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EU regulatory perspectives on digital legacy in view of the respect owed to the dead: a blessing for individuals and a curse for businesses?[*]

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Abstract

Early this year the European Parliament, the Council and the Commission proclaimed that everyone should be able to determine their digital legacy, and decide what happens with their personal accounts and information that concerns them after their death, a declaration that paves the way for post mortem protection of personal data at the EU level. The paper discusses the digital legacy in view of the respect owed to the dead and assesses the challenges that may arise from consecrating a right to digital legacy for businesses that process personal data of deceased persons. The article argues that the effectiveness of the right to decide what happens with personal data after death is – at least from a civil law perspective – an expression of the respect due to the dead as to their memory. It also contends that a future regulation should cover the situation when the deceased persons did not determine what happens with their data. Furthermore, the paper highlights the importance of technical and organisational measures to be implemented by all businesses that sooner or later are going to process information that concerns the living after their death.

Keywords: *European Union, data protection, personal data after death, digital legacy, business activities, technical and organisational measures.*

Preliminary considerations

Our lives have two sides, one for everyone to see and another that we keep hidden from the general public. The first one unveils our public persona. The second one hides our private lives from the gaze of others and is protected mainly under the right to privacy[1].

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Since, on the one hand, there are *data which are capable by their nature of infringing privacy* and fundamental freedoms[2] but, on the other hand, *data-processing systems are designed to serve man*[3], the European legislator – distinct from the right to private life – established a *right to the protection of personal data*, right later taken into Article 8 of the European Charter of Fundamental Rights[4].

Despite that the proper functioning of the internal market requires the free movement of personal data within the European Union[5], natural persons should have control of their own personal data[6]. However, according to its Recital (27), the General Data Protection Regulation (GDPR) does not apply to the personal data of deceased persons. Therefore, *de lege lata*, the data subjects are prevented from exercising under Regulation (EU) 2016/679 a *post mortem* control over their personal data.

Yet, early this year the European Parliament, the Council and the Commission proclaimed that *everyone should be able to determine their digital legacy, and decide what happens with their personal accounts and information that concerns them after their death*[7], a declaration that paves the way for *post mortem* protection and data subjects *control* of personal data at the EU level[8].

In its section on *Privacy and individual control over data*, the «Declaration on Digital Rights and Principles for the Digital Decade» reiterates that *everyone has the right to privacy and to the protection of their personal data* and that the latter right includes the *control by individuals on how their personal data are used and with whom*

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[1] The right to privacy or private life is enshrined in Article 12 of the Universal Declaration of Human Rights, Article 8 of the European Convention of Human Rights and Article 7 of the European Charter of Fundamental Rights.

[2] Recital (33) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, published in the Official Journal of the European Communities L 281 from 23 November 1995.

[3] Recital (2) of Directive 95/46/EC.

[4] Published in the Official Journal of the European Communities C 364 from 18 December 2000.

[5] Recital (13) and (21) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), published in the Official Journal of the European Union L 119 from 4 Mai 2016.

[6] Recital (7) of Regulation (EU) 2016/679.

[7] European Declaration on Digital Rights and Principles for the Digital Decade, published in the Official Journal of the European Union C 23 from 23 January 2023.

[8] Although Member States may provide for rules regarding the processing of personal data of deceased persons, there is no uniform practice at Union level. Exempli gratia, Romania did not enact such a rule, while Article 2 (5) of the Danish Data Protection Act provides that this Act and the General Data Protection Regulation shall apply to the data of deceased persons for a period of 10 years following the death of the deceased. See Lov om supplerende bestemmelser til forordning om beskyttelse af fysiske personer i forbindelse med behandling af personoplysninger og om fri udveksling af sådanne oplysninger (databeskyttelsesloven) Nr. 502 from 23 Mai 2018, published in Lovtidende A from 24 Mai 2018, available online at https://www.lovtidende.dk/api/pdf/201319.

they are shared. This is *de lege lata* the protection and control guaranteed under the General Data Protection Regulation.

Further, the European Parliament, the Council and the Commission commit to ensuring that everyone has *effective control* of their personal data *in line with EU data protection rules and relevant EU law*. Obviously, for now there isn't any EU rule enacted on the personal data of deceased persons. Or better said, such personal data is not currently protected under the EU legal framework. Basically, as part of the Digital Decade Policy Programme 2030[9], the EU aims to give individuals also a *post-mortem control* over their own data by deciding what happens after their death with their personal accounts and their personal data.

Digital Legacy and the Respect Owed to the Dead

Currently there is no legal definition of what *digital legacy*[10] is, except that it relates to personal accounts and information that concerns the data subjects, i.e. *personal data*. However, for the present study the definition of digital heritage is less important than its *impact on the memory of de cuius*.

As mentioned, there are data which are capable by their nature of infringing the privacy of the *living*, and consequently also the post-mortem privacy of the *dead*. *Post-mortem privacy* had been defined as the 'right of a person to preserve and control what becomes of his or her reputation, dignity, integrity, secrets or memory after death'[11]. That is why the effectiveness of the right to decide what happens with personal data after death is – at least from a civil law perspective – an expression of the respect due to the dead as to their memory.

Before the digital transformation, one's personal data footprint was confined to *analogue documents*. One could control post-mortem privacy, for example, by burning private (and maybe compromising) letters. If not, such documents would pass to the heirs as part of the deceased's estate.

In this regard, the Romanian Civil code[12] provides in Article 1141 that *family heirlooms* constitute the property which belonged to the members of the family and bears witness to its history, including letters and other documents[13],

[9] See Decision (EU) 2022/2481 of the European Parliament and of the Council of 14 December 2022 establishing the Digital Decade Policy Programme 2030, published in the Official Journal of the European Union L 323 from 19 December 2022

[10] For a doctrinal analysis of its content, see Maggi Savin-Baden, Digital Afterlife and the Spiritual Realm, 2022, Abingdon: CRC Press (Taylor & Francis), p. 149-152.

[11] Lilian Edwards, Edina Harbinja, Protecting post-mortem privacy: reconsidering the privacy interests of the deceased in a digital world, Cardozo Arts and Entertainment Law Journal, vol. 32, Issue 1/2013, p. 103.

[12] Law no. 287 of 17 July 17 2009 on the Civil Code, republished in the Official Journal of Romania, Part I, no. 505 of 15 July 2011.

[13] This category includes property such as correspondence of family members, family archives, decorations, collectible weapons, family portraits, documents and any other property of special moral significance to the family.

elements which are not without impact on the memory of the deceased. The heirs may only terminate the indivision (tenancy In common) related to the property constituting family heirlooms by voluntary partition. If such a partition is not carried out, the family heirlooms remain in indivision.

A similar provision can be found in Article 2047 (2) of the German Civil code (Bürgerliches Gesetzbuch). According to the latter, the documents relating to the personal circumstances of the deceased or of his family or to the whole estate remain joint property14. Article 2373 (2) on the purchase of an inheritance provides that, in case of doubt, the family papers and family pictures are not to be deemed included in the sale. The family papers include letters, diaries and family notes, and these should be interpreted broadly[15].

The French Civil code does not contain similar provisions. The family heirlooms (souvenirs de famille) are family objects of essentially moral and subjective value left by the deceased – even if some of them also have a market value which may not be negligible – such as family papers, portraits, weapons, decorations, etc.[16] It's through case-law that the family heirlooms acquired a distinct legal regime.

Family heirlooms escape the rules of inheritance and sharing established by the French Civil Code and the notion cannot be extended to documents which do not concern the family, do not originate from its members and are not addressed to them[17]. Practically, also in the French law, there is an undivided family co-ownership over family heirlooms.

In the absence of a testamentary provision, all three legislations above admit that the personal analogue documents of *de cuius* end up with the heirs as part of the deceased's estate. Today however, because of the shift towards online means of communication, we leave behind a digital footprint that also contains personal data. What is the legal fate of this digital legacy?

German jurisprudence brings us a clarification in this regard. The highest German court found that, there is no reason to treat digital content differently from an inheritance law perspective, the post-mortem personal rights of *de cuius* do not conflict with the inheritability of highly personal digital content and telecommunications secrecy protects neither *de cuius* nor the respective communication partner from the heir becoming aware of the contents of the user account[18]. Thus, as in the case

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[14] See Daniel Kollmeyer in Gerhard Dannemann, Reiner Schulze (eds.), German Civil Code = Bürgerliches Gesetzbuch (BGB), München: C.H. Beck & Baden-Baden: Nomos , p. 990.

[15] Christian Kutschmann in Idem, p. 1429.

[16] Christophe Vernières in Michel Grimaldi, Droit patrimonial de la famille, septième édition, Paris: Dalloz, juillet 2021, p. 566.

[17] French Court of Cassation, First Civil Chamber, Decision No. 76-10.561 of 21 February 1978, available at https://www.legifrance.gouv.fr/juri/id/JURITEXT000007000238.

[18] German Federal Court of Justice (Bundesgerichtshof – BGH), Judgment of 12 July 2018 – III ZR 183/17, paragraph 50, 52 and 54, available online at https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=86602&pos=0&anz=1.

of analogous documents such as diaries and personal letters, in all three legal systems the solution should be identical, in the sense that highly personal digital content is also passed on to the heirs.

Consequently, in the context of digital transformation, one can control post-mortem privacy by deleting personal data that otherwise could be accessed – lawfully – by the heirs as part of the family heirlooms. Of course, we can imagine that an illegal access to those data can also happen. However, we tend to assume that there is always time and we postpone things to do. Therefore the data deletion will probably not take place in our lifetime.

Here is where a post-mortem control comes into play and proves its usefulness: by deciding what will happen after death with our personal accounts and information, or, in other words, by determining our digital legacy. On the other hand, if the EU will adopt legislation enacting a right for the data subjects to determine their digital legacy it should be in a regulation, not a directive.

In this regard, it is important to remember that Directive 95/46/EC "has not prevented fragmentation in the implementation of data protection across the Union, legal uncertainty or a widespread public perception that there are significant risks to the protection of natural persons, in particular with regard to online activity"[19].

Thus, in order to prevent *differences in the level of protection* of the data subjects as a result of *differences in the implementation and application* in the Member States of a right to decide what happens with their personal accounts and information that concerns them after their death, a regulation is necessary to ensure a c*onsistent and high level of protection* for natural persons as to their digital legacy.

Also, besides the choice of legislative instrument (regulation or directive) and although *ius civile vigilantibus scriptum est* (civil law is written for the vigilant), the simple consecration of a right to determine their digital legacy would be insufficient to insure a consistent and high level of protection of natural persons, if no mechanisms are provided to ensure the post-mortem effectiveness of the data subjects' will.

The future regulation should stipulate that the data subject can appoint an executor of his or her digital legacy and the latter should have at least the rights provided for in Article 77 (right to lodge a complaint with a supervisory authority), 78 (right to an effective judicial remedy against a supervisory authority) and 79 (right to an effective judicial remedy against a controller or processor) GDPR.

Although "the right to ensure due respect to the memory of family members is a pious duty which incontestably belongs to the relatives of the deceased person"[20], not all data subjects have relatives and presumably not all relatives will

[19] Recital (9) of Regulation (EU) 2016/679.

[20] Paris Court of Appeal, Decision of 10 December 1850: „Le droit de veiller au respect dû à la mémoire des membres d'une famille est un devoir pieux qui appartient incontestablement aux parents de la personne décédée" – published in Recueil général des lois et des arrêts (Sirey), II^me^ Partie, 1850, p. 628.

be willing the enforce *de cuius'* will regarding the personal accounts and information that concerns him or her. That is why, an effective post-mortem control as the one stated in the «European Declaration on Digital Rights and Principles for the Digital Decade» should not depend on whether or not the deceased has relatives or heirs.

What If the Deceased Did Not Determine What Happens with Personal Data?

A future regulation should also cover the situation when the deceased persons did not determine what happens with their personal accounts and information that concerns them after their death. Otherwise the level of post-mortem privacy protection will not be equivalent in all Member States, will vary according to whether the deceased decided or not as to his or her digital legacy and there will be no homogenous rules on personal accounts and information that concerns data subjects after their death.

Leaving aside what the future may bring, nowadays the processing of personal data of deceased persons is protected in Romania under Article 79 of the Romanian Civil code[21] which prescribes that "(t)he memory of the deceased person is protected under the same conditions as the image[22] and reputation of the living person". Consequently, only a data processing that violates at least one of the two – the image or the reputation – could infringe the interdiction of defamation against the memory of the deceased and activate the protection provided by the Romanian Civil code.

However, this protection is rather limited considering that Article 256 (2) provides that the *action for restoring the integrity of the memory* of a deceased person may be initiated by a limited number of persons, namely the surviving spouse, the descendants, and the collateral relatives but only up to the fourth degree. Basically only those who have direct descendants can hope in the long term for the protection of their memory and implicitly of their personal data.

Perhaps the legislator should correlate the provisions on family heirlooms with the action for restoring the integrity of the memory in the sense that the heirs of the family heirlooms would be also be entitled to act for the protection of the memory of the deceased. If the memory of the deceased is honoured through family mementos, those in possession of them, regardless of the degree of kinship, should be able to act accordingly when the integrity of the memory of the deceased is affected.

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[21] Law no. 287 of 17 July 17 2009 on the Civil Code, republished in the Official Journal of Romania, Part I, no. 505 of 15 July 2011.

[22] Article 75 (2) of the Romanian Civil code: "In exercising the right to his own image, one may prohibit or prevent the reproduction, in any way, of his physical appearance or his voice or, as the case may be, the use of such reproduction".

Conclusion

The Declaration on Digital Rights and Principles for the Digital Decade seems to be the herald of post mortem protection and control of personal data at the EU level. However, their effectiveness will depend on how the European legislator will choose to regulate them. Only then it will become apparent if it's a true blessing for the data subjects.

Even if the regulation will be limited to allowing the data subjects to determine what happens with the personal accounts and information after death, it will undoubtedly have an impact on businesses that sooner or later are going to process information that concerns the living after their death. The impact may be dulled only by appropriate technical and organisational measures designed to protect the memory of the deceased's.