ask Mr James to add something on the process?

Simon James: If I may, just to be clear about the different stages of the process and, in particular, those that the Government has direct levers over, we are talking about the Council agreeing the text. The Minister has set out our ambitions there. It is important to remember, of course, that the European Parliament has agreed its text as well. You know enough about the background to know the European Parliament's text is in a slightly different place from where the Council's text, we hope, will end up. Once the Council has completed its process, we are then into trialogue, which is often a difficult process, given where these two texts are starting. That suggests to me itself that that trialogue may be an involved discussion as well. It is important just to bear in mind the different stages of the process, particularly what we, the Government, as a member state as part of the Council, have direct control over.

Q36 Lord Faulkner of Worcester: Can I ask you about the practicality of what Google and other search engines are being asked to do as a result of the judgment? Our understanding is that something like 10,000 people a day are asking Google to rectify or delete data relating to them and an astonishing figure of 25,840,230 URLs have been requested for removal. That is from the Google transparency report. It is not going to be possible for this judgment to be complied with, is it?

Simon Hughes: Your Lordships, I understand, have had evidence from Google in private session and I have met them too. Obviously, we both have asked them the same question. It is a huge task, which is why one of the things we need to do is try to get out the message that this is not what some people wish it would be. I have said it twice; I hope I can say it as clearly as possible: there is no right to be forgotten. If politicians think they can delete findings about their expenses infractions in the past, that is not going to succeed. If people think they can delete anything to do with their criminal history, that will not succeed. It is not in the public interest. If people in public life think they can manage, suddenly, to use this court judgment, that will not succeed. I hope we can discourage a lot of people, if we get the message out loudly and clearly. I took an opportunity last week at conference to speak about this and I hope people might hear what I say today about this.

There is also another rather mischievous new business that has suddenly popped up like a pop-up shop does. These are companies that have set themselves up to assist you—literally since the judgment—with making an application to remove your data. They are called online reputational companies. That is the phrase I have been given; I do not known whether that is what they call themselves. There is no need for anybody to go to an online reputational company or anybody else. There is a very simple process, if you really want to do it: you apply to the search-engine host, Google, and then there is a process to go through.

Lord Faulkner of Worcester: Did Google know there would be such an enormous number of applications?

Simon Hughes: I cannot speak as to whether they are technically competent. They have their lawyers; they are working on this. They came and told us they had a significant team of people. We have met their senior lawyer, who was looking after these matters. I agree with your Lordship: it looks to me as if it may be an unmanageable task. Google are a big organisation; they are an international organisation. They obviously have companies in many countries, but they are faced with a phenomenal task, and they are not the only people who are, obviously, going to be affected by the judgment. They were the respondent to the judgment, but there are search engines other than Google. My brief says, "The judgment raises some real challenges for Google". That is a generous understatement of the state of play. I thank goodness we are not in their position, because they are the first line of defence. I have a concern that the Information Commissioner—you heard evidence from one of the senior people in his office—could, if we are not careful, have a sudden wave of extra requests. That is not just in this country; that is all the information commissioners in 27 other countries, too.

The answer is for us as quickly as possible to do two things. First, the working party of all these countries should try to sort out guidance as quickly as possible. They have started. I do not quite know what the timetable is. They are not meant to be meeting again for a couple of months. I would encourage them to meet quickly and early. The sooner we can get the new regulation sorted, the better. Then we will have a new law. It takes a while between being agreed at EU level to being implemented in domestic law, but it seems to me that is an incentive for us to get on with making absolutely clear what the law of the UK is and what the law of the EU is, and making sure we do not end up with unmanageable volumes of work, whether that is for Google or anybody else.

Q37 Lord Jay of Ewelme: In a way, you have answered the question. I was going to ask you about the Information Commissioner. As you said, we heard evidence from the Information

Commissioner's Office last week. There is obviously a degree of concern about the extra bureaucratic workload that may suddenly be thrust upon them by this judgment. Particularly, if people think they have the right to get information deleted and then find that Google does not delete it or changes its mind, an awful lot of people are then going to go to their first line of redress, which is the Information Commissioner's Office. I suppose the question is: how serious an issue is this in terms of the staffing they would need, the time it would take and the risk that that then looks like them holding things up?

Simon Hughes: You are right to highlight this as a concern. Obviously, the Information Commissioner's Office is an agency of government that the Ministry of Justice is responsible for and whose staff are paid for by public money, and so on and so forth. First, what would be helpful to reduce the load on the Information Commissioner and his team is for Google, and anybody else who is dealing with applications of this sort, to make it clear how many applications they are turning down as well as those that succeed. If people generally get the impression that they are all succeeding—coming back to Robert Peston's example, it was one that had been acceded to—that will encourage others, obviously, to think their application might succeed. It is not for me to tell Google what to do, but, if Google were able to tell us how many they had turned down, that would be helpful, because I would hope and expect that—this is me as a layperson—the majority of them would not be successful. Of course, secondly, those that are acceded to do not end up coming to the Information Commissioner, by definition, because it is only—

Lord Jay of Ewelme: Unless they change their mind.

Simon Hughes: Yes, unless they change their mind. It is only if Google say no that somebody can go higher up the tree.

Thirdly, on the practicalities, I meet the Information Commissioner and his team on a regular basis, as you would expect. I will be meeting him again shortly. He will brief us as to whether his team are expecting to be able to cope with the current resources. We will have to deal with that. Colleagues much more experienced around the table than me know that Government has to continually re-evaluate how it spends its money to accommodate sudden new bursts of activity. I remember, when the Lord Blencathra was in our House, for example, if there were terrible agricultural crises, the Government had to divert money to deal with that. It is normal government. We have not had alarm bells ringing yet. We have a highly competent Information Commissioner with a very competent senior team. They have been in place for a good time; they are experienced; and they are very locked in to conversations with their colleagues across the European Union. So far, there is no crisis and no problems in terms of the ICO, but we clearly need to make sure that, if people are turned down by Google or anybody else and apply, we deal with them as quickly as we would any other case and as competently, and we get the first decision right, so that it will not need to go to a tribunal. That must be the public interest.

The Chairman: Minister, you have already to some extent answered the question on the Government's current thinking on the right to be forgotten, but I do not whether Lord Judd wants to ask anything further on that.

Q38 Lord Judd: Yes, in a letter to Lord Boswell on 22 November 2012, the then Minister, Helen Grant, described the right to be forgotten as "unworkable". In a letter of 2 May 2013, your predecessor, Lord McNally, the then Minister, said, "I do not support the right to be

forgotten as proposed by the European Commission. It is not technologically possible to remove all traces of data uploaded to the internet and this right raises unrealistic expectations for data subjects". You are actually, as I interpret it, saying something rather different. You are taking a firmer position in saying, "There is no right to be forgotten". It would be very helpful, as we try to produce an intelligent report, to have a definitive statement from you about what, exactly, the Government's position on the issue is and what the position as expressed in the draft regulation is.

Simon Hughes: I will try to be as precise and clear as I can. One, the Government does not support the right to be forgotten as it is currently proposed by the European Commission. That is where the phrase comes from; that is the phrase that was the cause of the discussion with my predecessors, because that is in the draft that is being worked on in Brussels and elsewhere. We do not support that proposal. It is currently in their draft; we oppose that and we have made that clear in the negotiation.

Lord Sharkey and Lord Wasserman made similar points to this. Secondly and, if I may say so, quite rightly, it is not technologically possible, I am advised, and it seems a logical explanation, to remove all traces of data uploaded to the internet. It just is not possible. You could remove Source A, but there are other sources behind it, there are places it goes to laterally and so on. It is not technologically possible. You could not exercise a complete right to be forgotten. The global information system could not be made to do it. It is just not possible. The title risks, therefore, giving rise to unrealistic expectations, which is the danger we have been in over the last few weeks since the judgment of the court.

There is another reason why it will not work as well, which is that there is a new obligation to inform all other data controllers. We are not just talking about huge companies like Google. I am a data controller, registered under the Act, as a Member of Parliament. I stand to be corrected; somebody may tell me I am registered as something else, but I certainly pay some money every year to be registered. I remember, Lord Blencathra, you and I had debates on this. We had slightly different views on the issue, but there is a real issue, which is to do with all the work we do, constituency casework and so on. There are data controllers on a global scale and there are little data controllers. An obligation to inform other controllers to whom data has been disclosed may be impractical. How can you find everybody else and make sure they know? It may also be very costly. Therefore, the obligation to inform other controllers of any request like this is not practical in its present form, because it cannot be delivered.

I am a lawyer by training; I practised before I came into this place. In the MoJ, one of the things I try to do is make sure our laws are simple, clear and the citizen can (a) understand them and (b) understand the implications of them. We are getting better in government and Parliament. We are not there yet by a mile; we have much further to go. I am absolutely clear that anything that is impractical, impossible and undeliverable is a nonsense, and we should not countenance it.

Again, I am not the expert. In Germany, for example, there is a debate going on about whether there ought to be different criteria for the public sector and the private sector. It seems to me that is not a sustainable argument in essence either. I am going to be a bit Cameronian here: we are not going to shift our view in negotiations that the right to be forgotten must go. We are very clear about that and we are going to argue the case both in

terms of the wrongness of the principle—because we believe in freedom of information, and transmission of it—and the impracticality of the practice.

Lord Judd: There is a difference between saying it is impractical and misleading to think that it is possible to apply the principle of a right to be forgotten and when we all reread the evidence we will see that you said earlier on that as a Liberal Democrat and you rather emphasised that you are not actually believing in the right to be forgotten.

Simon Hughes: I do not resile from that. That is my view. This Government and this Parliament have amended the law on defamation—started by the last Government as an exercise—rightfully, because we had a ridiculously expensive and inappropriate way of people getting redress if the front page of a newspaper said something that was clearly wrong. For ordinary people, people not in the public eye, those things are really important, and we were all concerned. The Leveson inquiry looked into all those things. We have strengthened that. There is an absolute right for people to take up misrepresentations of the truth about themselves—and so there should be. It should not be only the right of the rich to do that by paying expensive libel lawyers.

There is also a right, clearly, to make sure that things that are factually wrong are corrected. Let me be mischievous: if any one of your Lordships' entry on some Wikipedia site said you were born in 1933 when you were born in 1963, you might quite reasonably say you wanted it to be changed. I hope that is not overly simplistic, but it is clearly right to correct factual things. However, there is not a right for your life history to be deleted. We live in an age where something you do as a student or something you do as a shopper might get into the public domain. The media is much more open and accessible than it was. I do not believe there is a right there. I do not believe there should be; I do not believe there is. I believe there is a right for us to have control of the data and to decide what we want to be done with data we give to other people and have proper systems to make sure that, for example, if I pass on confidential information—like the salaries of my staff—to the Independent Parliamentary Standards Authority, it does not suddenly appear on the front page of the local paper. That would be inappropriate.

Q39 Viscount Bridgeman: You told us about the progress of the negotiation with the other members of the EU and Mr Smith of the ICO last week told us about that. What are the prospects of the draft regulations becoming a directive? My second question is: what would be the pros and cons of that happening? Also, what are other member states' views on this?

Simon Hughes: I have not been at the negotiations myself, around the table. They are being done at official level, but I will try to give your Lordships the best summary I can of where we are. The process, as your Lordship knows, is that the proposed regulation will require a co-decision by the European Council and the European Parliament, under what is called ordinary legislative procedure. Parliament agreed its first reading of the text in March. The Council, as you have heard, is going through the process now. There are a number of outstanding issues. There is something called the "one-stop shop". Should you be able to go to one place across the EU rather than having to go to different places? The Germans have raised the issue about the different attitude to the public sector. There are issues about international data transfer beyond the EU boundaries. At the last meeting, which was last month, of the European Council, the conclusion was that, "In further developing the area of freedom, security and justice over the next years, it will be crucial to ensure the protection and promotion of fundamental rights, including data protection, whilst addressing security

concerns, also in relation with third countries, and to adopt a strong EU General Data Protection framework by 2015". The Council as a whole has committed itself to getting a deal by next year.

To answer Viscount Bridgeman's specific question, whether the draft regulation becomes a directive or not is still up in the air. It has not yet been resolved. There is a meeting this very day in Milan—very nice for those who can be there—considering the question of public sector flexibility of the Justice and Home Affairs Council. It does matter—the Germans have made the case—whether it would be a regulation or a directive in terms of the way in which they would feel comfortable about that. My hunch is that we will have a directive rather than a regulation. That is my hunch. I stand to be corrected by left or right, but in the end both of those routes are open.

For me, I am determined, if I can influence things effectively, to make sure we do not get stuck over the detail and we do not say, "It is all too difficult". If there is any big resistance to things like the right to be forgotten from any quarters, that would give us a problem. What I do not know—colleagues may be able to help me—is whether there are any countries other than Germany, with their particular concern, that have raised issues we would find troubling. Mr James, do you know?

Simon James: If I may, the position of other member states on the question of whether it should be a regulation or a directive differs very much around the table. It is fair to say there are other member states who agree with the UK that a directive would be more appropriate. There are, similarly, other member states who agree strongly that it should be a regulation. What is interesting, though, is that the reasons behind each of those positions are very different. Some of these are for reasons of practicality; some of these are constitutional reasons for particular member states. Even within those two broad camps, there are still very many differing viewpoints, which makes the situation incredibly fluid, because when one starts to look at different concessions that may be made, that then becomes acceptable or not acceptable for various member states. What a lot of member states, even those who prefer a regulation, are doing is looking for carve-outs. We are seeing a process, which, I understand, is called the "directivisation" of the regulation. The UK has a very clear point of view, which is that if one is going to "directivise" a regulation, one should simply make it a directive, and that remains our position. It is a very fluid situation and, sadly, it is far from simple.

Q40 Viscount Bridgeman: You were referred to Lord Judd's question last time about the impossibility of destroying the information. I get the impression, as a layman, that the directive did not recognise the huge power that Google have in that respect with the different jurisdictions: google.com and google.co.uk. When you saw Google, did they give you any indication of the co-operation you were going to get on that specific point?

Simon Hughes: They were certainly very helpful and co-operative and were not trying to be in any way obstructive. They came to share exactly where they are at the moment. My interpretation is that they find this difficult and uncomfortable. They are conscious of their global influence. They are conscious of the fact that judgment relates to the EU—i.e. 28 countries in Europe—but has further implications because it is drawing in linked companies that are outside the EU. My interpretation of the meeting is that they will be very keen for the law to be changed as soon as possible and will collaborate with us to do that.

We have to be careful, because Google are an important organisation, but they are not the only player whose interests the Government have to look after. We have to look after the small and medium-sized companies that trade across Europe and the world. I gave evidence to your Committee a little while ago about safe harbour. We need to make sure that companies feel confident that they can transfer data properly and safely, so we need to make sure the business interests of our country are protected. There are other players. Lastly, we need to make sure the citizen, the layperson like you and me, has their rights protected too, and that we do not find it difficult to obtain information that we should find it easy to find. We are now all expected, particularly by younger members of our families, to be able to access information instantaneously, more or less. Provided it is well sourced and accurate, that should be possible.

Google will be helpful. They clearly have a vested interest. They were the defendants in the case. I have no sense that they are not willing to be helpful. Nobody can replace them. It has to be their decision, in response to the initial request. We cannot take that away from them, and they, as a company, have to have the capacity to do that. They are going to do it as quickly as possible. My plea to them would be to try to share, periodically, the balance between applications turned down and accepted, and share with the Government the robust message that this does not mean that something you do not like about your record can suddenly disappear just because you are going to ask about it. That is not the implication of the judgment, and the louder they can say it and we can say it, the better.

Q41 Lord Morris of Handsworth: Minister, you spoke earlier about the enormity of the task of compliance. What is your estimate of the impact of the regulation on business and, in particular, small and medium-sized enterprises, if it were to be enacted in its current form?

Simon Hughes: Lord Morris asks a very important question. I will give you the best factual answer I can, which is that our assessment—we did an assessment of the original proposal—was that it would have a net cost to our economy of something between £100 million and £360 million per year. In the phrase of my late father, that is no small beer. In terms of small and medium-sized companies, the impact assessment estimated that it could cost them between £80 million and £290 million a year, and that is not in addition to the first figure. For the total sector of UK business, it could be as big as £360 million a year; the SME part of that could get up to nearly £300 million. This is a serious cost of the regulation as it is currently drafted, which is why we are batting very hard to make sure that we do not have that burden on us as an economy, trying to grow our business and grow our market.

Obviously, the negotiations are going on. As your Lordship will know, European negotiations are often detailed. There have been 4,000 amendments to the text, I seem to remember, from conversations I have had with colleagues. There has been a wish that we have argued that there should be a much tighter focus on the risks of processing and that the obligations on controllers should be related to the risks. If the risk is not great, there should be minimal obligations, as opposed to anything excessive, and we will be pushing to keep the burden low. I am conscious this could be a very high-cost obligation on the current proposal, which is why the current proposal is not something we would agree with, but we absolutely want a deal, because that will help and expand business. I hope that is the sort of information your Lordship wanted.

Q42 Lord Blencathra: Minister, I will make a frivolous observation first and then ask a serious question. You have talked about politicians rolling around drunk on the pavement and you said that you wanted to become a member of the AA. For the record, we know you were talking about the motoring organisation and not about Alcoholics Anonymous. I share your resentment of motoring organisations trying to sell me batteries all the time and deathbed insurance, rather than fix my car.

The serious question is this: are we not making a bit too much of this? We know it is not a right to be forgotten. I am not sure if you have seen the excellent article by someone called Chris Moran in the Guardian, which set out that Peston was whinging too much. He was not cast into oblivion; that was gross exaggeration. Google are not removing any articles of substance. It is just the name, and you can search anything. Even if someone has got their name removed, you can still access the articles, but just not through that person's name. Are we all getting a bit overexcited when it is not as big an issue as some in the media think or say it is?

Simon Hughes: The short answer to your Lordship's question is yes. I can see, though, why it has happened like this. Again, I am going to be as honest with the Committee as I can. Google were taken to court; Google have been told they have to do this huge amount of extra work; Google cannot be overly keen on the fact that they have to spend lots of extra money doing this, I assume. They are a company and they presumably want to make profits and not spend any more money than they need to on doing this sort of work. I must be really careful here. When I saw Google, they had not started the processing of the decisions on the applications, which is fine. Not long after that, they clearly had started, because Mr Peston was on my radio telling me about his application. Mr Peston's case appeared to be at the top of the pile. It may have been on top of the pile because it might have been thought that Mr Peston might say something about it. It might also have been thought that Mr Peston might say that this was a great scandal and how dare anybody think anything he had ever written or featured should not be reported. That series of events suggested to me that, quite understandably, people want to make sure that their positions are known and they want to make sure that the implication of the judgment might be (a) thought to be extreme, and (b) need to be reined in as soon as practically possible.

Your Lordship is right that the judgment is actually a very limited judgment. As many of your colleagues have indicated, I cannot think of an example where you still would not be able to get the information. First, we should not overstate the implications of the judgment, but, secondly, the principles behind it—I think your Lordship would agree with me, and I hope all Members of the Committee might agree; I look forward to your report—are none the less that we should make sure, while protecting data, that we are not wanting to become a society, country or even a European Union that is starting to make it more difficult for people to be able to write freely as journalists or in any other way record details of our biographies and all the rest of it. Therefore, I hope it will be clear that the principle is not unimportant, but the judgment is actually limited in its implication.

The Chairman: You have given us an hour and a quarter of your time. I know colleagues have more questions. Have you got time to answer a couple more questions?

Simon Hughes: I am at your service.

The Chairman: That is very helpful indeed.

Q43 Lord Sharkey: The EU has taken the view in the past that some of Google's practices are monopolistic. There have been actions by the EU against Google on that basis. We have heard evidence, however, that the ECJ ruling is in fact significantly anti-competitive on the grounds that it raises a very significant barrier for entry into the search market, because Google can afford to take on this burden, but somebody in a garage in Southwark devising a new search engine will not be able to afford the burden laid on by the ECJ ruling. Do you have a view about whether this ruling is anti-competitive or not?

Simon Hughes: I have not thought through the implications of the ruling in every respect, but I have a clear view that, first, it is of course an unappealable judgment of the court, so at the moment we are governed by it. Secondly, Google clearly have a large share of the market and therefore, as I indicated, although it may be a burden to them, they have the capacity to manage it and other people—absolutely the small businessperson on the Old Kent Road or whatever—may not. It has that risk. I am trying to recollect properly. I do not think there is no way in which the EU powers of challenging monopolies could in any way challenge the judgment in the short term. Technically, obviously, the Commission—I stand to be corrected here—could have intervened in the case, I would have expected, before the court—

The Chairman: It did intervene.

Simon Hughes: They have a right to intervene to put their case. I do not know whether they made the point about anti-monopolistic—

Tim Jewell: It is not apparent from the judgment.

Simon Hughes: It is not, no. They did not spot that, but, no, there is that implication. It adds weight to the negotiations that we need to have. It would be clearly unacceptable that somebody who wanted to set up a new company that would be now categorised as a data controller is going to have a potentially large and, following Lord Judd's question before, impossible task to do the work. It must have that implication.

Q44 Lord Judd: What you said a moment ago prompted this question. Is there not a very big issue about what is in the public interest and what is profitable in terms of peddling tittle-tattle, gossip, and entertaining—for want of a better word—material to the general public? Coupled with all the answers you have been giving us—you have been very helpful—does this not mean that there is no substitute, in the end, for the prevailing ethic and principles of the operating companies and a sense of public responsibility?

Simon Hughes: I understand. There can be no substitute for them, because, in the end, they are, as it were, the court of first resort. It will be their decisions and therefore, whether it is a newspaper deciding what to publish or whether it is a company deciding how to behave, they are the first guardians of that judgment. Therefore, an ethic of public responsibility is very important. That is why, collectively, all parties agreed that we wanted to look at the press collectively and set up the Leveson inquiry by cross-party agreement, because we thought it had got out of kilter. I agreed strongly with that view. I felt that there were things able to be said on the front pages of papers—normally tabloid ones, though not necessarily—that were either never corrected, even if they were completely fallacious, or were corrected on page 27 two years later. That is not an adequate balance between the right of the citizen and the right of the player in the press. We absolutely needed better standards, and that is why I supported the idea. We had the new arrangement for press

complaints, which has been proposed by the royal charter. It seemed to me that the previous arrangement had not worked. I understand all the arguments about that.

In the wider sector, not just the media, your Lordship is right: there is no substitute for companies behaving in a way that is accountable, if they are public companies, and that is why the Government have been very clear that, for example, shareholders should have more power to decide executive salaries and so on, because those things have a wider interest. Your Lordship is right: this does not change the fact that the ethics of the individual player are in the end going to determine things, but it is right we have rules. In this day and age of really complicated technology, we cannot not have rules governing data transfer. It is right that the rights in the European Convention, the right of freedom of expression and so on, in my and the Government's view are rights that we want to uphold and sustain.

The judgment is a judgment that deals with a specific, technical piece of the process, but it has thrown up the need to have the big debate about the balance between freedom of expression and privacy. We have to have people with rights to privacy, but we have to not go overboard in making sure we limit what we in this country, I hope, are very constitutionally proud of being, which is a country where freedom of expression rules.

On Lord Blencathra's question, if this court judgment, though small, actually generates a debate about that balance and allows us to get the right results in the regulations in Brussels next year, we will have hopefully benefited from a large noise out of quite a small, focused judgment.

Q45 Lord Jay of Ewelme: The question I am going to ask is rather more pointed. It is the same question as Lord Judd's, in a way. If one of your constituents comes to your surgery with an iPad on which there is something that is clearly both untrue and defamatory and says, "How can you help me get this removed?" what is the answer?

Simon Hughes: The answer is that I would give them advice as to what the process is. They can apply to have it removed. Interestingly, nobody has expressly done that, but it is increasingly an issue that is discussed. I am very clear that we need to make clear what the process is for people to correct things that are incorrect, defamatory and untrue. The old libel route was not a satisfactory route, taking months or years at high risk of the cost of going to court. If we are going to respond properly, we all need to be able to know personally and advise as to what the process is. Anybody should be able to take action immediately to try to challenge. Wikipedia, as your Lordships will know, has a sort of public challenge process, where people can put up things questioning the accuracy and then, in the end, they may be altered. The trouble is that it appears to be not that quick a process. Though the judgment was now two months ago, Google made their first decisions in the last two weeks, so it has taken a couple of months to start the process. They want it, I guess, to be on fairly sure ground. Now, however, we need to encourage Google to make sure that they deal as quickly as possible with requests. We need to discourage vexatious, frivolous or completely misconceived requests, but we need to give the public the information so that they know how to do it, but with the warning that this is for serious complaints against something that is seriously wrong, not just for trying to correct something that is uncomfortable.

Thank you for the point, however. I will go away and pick up Lord Jay's implied suggestion that we may need to give much clearer information to the public as to what to do and how

to test whether you have a valid case in the first place and then how to proceed with it. The way we sometimes interpret our process does not make it very easy for the public to understand their methods of complaint. I will take that away.

The Chairman: On a positive note, I am going to end this session. Can I just say that you have been very generous with your time and very helpful? You have given comprehensive answers. Thank you to you and your colleagues.

Simon Hughes: Thank you for taking an interest. The issue will not go away.

The Chairman: We have just started the process.