**Post-mortem privacy and the latest GDPR legislative shifts**

**Marta Terletska[[1]](#footnote-1)  
Tallinn University of Technology, Estonia**

***Abstract:***

*The decision in the LG Berlin Facebook case caused a fierce debate in the field of digital inheritance and became the first in a number of cases throughout Europe on the issue of access to the accounts of deceased relatives by their heirs. On the contrary, the issue of posthumous privacy, which is inseparably interconnected to a digital succession, has not received such comprehensive research, and is lacking it in the context of the civil legal system, and the EU in particular. This study systematises the knowledge about and the right to decide the fate of the assets by a legal predecessor after no longer being in a position to exercise human autonomy and contextualises it within the framework of recent regulatory developments, namely the implementation of GDPR for the protection of post-mortem data and recent relevant case-laws.*

***Keywords:*** *EU, post-mortem privacy, posthumous privacy, digital assets, GDPR post-mortem, social media accounts post-mortem.*

# **Introduction: Defining post-mortem privacy**

Post-mortem privacy is not a legal term or category. At the current stage of legislative development post-mortem, privacy is still a predominantly abstract notion, which in most cases is understood as a right of the person to preserve and control what becomes of his reputation, dignity, integrity, secrets, or memory after death, meaning after no longer being able to exercise human autonomy as an active agent. [[2]](#footnote-2)

Considering the issue from a social perspective, post-mortem privacy is often associated with aspects such as the protection of personality rights, the author’s moral rights, dignity, and protection against defamation. [[3]](#footnote-3)

The controversy of the phenomena of post-mortem privacy lies not only in the absence of the right codified but also in the natural controversy of the very idea of posthumous privacy in relation to the fundamental principles and pillars of certain jurisdictions, for example, the maxim of the English law “*actio personalis moritur cum persona*”[[4]](#footnote-4) implying that “a personal right of action dies with the person”.

In contrast to the common law system, the idea of posthumous privacy cannot be called foreign and uncharacteristic of the civil law system: although not in the scope of what we understand as modern digital posthumous privacy regulation, the concept-related manifestations and indications can be found in numerous related cases and laws. For example, Malgieri, in his work, considers being such an Application n. 8741/79, 47, in which the Commission admitted that the applicant’s wish to have his ashes spread out over his own land” was so closely connected to private life that it fell within the sphere of Art. 8 of the European Convention on Human Rights (ECHR)”, correctly defining it as life-transcending decisional privacy [[5]](#footnote-5) and the Danish Act on Coroner’s Inquest, post-mortem examinations and transplantation, which prohibits interference with a corpse of a deceased person without his prior consent in writing.[[6]](#footnote-6)

Of course, there are also many contrary opinions and testimonies.

In particular, under the general practice, Article 8 of the European Convention on Human Rights (ECHR), which is dedicated to the protection of the private and family, home, and correspondence, is limited to the protection of living individuals only unless case concerns very exceptional circumstances constituting an inseparable and direct link between the deceased’s privacy and the rights or interests (sometimes economic) of the living individuals.[[7]](#footnote-7)

But even in situations where the objective of protecting posthumous privacy seems entirely legitimate, as for example, in the case of Rb Amsterdam 12 December 2003, KG 2003, 1363 m.nt. GJZ, where the daughter of two Holocaust victims applied to the court to remove her parents’ personal information from the Digital Monument to the Jewish Community in the Netherlands, as this identification violates their and her data protection rights and evokes painful memories, other factors often prevail, such as ensuring freedom of expression.[[8]](#footnote-8)

Despite the lack of global legal clarity on the matter, in light of the increasing threats to both our ante-mortem[[9]](#footnote-9) and post-mortem privacy associated with the rapid development of technology and the growing influence of private corporations, many scholars take a firm normative stance supporting and proclaiming the existence and the need to regulate the post-mortem privacy and data justifying it from the different perspectives. The works of Sperling, Smolensky, Harbinja, Buitelaar and many other legal and social scholars constitute a paramount contribution to the theoretical conceptualisation of the posthumous privacy phenomena.[[10]](#footnote-10)

Thus, based on the idea that, although not all, the interests of individuals survive their death and deserve to receive legal protection,[[11]](#footnote-11) this work, without further consideration of the theoretical basis, will proceed to consider the practical aspects of the implementation and regulation of posthumous privacy and data protection.

# **General remarks and important categorisations**

As was previously stated, the discussion and consideration of the notion of post-mortem privacy in general and in the legal dimensions, in particular, are mainly caused by the increased level of concern both in the ordinary and in the legal discourses about the lack of regulation and inscrutability of legal elements or their aggregates, usually designated as components or influencing factors of what we understand as digital posthumous privacy within the discourse.

These components, among other fields, include:

* property and essentially succession law: the principle of universal succession is generally governing the posthumous transfer of assets.[[12]](#footnote-12)
* intellectual property law regimes: transferability is usually dependent on the classification of the assets in question.
* contract law: the contract of service is essential for the usage of digital intermediaries` services; it also sets the normative basis for the internal procedures of the assets and data processing activities conducted by the intermediary.
* data protection law: sets standards for data processing, control, and transmission, defining the scope of data subjects` and controllers` (the intermediary/platform service-providers) conduct.

The abovementioned conditional categorisation is primarily based on the observations of issues considered by the civil legal system courts in the event of ruling and substantiating the account-related transfer issues.

There are also various stakeholders relevant to the issues surrounding post-mortem privacy online, namely, internet users, their families, service providers (intermediaries) and society.[[13]](#footnote-13) As the author takes a normative stance and promotes the interests of the users over their family or intermediaries, this work will focus on the practical aspects of the implementation of digital posthumous privacy directly related to the possibility and accessibility of individuals to control the fate of their digital assets in their own interests after death in within the framework of international and national legislation of the EU member states, trying to shed light on their nature, prospects and peculiarities.

# **Post-mortem privacy on the EU-level data protection legislation**

As was already mentioned above, due to the relative novelty of the phenomena in general, the fate of our digital assets and their post-mortem aspects after our death currently remains in the so-called “grey area”. Also, no European-wide piece of legislation harmonises or sets explicit standards for either succession of digital assets or posthumous privacy regulation.

According to recital 27 of the General Data Protection Regulation (GDPR), the European GDPR is not applicable to the personal data of deceased persons.[[14]](#footnote-14) However, the Member States were left free to implement their own decisions and regulations regarding the post-mortem data and data subjects’ protection. Despite the recommendation’s non-mandatory nature, GDPR has stirred a wave of post-mortem property and data regulation that is forcing us to rethink our vision of these phenomena.[[15]](#footnote-15) Legislative responses to the encouragement to self-regulate post-mortem privacy vary widely from MS to MS: non-implementation and various examples of partial implementation. There have also been court proceedings, which in this context, can give us a better understanding of the consequences of these regulations and help form an idea of the potential for harmonisation.

In the next section, as part of a comparative analysis, the approaches of such countries as Germany, Italy and France will be carefully assessed.

# EU Member States’ national level regulation:

## ***Germany***

Germany, in the context of conditional categorisation, belongs to countries in which the issue of posthumous privacy in the absence of GDPR incorporation for its regulation is considered in the context of **the conflict of contract law, meaning the contract of services between the intermediary platform and the user, and inheritance law.**

The assessment of the right to inherit and the right to access the account within the six instances of the court of the fundamental LG Berlin, 20 O 172/15[[16]](#footnote-16), (“LG Berlin”) case – the first major European case on the issues of digital inheritance of social media accounts and, accordingly, posthumous data privacy directly linked to the transfer accompanying it, clearly and in detail demonstrates the logic and specificity of the approach from the position of reaching the objectives of protection of property rights in the context of the principle of universal succession.[[17]](#footnote-17)

LG Berlin concerned the parents’ right of access to the Facebook account of their underaged daughter who had committed suicide: the mother tried to log into the account, but the access was restricted, as Facebook transferred the account to a memorialised status in accordance with the internal rules of Facebook and the provisions of “Terms of service”, and on the deceased’s mother’s request for access was refused with reference to internal rules and principles of Facebook. [[18]](#footnote-18)

As part of its arguments in the first instance of the court, Facebook claimed the non-transferability clause in the service contract between the provider and the original owner of the account prevents the heirs from succeeding and accessing the account. The court, instead, declared that this contractual provision has no effect and cannot prevent the inheritance of a service contract, which is the same property as any other. The Berlin Regional Court noted that one of the reasons for the invalidity of the memorialisation and non-transferability clause is the disproportionate and unreasonable disadvantage to the heirs that these regulations cause.

The Berlin Court of Appeal denied the existence of the successor’s right to access of account on the basis of the secrecy of telecommunications designed to protect the communications of the legal predecessor of the account and their communication partners.

In turn, the Federal Supreme Court returned the decision of the court of the first instance, emphasising the priority of the principle of universal inheritance over contractual provisions. Also, an essential and fundamental explanation of the rules of inheritance of digital assets was made: according to the Court, digital assets should be equated with physical ones and be inherited accordingly, that is, identically based on this equivalence. The secrecy of telecommunications, which Facebook put forward as an argument for denying access to the account, would not be valid if it was a paper letter communication – thus, messages should be inheritable as well.

This argument quite reasonably raises doubts in the context of the interpretation of the protection of the data of these third parties in the context of the GDPR: at the same time, as the court notes, the right of access to this data of their testator should be extended to the heirs within the framework of Art. 6 GDPR 1 (b), as they are now effectively the beneficiaries and party to the agreement that is the basis of this basis for processing.[[19]](#footnote-19)

Despite the apparent inheritance rights-centred position regarding access to account data and, accordingly, posthumous privacy, which is actually excluded, since the consent given by the legal predecessor to memorialisation was not considered even potentially as an expression of will[[20]](#footnote-20), it is worth noting that, nevertheless, probably, not all factors posthumous personal rights are entirely rejected by the German legislation. A strong argument in support of this is the advisory ban on granting heirs the right to actively use the page[[21]](#footnote-21): that is, despite the order to provide access to all information from the account and the actual transfer of the account with all rights to it to the hands of the heirs in accordance with the law of universal succession, the court considers it appropriate to limit the right of use such functions as sending messages from the face of the deceased or editing the account.

Mikk and Sein, concluded that such a prohibition may be related to an exception to the principle of universal succession, which excludes rights and obligations of a personal nature, that is, those that are inextricably linked and directly depend on the personality of the owner from the list of “universal inheritance”.[[22]](#footnote-22) At the same time, as the court rightly noted, this principle, in accordance with the norms of German law,[[23]](#footnote-23) is difficult to apply to the contractual provisions of General Terms and Conditions due to their lack of personal character.

Despite the undeniable fundamental nature of the case, considering the many subtleties associated with such aspects of it as the age of the original data subject, which directly affects the validity of the consent, the parent’s reasons for seeking access, namely suicide, and the procedural flaws in the attempts at contractual regulation Facebook, LG Berlin cannot be considered unequivocally indicative and decisive of the post-mortem privacy in Germany as a whole. Nevertheless, given Facebook’s abolition of the memorialisation procedure for German accounts, the prospect of considering the aspect of standardised and non-standardized contractual clauses as a potential way to ensure posthumous privacy in the context of the 1922 BGB anywhere other than in scholarly discourse seems unlikely.[[24]](#footnote-24)

A similar, i.e., primarily based on the principle of universal succession, approach to the regulation of posthumous privacy is likely to be used in most EU countries that have not incorporated or deliberately excluded the potential possibility of incorporating (Sweden) [[25]](#footnote-25) provisions on posthumous data protection into their codes, given prevalence of the principle of the universal succession in European legal systems.[[26]](#footnote-26)

However, to consider this approach the only possible, given the lack of harmonisation in the issue of digital inheritance, would be too presumptuous considering the additional factors of its regulation, in each country countries, such as the definition and classification of “digital assets”, the level of their heritability, additional aspects of privacy or the interpretation and weight of contract law. For example, if we proceed from the LG Berlin judgement`s idea of equating the inheritance of digital assets with their material counterparts in the context of Polish legislation, then taking into account the Polish rule of the limitation of disclosure of private correspondence to specific categories of people only, the disclosure of the messages would already be assessed differently.[[27]](#footnote-27)

## ***Italy***

Italy is one of the countries that has taken the opportunity to extend some provisions of the GDPR to post-mortem data. Legislative Decree no. 101 of 2018, incorporates Articles 15 to 22 of the GDPR into law in such a way that they can be used by legal successors or a designated person to protect the interests of the deceased in relation to the management of their data.[[28]](#footnote-28)

Also, according to the new decree, it became possible for persons to partially regulate the post-mortem data by means of a direct written will regarding the further fate of digital assets to the address of the data controller, i.e. the service provider in the case of social networks and digital storage, which includes the possibility to prohibit legal successors from using the rights within the framework of the above-mentioned Articles 15-22 of the GDPR. [[29]](#footnote-29)

It is crucial that the law itself neither overrides the fundamental principle of universal succession, nor excludes the factor of “unfair contractual provisions”[[30]](#footnote-30), but only partially models the inheritance process with respect to some of its components, actually expanding freedom of testation to the application on the data, but not directly to the control of the economic-related aspects of the data. It would seem that such an approach can be called consensual from the point of view of the balance of the right of inheritance, the practical and economic interests of the successor and informational self-determination, but despite both the standard contractual conditions, which were recognised as insufficient to protect the will of the predecessor, as well as the possibility of the will to be expressed within the framework of the legislative decree, inheritance and access to data according to universal succession remains the default position.

This pattern is clearly observed in the court case Tribunale Ordinario di Milano, N. R.G. 2020/44578, which can also give us a general idea of the practical side of the procedure for establishing the will of the legal predecessor.

Tribunale Ordinario di Milano, N.R.G. 2020/44578 concerned the request of the deceased man’s parents for access to his Apple account to store photos and information from there to “make it easier to cope with the loss”. Counting this as a valid reason, after dismissing the non-transferability clause-related counterclaims, the court proceeded to a practical consideration of the will or lack of will regarding providing access to the deceased’s information:

«From the correspondence between the appellants and the respondent company, it emerges clearly that Mr. XX has not expressly prohibited the exercise of the rights connected to his post-mortem personal data…»[[31]](#footnote-31)

In general, comparing the Italian and German approaches from the point of view of posthumous privacy, the Italian one, despite the apparent shortcomings, can be considered more beneficial for posthumous privacy, since, unlike the German one, it developed the primary mechanisms for its regulation, thus still incorporating into legislation and developing the adjustment mechanism, even if not a perfect one. The identity of the approach with the principles and characteristics of what we understand as post-mortem privacy is also evident. Italian law refers to the potential intentions of the predecessor-data subject of the information as a reasonable person to determine its application, emphasising the connection with concepts such as identity, individual autonomy, and dignity, implying that these things are valid and relevant even after the death of an individual.[[32]](#footnote-32)

## ***France***

The French model of protection of posthumous privacy incorporated on the basis of GDPR is considered one of the most complete and detailed in terms of many aspects. What considerably differs it from previous examples is the possibility to leave precise instructions on the desired regulation of the posthumous data – decrees under the responsibility of third parties certified directly by the CNIL[[33]](#footnote-33).[[34]](#footnote-34) As in the previous two cases, the sole consent to the „terms and conditions” cannot be considered such an instruction, and, accordingly, cannot affect the regulation of post-mortem data as it does not contain explicit consent on which the decrees are based, however, as in the Italian example, specific instructions left through direct personal communication with the controller may be such a legal basis.[[35]](#footnote-35)

A particular person can be appointed to activate the execution of left decrees. The law clearly states that if a person was not appointed, or died before being able to fulfil his obligations, the decrees can also be activated by the heirs.[[36]](#footnote-36)

A key factor and a significant feature of the French approach is the actual division of rights related to digital assets into economic rights related to digital goods and personal ones, where the legal predecessor, that is, the deceased, has the right to regulate both the first and the second, and where the second always prevails over the first, which is “actually an absolute form of posthumous privacy”.[[37]](#footnote-37)

It would seem that the lack of division into economic and personal aspects of personality rights in approaches to the regulation of posthumous privacy in aforementioned Germany actually leads to the opposite result: personality rights are complementary to economic rights. But is it actually, correct?

In fact, Germany considered the heritability of an account from the point of view of counterbalancing the rights to it within the framework of the contract, defining it as a legal basis covering all the assets in it, while the French classification and approach are based on the idea of judging by the content, not form: assets from the account are formed under the influence of the personality-linked activity of the user and therefore are personality-linked assets, freedom to testate regarding which is considered unlimited.[[38]](#footnote-38)

In the German example, the court put forward the idea that the right to actively continue using the account as it was done by the legal predecessor is not included in the list of inherited rights, which theoretically can also be interpreted as a restriction made on the basis of the deeply personal nature of rights and obligations, for the conditions of which the presence of an individual is necessary, that is, a category of non-inherited rights. Based on this interpretation, the difference between the German and French approaches lies not in the ideological difference of the principles and bases of legal acts concerning posthumous privacy, but in the classification of the type of assets.

# **Role of the platform-provider providers’ conduct and perspectives**

One of the most important links in matters of posthumous privacy and the transfer of digital assets equally to the legal regulator is the platform service provider. Platforms supplement the general rules on privacy and transfer of assets, by providing the instrumental framework for their application.[[39]](#footnote-39) And as is clear from the standard GDPR application, while the classic law provides the answers to the question of persons liable, private-made rules of the platforms tackle the issue of «how», still constituting a large fraction of control over the data.[[40]](#footnote-40)

In the absence of legal regulation of the issue, the platform is actually the main and only regulator. The lack of legal regulation of post-mortem data opens incredible prospects for platforms whose goal is often profit, which for aspects such as privacy and reputation, and certainly for those connected to the deceased data subject, means a radical increase in the risks of violation of rights and personal boundaries. Malgieri, in particular, attributes to these risks the possibility of obtaining data about friends and relatives from unregulated posthumous data through secondary data processing and exploiting it in attempts to profit from the grief and vulnerability of people related to the deceased through online behavioural advertisements.[[41]](#footnote-41)

Considering these risks, attempts to distance the regulation of post-mortem privacy from service providers within the framework of the French regulatory approach do not appear to be unreasonable, despite the availability of a much easier regulatory method – full delegation of the role of the “post-mortem data controller” to the service provider.

# **Harmonization aspects**

In the conditions of such a little-regulated and little-studied phenomenon as post-mortem privacy, views on the need for an EU harmonisation, identical to that existing for the rest of the provisions of the GDPR, differ to a large extent. For example, Okoro believes, that the call for posthumous privacy will not be welcomed and answered by all Member States “as each state has its own unique history and traditional beliefs upon which its legal system is built and to harmonise them in this regard would be too problematic”. [[42]](#footnote-42)

At the same time, Petra raises the quite valid issue of risks associated with non-regulation at the European level, in particular, the possibility of legal fragmentation and legal uncertainty in cross-border matters.[[43]](#footnote-43) Hamuľák, Kocharyan, and Kerikmäe agree that harmonisation is indeed needed, but the “unified hybrid (“consensual”) mechanism of post-mortem data protection” created on the basis of the states` best practices should precede the GDPR harmonisation of the matter.[[44]](#footnote-44) Considering the vast dissimilarities in the current EU-Member States’ approaches to tackling post-mortem privacy, the author of this work also shares this opinion. It is important that this potential approach should not be one-sided. Posthumous privacy is a multi-category notion that depends on and, accordingly, affects many different legal fields and subjects. Judging and managing it solely from the point of view of the right of inheritance, or solely from the point of view of contract law, without taking into account privacy, data protection and ethics, or vice versa – to completely eliminate inheritance rights – is the road to nowhere.

# **Conclusions**

This paper critically discovered the issue of post-mortem privacy in terms of the latest legislative ‎development shifts and legal discourse’s reaction to them thus:‎

* Consolidating and complementing the theoretical basis based on the critical observation of the latest ‎regulatory ‎trends and updates in light of the previous considerations and assumptions.‎
* Revealing a view of the ‎problem and possible ways to mitigate it from the point of view of an ‎approach that includes consideration of ‎related interdependent areas of law: contract and succession ‎law in the light of review and interpretation of the ‎most recent and significant case law.‎
* Critically discovering the approaches of the legal regulators in 3 countries representing different stances on the issue and evaluating the probability of the possible EU-level harmonisation and possible harmonisation issues.

This research considers only types of property related to the “personality of the legal predecessor” criteria, thus not ‎taking into account the intellectual property rights regimes’ applications towards the goods within certain accounts. ‎The conditional categorisation of the accounts on private and public ones based on the criteria of economic and ‎public value may be sufficient for further research.

The research mainly concentrates on the general conceptualisation of the issues related to post-mortem privacy and its regulations, while slightly touching upon the issues of procedural legal regulator-intermediary conduct and cooperation, which requires more careful consideration and discovery as this factor is key for the practical enforcement aspects.

The direct recipients of the research and its conclusions are assumed to be the legislator, the regulator, and the ‎intermediaries, that is, the service provider, while the users are presumed to be the indirect recipients benefiting from their ‎conduct. ‎

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