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**The Naturalisation–Privacy Interface:  
Publication of Personal Data of New Citizens vs European  
Privacy Standards**

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The Naturalisation–Privacy Interface:  
Publication of Personal Data of New Citizens vs European Privacy Standards

*Dimitry Kochenov, Oskar Gstrein and Jacquelyn Veraldi\**

**Abstract:**

At present, there is great variance in the law and practice concerning the publication of personal data of newly naturalised citizens across the EU Member States, affecting a million individuals annually. Depending on the extent of the personal details made available, publishing the fact that an individual has naturalised can have negative repercussions in that individual's state of naturalisation or state of other/prior nationality. While certain Member States publish personal details in their official journals to some extent, twelve do not do so at all. In recent years, several countries have amended their related legislation or re-assessed publication practices in response to the growing awareness of the importance of data protection concerns. This article analyses the current Member State practices in this respect, conducting case studies into the practices of Ireland, France, and Latvia. The analysis documents the emergence of a clear trend toward the development of a more critical approach to the publication of personal data, which was previously the unquestioned default. The article subsequently investigates the possibility of identifying a legal standard that can be used to determine whether a more coherent approach to regulating the issue of publishing personal data of naturalised citizens can be deduced. In the EU context it finds that these publication practices may fall within the scope of the GDPR, while in the context of Council of Europe law, the principles of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data undoubtedly apply. UN instruments, by contrast, appear *de facto* inapplicable. The article concludes with a set of recommendations on what information should be published and how, emphasising that public authorities should

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carefully scrutinise and potentially re-consider their strategies managing the publication of personal data upon naturalisation.

## I. Introduction

Law and practice on the publication of the personal data of the new citizens varies greatly throughout the EU. Some countries, such as Greece, publish a large amount of information in respect to new citizens in the *Official Journal*. Others, like Estonia, strictly prohibit the publication of personal data. With 995.000 new citizens naturalising in the EU every year,<sup>1</sup> plenty of EU citizens are directly affected by radically different privacy policies, depending on the Member State of naturalisation.<sup>2</sup> Indeed, whether your personal data will be made easily accessible and searchable via the most popular Internet search engines seems to be a matter of luck. This state of affairs seems to linger under the radar of privacy advocates and citizenship scholars and is highly problematic, especially in the context of the heightened attention to privacy and data protection with the entry into force of the new European Union General Data Protection Regulation (GDPR) on 25 May 2018,<sup>3</sup> and the adoption of the recently modernised Convention 108 of the Council of Europe.<sup>4</sup>

The aim of this article is to map the landscape of the law and practice of disclosing the personal data of new citizens at naturalisation across the European Union, as well as to analyse the applicability of the updated European data protection regime to the current

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<sup>1</sup> Eurostat, 'Acquisition of citizenship in the EU', *Europa*, 9 April 2018, [ec.europa.eu/eurostat/documents/2995521/8791096/3-09042018-AP-EN.pdf/658455fa-c5b1-4583-9f98-ec3f0f3ec5f9](https://ec.europa.eu/eurostat/documents/2995521/8791096/3-09042018-AP-EN.pdf/658455fa-c5b1-4583-9f98-ec3f0f3ec5f9), visited 1 November 2018.

<sup>2</sup> EU citizenship is a supranational legal status derivative from the nationalities of the Member States as per Art. 9 TEU and Art. 20 TFEU. Cf. G.-R. de Groot, 'Towards a European Nationality Law', 8 *Electronic Journal of Comparative Law* (2004); M. Szpunar and M.E. Blas López 'Some Reflections on Member State Nationality: A Prerequisite of EU Citizenship and an Obstacle to Its Enjoyment', in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) p. 107.

<sup>3</sup> Regulation (EU) 2016/679 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) ELI: [data.europa.eu/eli/reg/2016/679/oj](https://data.europa.eu/eli/reg/2016/679/oj); L. Feiler, N. Forgó and M. Weigl, *The EU General Data Protection Regulation (GDPR): A Commentary* (Globe Law and Business 2018).

<sup>4</sup> Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, CETS 223. J. Ukrow, 'Data Protection without Frontiers? On the Relationship between EU GDPR and Amended CoE Convention 108', 2 *European Data Protection Law Review* (2018) p. 239.

practice, as widely heterogeneous as it stands. The article concludes with a set of recommendations concerning the best practice of handling the personal data of new EU citizens following their naturalisation in the Union. We particularly underline the need to find and strictly uphold the right balance between the societal need to know who ‘joined’ the collective of citizens on the one hand, and the imperative to avoid discrimination between the citizens and equally uphold privacy and dignity standards of all those concerned, including the newly-naturalised citizens.

Let us start with two examples where personal data disclosure following naturalisation was in the spotlight: immediate reaction followed when the newly-naturalised citizens of Latvia discovered that the *Official Gazette* of the Republic contained not only their full names and the dates of naturalisation, but also the dates and places of birth, full addresses and individual taxpayer numbers.<sup>5</sup> As a result of a multi-agency deliberation process involving also the courts, the Latvian Republic decided to change its approach to the publication of the personal data of the newly-naturalised citizens by 180 degrees in 2014.<sup>6</sup> Indeed, when all the core bureaucratic data about the person is freely searchable on the Internet, it is difficult to argue that high European privacy standards are upheld. The discrimination element is equally of importance here: in many EU Member States dozens of thousands of naturalised citizens *de facto* seem to enjoy fewer rights to privacy than the natural born citizens, who legitimately expect not to have their core taxpayer information findable on search engines such as Google in almost all countries.<sup>7</sup> This being said, discrimination on the basis of the manner in which citizenship is acquired remains prohibited in the Union,<sup>8</sup> making part of the general non-discrimination principle in EU law.<sup>9</sup> The Latvian U-turn is not atypical. As we will demonstrate, numerous EU Member

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<sup>5</sup> Minister of Justice Baiba Broka, ‘Informatīvais ziņojums „Par Ministru kabineta rīkojuma „Par uzņemšanu Latvijas pilsonībā naturalizācijas kārtībā” publicēšanu”’, 6 June 2014, [bit.ly/2QSOYw0](http://bit.ly/2QSOYw0), visited 23 September 2018.

<sup>6</sup> See section 2 below for more details.

<sup>7</sup> Just as with the publication of names of the newly-naturalised citizens, however, there is no uniform approach to this issue – what could be a subject-matter of another paper. Cf. e.g. K. Devos and M. Zackrisson ‘Tax Compliance and the Public Disclosure of Tax Information: An Australia/Norway Comparison’, 13 *eJournal of Tax Research* (2015) p. 108.

<sup>8</sup> E.g. ECJ 7 February 1979, Case C-136/78 *Ministère public v Auer*, para 28.

<sup>9</sup> See e.g. ECJ 19 October 1977, Case 117/76, *Ruckdeschel et al v Hauptzollamt Hamburg-St Annen*, para. 7. For a more recent example see ECJ 12 September 2006, Case C-300/04 *Eman and Sevinger v College van burgemeester en wethouders van Den Haag*, para. 61.

States have been reassessing their prevailing practice in the context of the growing awareness of the privacy concerns of the newly-naturalised citizens, as this right is gaining ground in the Union.

Also in terms of the starting position to publish personal data without giving it further thought, Latvia's is not an atypical story. In fact, there seems to be no consensus in the EU between the approaches taken on this issue as we move from one state to another, as has been documented, most recently, by the *ad hoc* query on naturalisation of the European Migration Network (EMN), the data, which this article takes as a starting point and updates.<sup>10</sup> As we will discuss in the next section, twelve Member States refuse to publish any information on the newly-naturalised citizens, while others disclose such information to varying degrees, often making it freely available on the internet.

This can be illustrated by the second example of putting the issue in the spotlight, which, instead of a regulatory reform, like in Latvia, led to threats of prosecution. When the names of the investors naturalised in Cyprus based on *ius doni*<sup>11</sup> were leaked by the activists to the press,<sup>12</sup> the Commissioner for Personal Data Protection noted that, 'there is no legal basis for publishing such data' and concluded that such publication may constitute a criminal offence.<sup>13</sup> In contrast, in many other countries, such as Cyprus' sister-nation Greece, *not* publishing the data of the new citizens amounts to a violation of the law.<sup>14</sup> Furthermore, the authorities of Malta, operating a similar citizenship for

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<sup>10</sup> European Migration Network, 'Ad-Hoc Query on Naturalisation', *EMN*, 9 November 2015, [bit.ly/2pvT2WR](http://bit.ly/2pvT2WR), visited 23 September 2018, p. 5.

<sup>11</sup> For a critical analysis of the Cypriot citizenship by investment programme in the light of EU law, see, S. Kudryashova, 'The Sale of Conditional EU Citizenship: The Cyprus Investment Programme under the Lens of EU Law', 4(3) *European Papers* (2018) (forthcoming). For the general context of citizenship by investment in the EU, see K. Surak, 'Global Citizenship 2.0 – The Growth of Investment Citizenship Programmes', *IMC Working Papers* No. 3/2016 (2016); C. Kälin, *Ius Doni in European and International Law* (Brill/Nijhoff 2019).

<sup>12</sup> *The Guardian* was the first to publish the leak: S. Farolfi, D. Pegg and S. Orphanides, 'The Billionaires Investing in Cyprus in Exchange for EU Passports', *The Guardian*, 17 September 2017.

<sup>13</sup> S. Orphanides, 'Confidentiality for Investors Buying Passports', *Cyprus Mail*, 28 February 2018, [cyprus-mail.com/2018/02/28/cipa-insists-confidentiality-leak-exposed-naturalised-investors/](http://cyprus-mail.com/2018/02/28/cipa-insists-confidentiality-leak-exposed-naturalised-investors/), visited 1 November 2018.

<sup>14</sup> Art. 8(1) Code of Greek Citizenship: 'The naturalisation decision shall be made by the Minister of the Interior, Public Administration and Decentralization, published in the Government Gazette' (translated); for the official version (in Greek), see Greek Citizenship Code, Law 3284/2004, [www.mfa.gr/missionsabroad/images/stories/missions/japan/docs/kodikas\\_ellinikis\\_ithageneias.doc](http://www.mfa.gr/missionsabroad/images/stories/missions/japan/docs/kodikas_ellinikis_ithageneias.doc).

investment scheme, also fully disclose the names of all the investors on a regular basis.<sup>15</sup> Hence, what is against the law on Cyprus (and now Latvia) is thus precisely required by law in Malta, and Greece.

It is difficult to blame the journalists breaking Cypriot law outright: the Cypriot lists contained plenty of interesting names, including powerful oligarchs from the former Soviet Union, Chinese tycoons, and scions of prominent dictatorial families from all around the world. One can unquestionably argue that the disclosure of the names of new citizens could definitely be in the public interest – precisely what the journalists have done.<sup>16</sup> Yet, it is also true that disclosing names of new citizens can cause grave harm to the persons concerned moving far beyond simple inconvenience. Those heading from jurisdictions inimical to the possession of multiple citizenships, such as China, Ukraine, or Japan, can be deprived of their original nationalities with all the harsh consequences that follow<sup>17</sup> – a threat affecting the citizens of slightly under half of the world’s jurisdictions,<sup>18</sup> including several EU Member States, such as Austria, Lithuania and Slovakia.<sup>19</sup> Others, changing citizenship precisely to get a chance to escape dictatorial regimes in the previous home, could suffer repercussions too. It is thus impossible to state that law-abiding citizens have nothing to fear when their names are publicised in the context of naturalisation abroad: quite the contrary is true. Negative consequences ranging from persecution to the loss of the original nationality and all the rights attached to it, are among the outcomes of the disclosure of private data at the moment of

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<sup>15</sup> s. 14(2) ‘Individual Investor Programme Regulations (S.L. 188.03).

<sup>16</sup> n. 11 *supra*.

<sup>17</sup> For a masterful analysis, see, P.J. Spiro, ‘Dual Citizenship as a Human Right’, 8 *International Journal of Constitutional Law* (2010) p. 111; Cf. P. Spiro, ‘Dual Nationality and the Meaning of Citizenship’, 46 *Emory LJ* (1997) p. 1411.

<sup>18</sup> P. Spiro, *At Home in Two Countries* (NYU Press 2016).

<sup>19</sup> D. Kochenov, ‘Dual Nationality in the EU: An Argument for Tolerance’, 11 *ELJ* (2011) p. 323; J.-M. Arraiza, ‘Good Neighbourliness as a Limit to Extraterritorial Citizenship: The Case of Hungary and Slovakia’, in D. Kochenov and E. Basheska (eds.), *Good Neighbourliness in the European Legal Context* (Brill/Nijhoff 2015). At the current state of EU law, dual EU Member State nationality can amount to a liability, undermining the level of protection of such dual Member State nationals in the light of EU law, thus bringing about a diminished enjoyment of rights in EU law: D.A.J.G. de Groot, ‘Free Movement of Dual EU Citizens’, 3(3) *European Papers* (2018) 1075. The most recent confirmation of the potential negative effects of possessing a second nationality emerge with clarity from Case C-221/13 *Tjebbes* ECLI:EU:C:2019:129. Cf. D. Kochenov, ‘The *Tjebbes* Fail’, *Verfassungsblog*, April 5, 2019 <https://verfassungsblog.de/the-tjebbes-fail-going-farcical-about-bulgakovian-truths/>.

naturalisation. Catering to the interests of openness and transparency, while attempting to minimise the loss of rights by the newly-naturalised citizens is thus a typical example of a situation where finding balance is not an easy matter, which no doubt underlies the radical differences in the regulation of this issue at the national level among the EU's 28 Member States.

Privacy in connection with national identities is mostly presented in the literature and public debate in a radically different light: naturalisation context hardly enters the picture. The increasing use of biometric data in identity documents to counter identity theft, fraud as well as to enable the prevention, detection, prosecution or investigation of crime raises concerns about potential abuse or misuse by authorities or private parties.<sup>20</sup> While photographs and information on height and eye colour to identify persons have become a standard for a considerable time span, the increased use of further biometric information such as fingerprints and means to increase facial recognition as well as the use of other biometric identifiers has become widespread in the years following the 9/11 terror attacks in New York City.<sup>21</sup> Biometric data is also integrated in personal identity cards or passports to facilitate machine recognition and increase traceability.<sup>22</sup> Since 2004 the EU has harmonised the basic features of passports even further and increased the use of biometric information.<sup>23</sup>

This is potentially problematic, since it remains largely unclear whether such practices are efficient, proportionate, or effective, despite widespread use.<sup>24</sup> Particularly, while humans can 'opt-out' and (potentially) cease to use devices such as computers, smartphones, wearables or tablets, the 'use' of biometric identifiers such as fingers which create fingerprints, eyes including irises which may be scanned, voices that may be

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<sup>20</sup> C. Jasserand, 'Law enforcement access to personal data originally collected by private parties: Missing data subjects' safeguards in directive 2016/680?', 34 *Computer Law & Security Review* (2017) p. 155.

<sup>21</sup> Art. 29 WP, Working document on biometrics, 12168/02/EN, WP 80, p. 2; Opinion on implementing the Council Regulation (EC) No 2252/2004, 1710/05/EN WP 112 04/09/12, p. 3.

<sup>22</sup> EU Fundamental Rights Agency, *Fundamental Rights and the interoperability of EU information systems: borders and security* (EU FRA 2017), p. 20 – 21.

<sup>23</sup> Council Regulation (EC) No 2252/2004 on standards for security features and biometrics in passports and travel documents issued by Member States (Regulation No 2522/2004) ELI: [data.europa.eu/eli/reg/2004/2252/oj](http://data.europa.eu/eli/reg/2004/2252/oj).

<sup>24</sup> EDPS, Opinion on Regulation (EC) No 2252/2004, (2008/C 200/01), mn. 7; Art 29 Opinion on implementing the Council Regulation (EC) No 2252/2004, *supra* n. 20, p. 11 – 12.



automatically recorded, or the DNA of a person cannot be manipulated without grave consequences for the respective individual. Additionally, the sheer presence of artefacts such as human DNA in a specific area (e.g. a crime scene) at times might potentially lead to unjustified conclusions by investigators. This example illustrates that strictly limited use, additional safeguards, and high standards when employing such methods are crucial to avoid human rights violations.<sup>25</sup> Besides, states have seemingly become increasingly willing to ‘innovate’ on the use and dimensions of national identities, as the example of Estonia and the ‘e-residence’ shows, an endeavour which is meant to facilitate cross-border business and boost the country as an economic hub.<sup>26</sup>

It is most surprising in this context to see that significant disclosures of personal information required by law following naturalisations in a large number of EU Member States have gone unnoticed both in privacy and in citizenship legal and political science literature. The lacuna is all the more acute, given the particularly grave level of harm that such disclosures are prone to inflict on those concerned, ranging from violations of privacy to the loss of other citizenships and all the rights they bring against their will. This is the lacuna this paper aims to identify and take the first steps towards filling.

Balancing the interest of the state and society in disclosing such information and the privacy and the protection of other rights of individuals is thus the fundamental starting point in thinking about the interface of privacy rights and naturalisation. Keeping this starting point in mind, we proceed by analysing the current practice of personal data disclosures upon naturalisation across the EU. Using Ireland, France, and Latvia as case studies, a bird’s-eye view is provided of the legal systems where the practice of full disclosure of the personal information of the newly-naturalised citizens has recently been in the spotlight of public scrutiny and was either entirely or partially amended. Indeed, all three of these Member States recently saw a radical rethinking of the legal-political approach to the issue (Part 2). In the section that follows we move to the analysis of European and international privacy standards potentially applicable to data disclosures

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<sup>25</sup> Forensics Genetics Policy Initiative, ‘Establishing best practice for forensic DNA databases’ [www.dnapolicyinitiative.org/wp-content/uploads/2017/08/BestPractice-Report-plus-cover-final.pdf](http://www.dnapolicyinitiative.org/wp-content/uploads/2017/08/BestPractice-Report-plus-cover-final.pdf), visited 27.03.2018, p. 8 – 9, p. 17 – 34.

<sup>26</sup> V. Poleshchuk, “‘Making Estonia Bigger’: What E-Residency in E-Estonia Can Do for You, What It Can Do for Estonia”, 1 *Investment Migration Policy Brief* (2016).

upon naturalisation. It is found that, although the law of the EU and the Council of Europe as well as international legal standards could potentially be of relevance, they do not provide any clearly articulated guidance on the matter, leaving it up to states to determine how to approach the difficult issue of guaranteeing the privacy of new citizens (Part 3).

We conclude with a brief outline of the best practice in this area of law and policy, based on the analysis provided. In particular, we make three interrelated points in figuring out the best practice:

*First*, we propose that national practices of publication of personal data upon naturalisation should be assessed and redesigned taking into account the possibilities of information management in the Digital Age, as well as the existing obligations of states under European and international law. Whereas it had been cumbersome to search, combine, and analyse information in the pre-Internet era, new technologies facilitate these processes enormously. Hence, the risks of privacy infringements in this domain have grown considerably, which seems to make it advisable to consider general publication of such information carefully.<sup>27</sup>

*Secondly*, it is not only necessary to think about publication, but also to consider what happens once the information is in the public domain. As we will show, the French and Dutch approaches in particular address this problem in their practices. Generally, however, by limiting access to (not the existence of) such a publication – in the spirit of the *Google Spain* decision of the ECJ<sup>28</sup> – any naturalised individual will have the possibility to opt out of the public spotlight within the new country by making a de-listing request; nevertheless, this should arguably be the default position. By managing access to this data appropriately, it is possible to strike a balance between the public interest in receiving the information and individual rights.

*Thirdly*, it would be advisable for the Member States to come up with the acknowledged best practice in this area. While the current regulatory framework suggests that each country enjoys absolute discretion to decide for itself, the increasing harmonisation of the

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<sup>27</sup> On 'Open Data' policies and challenges see United Nations, Report to the General Assembly of the Special Rapporteur on the right to privacy, A/73/45712 17.10.2018, p. 9 – 11.

<sup>28</sup> ECJ 13 May 2014, Case C-131/12, *Google Spain v AEPD and Mario Costeja Gonzalez*.

privacy framework in Europe and across the world raises the expectation of individuals to be subject to at least comparable standards guaranteeing the safeguarding of their rights, albeit via different routes, thus also reflecting the on-going global convergence of privacy standards.<sup>29</sup> Crucially, where disclosure of personal data related to naturalisation is mandatory, any common standard or best practice ought to contain very clear guidelines for opt-outs when such disclosures could demonstrably lead to significant negative consequences for the newly naturalised citizens either in the new or other states of nationality.

## II. European practice

The landscape of legal rules on the disclosure of personal information of the newly-naturalised citizens and of the practice of application of such rules in the EU is very diverse indeed, demonstrating no strong consensus among EU's governments on this matter. This being said, a strong trend, which seems to be emerging across the continent, points in the direction of at least problematising the formerly default option of full data disclosure, leading in a number of cases to the reversal of the established approaches in favour of respecting privacy and other rights of the newly-naturalised citizens. Following a general presentation of the EU's legal landscape on this issue, this section turns to three case-studies of regulation at the national level, where the rules have recently been changed following a public debate and, in some cases, engagement of the judiciary. Such change resulted either in the attempts to restrict the availability of the disclosed personal information in the public domain, like in France, or the abolition of such disclosures altogether, like in Ireland and in Latvia. The emerging trend in Europe is crystal clear: disclosure by default is gradually being replaced with a more critical approach.

EU Member States that do not publish information related to the naturalisation of specific individuals include: Austria, Croatia, Cyprus, the Czech Republic, Estonia, Germany,

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<sup>29</sup> G. Greenleaf, 'Global Convergence of data privacy standards and laws', 56 *UNSWLRS* (2018).

Hungary, Ireland, Latvia, Luxembourg, Slovakia, Slovenia,<sup>30</sup> Sweden, and the UK.<sup>31</sup> Moreover, it appears that Denmark and Poland do not publish information related to the naturalisation of specific persons either.<sup>32</sup>

Other Member States of the EU demand different levels of personal information disclosure. So in accordance with its Law on Citizenship,<sup>33</sup> Lithuania publishes the name, date of birth, as well as the country of birth and current residence of newly naturalised citizens in the online Register of Legal Acts.<sup>34</sup> New Greek citizens also have their full names, country of birth, city of residence, as well as Special Identity Card numbers published in the Greek digital *Gazette*.<sup>35</sup> Belgian nationality law likewise prescribes the publishing of naturalisation acts,<sup>36</sup> and their *Official Monitor* disseminates the full name as well as date and place of birth of each new citizen.<sup>37</sup> The *Monitor* makes the information highly accessible, as a simple search for ‘naturalisations’ will populate all such instances from May 1997 to present.<sup>38</sup> While the Portuguese National Contact Point (NCP) of the European Migration Network indicated in 2015 that they do not publish naturalisation details, Article 19 of their 1992 Nationality Regulation states that naturalisation is granted by a decree published in the official journal,<sup>39</sup> and since 2007 the *Diário da República* contains naturalisation notices which provide name, birth date, and city of birth of the individual concerned.<sup>40</sup> Spanish NCP requested their response in

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<sup>30</sup> In Slovenia, the authorities exceptionally publish the information of successfully naturalized citizens if the individual’s address is unknown: European Migration Network, *supra* n. 9, p. 6.

<sup>31</sup> *Ibid.*

<sup>32</sup> On Poland, see ‘Confirmation of Polish citizenship or its loss’ (*Ministry of the Interior and Administration*), [bit.ly/2pwxCcb](http://bit.ly/2pwxCcb), visited 23 September 2018. On Denmark, see the Annex in ‘Bekendtgørelse om forskellige forhold vedrørende Statstidende’ (2014), [bit.ly/2xx0TaK](http://bit.ly/2xx0TaK), visited 23 September 2018.

<sup>33</sup> Art. 36 Law on Citizenship No. VIII-391 (2010, as amended).

<sup>34</sup> ‘Register of Legal Acts’, *Office of the Seimas*, s2014, [www.e-tar.lt/portal/en/index](http://www.e-tar.lt/portal/en/index), visited 23 September 2018.

<sup>35</sup> See n. 13 *supra*; see for example: Greek Gazette No. 3184 of 12 September 2017, 37690, [bit.ly/2QMt3Xz](http://bit.ly/2QMt3Xz), visited 23 September 2018.

<sup>36</sup> Art. 21(6), Belgian Nationality Code (1984).

<sup>37</sup> See eg ‘Loi accordant des naturalisations’ No. 2018013138 (11 juillet 2018), [bit.ly/2pwDjXe](http://bit.ly/2pwDjXe), visited 23 September 2018.

<sup>38</sup> ‘Moniteur Belge: Nouvelle recherche’, [www.ejustice.just.fgov.be/doc/rech\\_f.htm](http://www.ejustice.just.fgov.be/doc/rech_f.htm), visited 23 September 2018.

<sup>39</sup> Decree no. 332/82, Portuguese Nationality Regulation (1981).

<sup>40</sup> It appears the authorities have not been particularly expeditious in publishing such information, however, as they are still retroactively publishing naturalisations from 2007: See eg ‘Aviso n.º 14404/2017’, *Diário da República*, 30 November 2017, [bit.ly/2DmJrLN](http://bit.ly/2DmJrLN), visited 23 September 2018.

the EMN query be kept private,<sup>41</sup> but a simple search reveals that they do publish the names of naturalised individuals in their *Official Bulletin*.<sup>42</sup>

In Romania, press releases of the National Citizenship Authority provide the number of individuals naturalised on the given date.<sup>43</sup> Unlike other countries, which publish the data of the newly-naturalised citizens, Romanian authorities publish the names of those who *applied* for naturalisation<sup>44</sup> though the OJ can only be accessed without subscription within ten days of publication.<sup>45</sup> Similarly, the Finnish authorities also publish the names of applicants who make naturalisation requests in their official journal.<sup>46</sup> Italy previously did the same, but has recently deleted these online lists upon the entry into force of the GDPR.<sup>47</sup>

Countries that previously had naturalisation lists but which have abolished the practice in recent years include Ireland, Latvia, Luxembourg and the UK. Unlike in Latvia, where personal details were retroactively deleted from official sources, the *London Gazette* and Luxembourg *Journal Officiel* have maintained the availability of previously published naturalisation decisions.<sup>48</sup>

‘In-between’ options of public dissemination of the personal data of the newly-naturalised citizens and other ways of making such information available, are also possible. Bulgaria used to publish all naturalisation decrees in the national *Gazette*,<sup>49</sup> but does not do this

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<sup>41</sup> European Migration Network, *supra* n. 9, p. 7.

<sup>42</sup> A simple search of the term ‘nacionalidad’ within Section III documents of the Spanish OJ populates decisions granting naturalisation from 1960 to present: ‘Buscar’ (*Boletín Oficial del Estado*), [bit.ly/2O2lOfs](http://bit.ly/2O2lOfs), visited 23 September 2018.

<sup>43</sup> See eg ‘Ceremonie depunere jurământ’ (*Autorităţii Naţionale pentru Cetăţenie*, 23 August 2018), [bit.ly/2OIkPOz](http://bit.ly/2OIkPOz), visited 23 September 2018.

<sup>44</sup> ‘Citizenships’ (*Monitorul Oficial*), [bit.ly/2PYUufp](http://bit.ly/2PYUufp), visited 23 September 2018.

<sup>45</sup> ‘Monitorul Oficial’, [www.monitoruloficial.ro/?lang=en](http://www.monitoruloficial.ro/?lang=en), visited 23 September 2018.

<sup>46</sup> European Migration Network, *supra* n. 9, p. 4, 7.

<sup>47</sup> ‘Lista delle richieste di appuntamento per il riconoscimento della cittadinanza italiana’ *Consolato Generale d’Italia San Paolo*, 4 September 2007, [www.consosanpaolo.esteri.it/consolato\\_sanpaolo/it/la\\_comunicazione/dal\\_consolato/lista-requerimentos.html](http://www.consosanpaolo.esteri.it/consolato_sanpaolo/it/la_comunicazione/dal_consolato/lista-requerimentos.html), visited 23 September 2018.

<sup>48</sup> See eg *London Gazette* Issue 4684, 24 July 1959, [bit.ly/2OKG3LX](http://bit.ly/2OKG3LX), visited 23 September 2018; ‘Lois du 7 novembre 2008 conférant la naturalisation’, *LegiLux*, 24 November 2008, [bit.ly/2Ic0hM8](http://bit.ly/2Ic0hM8) visited 23 September 2018. It appears the Edinburgh and Belfast gazettes have not historically published information related to naturalisation.

<sup>49</sup> V. Paskalev, ‘Naturalisation procedures for immigrants – Bulgaria’, 34 *EUDO Citizenship Observatory RSCAS/EUDO-CIT-NP* (2013), p. 2.

anymore: according to the webpage of the Ministry of Justice the decree certificates can only be obtained in person by appointment.<sup>50</sup> A different privacy-sensitive approach is adopted in the Netherlands, where the details of those who naturalise are published only 100 years after the date of birth. Exceptionally, personal information of this nature may be requested under defined circumstances, such as, for instance, when the consultation of the files is necessary as legal evidence, or when the individual concerned is deceased.<sup>51</sup>

Besides pointing to a lack of any uniform EU-wide approach to the issue, the above overview illustrates the emergence of a clear trend: more and more countries view the publication of the newly-naturalised citizens' private data as a problem. Countries have therefore been amending their laws accordingly and attempting to strike a more rights-friendly balance as a response, as we have seen with the examples of Bulgaria, Romania, and the Netherlands. The developments in Ireland, France and Latvia are of particular interest in this regard, offering examples of U-turns or significant fine-tuning of law and policy, while moving away from the formerly default option of full disclosure. These examples are worth considering in further detail.

## Ireland

S. 18(2) of the Irish Nationality and Citizenship Act indicates that a notice regarding the issuance of a naturalisation certificate 'shall be published in the prescribed manner in the *Iris Oifigiúil*,<sup>52</sup> the Irish official journal (OJ). The information to be contained in the public notice was not enshrined in the Nationality and Citizenship Act itself – it was laid down in a secondary, delegated measure – the Irish Nationality and Citizenship Regulations of 2011 – a statutory instrument of the Minister for Justice and Equality.

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<sup>50</sup> 'Obtaining certificates in execution of a decree' (*Ministry of Justice*), [bit.ly/2DqHvls](https://bit.ly/2DqHvls), visited 23 September 2018.

<sup>51</sup> Besluit van de Minister van Justitie en Veiligheid tot beperking van de openbaarheid van het naar het Nationaal Archief over te brengen digitale archief 'Vreemdelingendossiers en Naturalisatie- en Nationaliteitsaangelegenheden van de Immigratie- en Naturalisatiedienst, 2006–2010 (2017) Statscourant Nr. 68091.

<sup>52</sup> S. 18(2) *Irish Nationality and Citizenship Act*, 1956 (Public Act No. 26 of 1956). Act of the Irish Parliament.

These regulations stipulating the form of the notice state that the information of the naturalised individual published in the OJ will include their name, address, date of naturalisation certificate, and whether they are an adult or a minor.<sup>53</sup> The website of the Irish Department of Justice and Equality includes the reminder that such notices are ‘required to be published by law and are mandatory’ and that no exemptions are available.<sup>54</sup> A review of the practice was undergone the same year these Regulations were enacted.<sup>55</sup>

The publication of these notices has not gone unremarked. Upon being contacted by a disgruntled newly-naturalised citizen, the *Irish Times* wrote a piece in August 2015 which initiated a public debate on the privacy concerns related to publishing such notices.<sup>56</sup> The Ministry of Justice and the Office of the Data Protection Commissioner responded that the practice was justified on the grounds that it was required by law; the Data Protection department also argued that disclosure of this information was in the public interest.<sup>57</sup> The authority for data protection correctly pointed out that the OJ cannot be searched by name; the information was, however, indexed by search engines.<sup>58</sup> Digital Rights Ireland – the civil society organisation that brought down the Data Retention Directive<sup>59</sup> – argued that the publishing of such notices was in conflict with the (former) Data Protection

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<sup>53</sup> Form 4 of the *Irish Nationality and Citizenship Regulations*, 2011 (SI No. 569 of 2011). Statutory Instrument of the Minister for Justice and Equality.

<sup>54</sup> Department of Justice and Equality, ‘Become an Irish citizen by naturalisation’, *Irish Naturalisation and Immigration Service*, 10 July 2017, [bit.ly/2NcFMAI](http://bit.ly/2NcFMAI), visited 23 September 2018.

<sup>55</sup> E. Edwards, ‘Publication of new Irish citizens’ data put on hold’, *Irish Times*, 11 April 2016, [bit.ly/2MTW40c](http://bit.ly/2MTW40c), visited 23 September 2018.

<sup>56</sup> M. O’Halloran and E. Edwards, ‘Government publishes personal details of new citizens online’, *Irish Times*, 21 August 2015, [bit.ly/2DmAyl5](http://bit.ly/2DmAyl5), visited 23 September 2018.

<sup>57</sup> Edwards, *supra* n. 54; see also E. Edwards, ‘Migrant rights group ‘astounded’ citizen data published online’, *Irish Times*, 21 August 2015, [bit.ly/2DmBjKX](http://bit.ly/2DmBjKX), visited 23 September 2018.

<sup>58</sup> E. Edwards, ‘Online publication of new citizens’ personal details is unwise’, *Irish Times*, 21 August 2015, [bit.ly/2I9oMJA](http://bit.ly/2I9oMJA), visited 23 September 2018.

<sup>59</sup> ECJ, 8 April 2014, Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung et al.*, para 8.

Directive and the EU Charter of Fundamental Rights,<sup>60</sup> as the restriction of the privacy rights of the individuals concerned is in breach of the principle of proportionality.<sup>61</sup>

Despite the government's initial defence of the publication procedure, after public backlash the then Justice Minister Frances Fitzgerald announced she would examine the situation.<sup>62</sup> The Justice Department requested that the EU's European Migration Network launch the 'Ad-Hoc Query on Naturalisation' in September 2015, which was produced that November and published in March 2016. The Irish National Contact Point requested their responses not be publicly disseminated.<sup>63</sup> In April 2016, the practice of publishing naturalisation notices was suspended in Ireland,<sup>64</sup> though neither the relevant legislation mentioned above nor the government website have been updated to reflect these changes. In the end, the outdated legal basis for the publishing of naturalisation details in the Irish OJ – established in the pre-digitised era – gave way to the emerging recognition of privacy-related data protection concerns.

## France

In France, when citizenship is acquired via naturalisation, a notice is published in the *Journal Officiel* in accordance with Articles 50 and 51 of Decree no. 93-1362 of 1993.<sup>65</sup> The published decrees include the newly naturalised citizen's full name, date and place of birth, as well as the same information in respect to their eligible children.<sup>66</sup> In their response to the EMN's above-mentioned query, the French NCP indicated that these

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<sup>60</sup> 'Ireland's Public Database of Naturalised Citizens', *Digital Rights Ireland*, 21 August 2015, [www.digitalrights.ie/irelands-public-database-of-naturalised-citizens/](http://www.digitalrights.ie/irelands-public-database-of-naturalised-citizens/), visited 1 November 2018; Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] ELI: [data.europa.eu/eli/dir/1995/46/oj](http://data.europa.eu/eli/dir/1995/46/oj); Charter of Fundamental Rights of the European Union [2000] OJ C364/01.

<sup>61</sup> *Digital Rights Ireland*, *supra* n. 59.

<sup>62</sup> R. McGreevy, 'Minister to look into data concerns of new Irish citizens', *Irish Times*, 26 August 2015, [bit.ly/2I9GWuW](http://bit.ly/2I9GWuW), visited 23 September 2018; on criticism, see the statements of the Irish Migrant Rights Centre: Edwards, *supra* n. 7.

<sup>63</sup> European Migration Network, *supra* n. 9, p. 5.

<sup>64</sup> Edwards, *supra* n. 54.

<sup>65</sup> Arts 50 and 51, *Décret n° 93-1362 du 30 décembre 1993 relatif aux déclarations de nationalité, aux décisions de naturalisation, de réintégration, de perte, de déchéance et de retrait de la nationalité française*.

<sup>66</sup> *ibid*, Art 50.



decrees are indeed publicly available, ‘but only in a paper version’.<sup>67</sup> This, however, is no longer the case: as of 1 January 2016, the online version of the OJ (originally digitised in 2004) now includes texts related to the status and nationality of individuals.<sup>68</sup>

While the decree digitising the OJ was passed by the National Assembly in December 2015, the President had just signed an ordinance on the Code of Administrative Procedure in October 2015 stating that certain individual acts as defined by the Council of State, ‘particularly relating to the status and nationality of individuals’, were not to be published electronically.<sup>69</sup> In a clear effort to balance the interests of freedom of information, on the one hand, and privacy of the individuals concerned, on the other, the newly passed Code was amended upon the OJ’s digitisation.<sup>70</sup> The solution was that the status- and nationality-related acts previously restricted from publication would now indeed be published, but only ‘under conditions guaranteeing that they are not indexed by search engines’.<sup>71</sup> In an apparent effort to guarantee such conditions, and upon the advice of the French Data Protection Authority, the online naturalisation decrees are now available under ‘Protected Access’.<sup>72</sup> These Protected Access barriers, however, have been largely circumvented, as private parties were quick to establish web-pages assembling links to all OJs published since 1 January 2016 containing naturalisation decrees.<sup>73</sup> The example of France demonstrates how well-meaning privacy-sensitive approach, when not properly

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<sup>67</sup> European Migration Network, *supra* n. 9, p. 4.

<sup>68</sup> See the statement on the homepage of the French OJ: ‘Le Journal Officiel’ (2004), [www.journal-officiel.gouv.fr/](http://www.journal-officiel.gouv.fr/), visited 23 September 2018. See also: Loi n° 2015-1713 du 22 décembre 2015 portant dématérialisation du Journal officiel de la République française (initial version); and ‘2016: Le Journal officiel dématérialisé’, *Direction de l’information légale et administrative*, 16 février 2016, [bit.ly/2xJC7nr](http://bit.ly/2xJC7nr), visited 23 September 2018.

<sup>69</sup> See Art L221-14 of the initial version of Ordonnance n° 2015-1341 du 23 octobre 2015 relative aux dispositions législatives du code des relations entre le public et l’administration.

<sup>70</sup> See the initial version of the Décret n° 2015-1717 du 22 décembre 2015 relatif à la dématérialisation du Journal officiel de la République française.

<sup>71</sup> Art L221-14 (translated), which was amended by Article 1 of Loi n° 2015-1713 (n 13).

<sup>72</sup> See eg JORF No 177 du 3 août 2018 texte n 113, [www.legifrance.gouv.fr/jo\\_pdf.do?inap](http://www.legifrance.gouv.fr/jo_pdf.do?inap), visited 23 September 2018. To actually access a naturalisation decree one must first indicate the specific date of the relevant OJ and then select the decree. Prior to gaining entry to the ‘Protected Access’ portal, one is reminded that, in accordance with the national data protection rules, reuse of information found in the database is only allowed: if the person concerned has consented to this, if the information has been anonymised, or if authorised by law. After answering a numeric question, one may access the decree.

<sup>73</sup> See eg ‘Décrets de naturalisations parus en France’, *Pour Les Étrangers*, 2018, [bit.ly/2DpJne0](http://bit.ly/2DpJne0), visited 23 September 2018; ‘Liste des décrets de naturalisation 2017–2018’, *Easytrangers*, 2018, [bit.ly/2xF58R0](http://bit.ly/2xF58R0), visited 23 September 2018.

implemented at the technical level, brings about purely illusory improvements, stopping short of addressing the on-going violations of privacy rights of the newly-naturalised citizens.

## Latvia

Latvia provides another recent example of a Member State where the practice publishing of naturalisation information in the national OJ, the *Latvijas Vestnesis*,<sup>74</sup> as well as on the website of the Cabinet of Ministers<sup>75</sup> was subject to radical change. While previously, full names and personal identification codes containing the person's date of birth were provided in a list, now such information is completely withheld and one can only determine the number of individuals naturalised per issue of the *Journal*.

In May 2014, the Latvian Prime Minister requested former Minister of Justice Baiba Broka to submit an evaluation of the publication practice and to propose possible solutions to the outstanding problems connected to it.<sup>76</sup> The report submitted to the Cabinet assessed the procedure from the perspective of Article 96 of the Constitution, the right to privacy, as well as the national data protection rules implementing the former Data Protection Directive. They considered the aims of publishing the naturalisation information online to be twofold: 1) to inform the individual concerned of the decision and 2) to inform the public about Cabinet decisions. The Minister found the practice to be in conflict with the principle of proportionality, as the first aim was already achieved by directly informing the individual of the decision, and because the right to privacy of said individual outweighed informing the public.<sup>77</sup>

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<sup>74</sup> 'Latvijas Vēstnesis', [www.lv.lv/](http://www.lv.lv/), visited 23 September 2018.

<sup>75</sup> 'Cabinet of Ministers – State Chancellery', [www.mk.gov.lv/](http://www.mk.gov.lv/), visited 23 September 2018.

<sup>76</sup> Minister of Justice Baiba Broka, 'Informatīvais ziņojums „Par Ministru kabineta rīkojuma „Par uzņemšanu Latvijas pilsonībā naturalizācijas kārtībā” publicēšanu”', 6 June 2014, [bit.ly/2QSOYw0](https://bit.ly/2QSOYw0), visited 23 September 2018.

<sup>77</sup> Indeed, they pointed out that publication of the personal code could give rise to identity theft, and that other forms of citizenship acquisition are not published: see *ibid*. A later report by current Minister of Justice Dzintars Rasnačs points out that naturalisation decisions entail consequences for a particular person rather than society as a whole, hence justifying their non-publication: Minister of Justice Dzintars

Similarly, they found the national law laying down the rules for the publication of information in the OJ provided the possibility of not publishing certain legal acts if necessary for the protection of information of a ‘restricted access’ nature, which encompasses information relevant to the private life of an individual.<sup>78</sup> In light of those considerations, the Minister proposed a compromise: the naturalised individual’s personal details would go unpublished, but the number of naturalised persons would be indicated in order to facilitate the right of society to receive information on Cabinet decisions. After further discussion and study,<sup>79</sup> the practice of the publication of the personal data of newly-naturalised Latvians was temporarily suspended. Upon consultation of the national data protection authority that conducted a similar analysis for the former Minister of Justice and came to very similar conclusions, publication of the personal details of those who naturalise was permanently abolished in 2017.<sup>80</sup>

### III. Applicable privacy standards

The entry into force of the GDPR has sparked a trend of taking privacy more seriously,<sup>81</sup> which might also have stimulated changes in data management practices of the newly-naturalised citizens in some European countries. Nevertheless and despite this legislative attempt to fully harmonise data protection on a regional level, the fact remains that the standards and practices in the specific field discussed in this paper differ deeply from jurisdiction to jurisdiction. In reality, as we survey the situation in EU Member States we can observe that one national law often requires the opposite of another. The aim of this section is to outline the potential influence the new data protection framework of the EU could have on national legislation. While this is the main focus of this submission we think it is useful to consider the bigger picture as well. Hence, we will have a very brief look at

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Rasnačs, ‘Informatīvais ziņojums „Par personas datu izmantošanas praksi tiesību aktos”’, [bit.ly/2xze9vz](http://bit.ly/2xze9vz), visited 23 September 2018.

<sup>78</sup> s. 5(4), *Freedom of Information Law* (1998, as amended 2006).

<sup>79</sup> s. 41 ‘Latvijas Republikas Ministru Kabineta Protokols Nr. 43’, [bit.ly/2O39j3n](http://bit.ly/2O39j3n), visited 23 September 2018.

<sup>80</sup> Datu valsts inspekcija, ‘Nr. 2–3.4/820-N’, *Latvijas Vestnesis*, 4 August 2017, [bit.ly/2QQk0ot](http://bit.ly/2QQk0ot), visited 23 September 2018.

<sup>81</sup> C. Hoofnagle et al, ‘The European Union general data protection regulation: what it is and what it means’, 28, No.1 *Information & Communications Technology Law* (2019) p. 97-98.

the framework of the Council of Europe, and international legal standards of the United Nations. We will check whether a more coherent approach to regulating the issue of publishing personal data of newly-naturalised EU citizens across the Union could be desirable and required since the legal framework has and continues to be updated. As we demonstrate, it remains questionable whether and to what extent the existing national, regional, or international legal acts contain clear guidance on this matter.

### EU legal framework

In 2012 the EU commenced an effort to deliver on the ‘digital single market strategy’,<sup>82</sup> resulting in a deep revamp of the legal framework. Although this reform is not completed at the time of writing,<sup>83</sup> the first provisions in force are already studied intensely in the literature.<sup>84</sup> Particularly, the GDPR and its principles seem noteworthy, because the new data protection law has considerable chances to become the standard-setting document for the years to come in the field of privacy, as comparative research on this legal area suggests.<sup>85</sup> The policymakers and authorities in EU Member States ought to consider whether the changes have effect on the regulatory frameworks already in force in their respective legal orders.

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<sup>82</sup> For an overview see ‘Data protection: Rules for the protection of personal data inside and outside the EU’, *Europa*, [ec.europa.eu/info/law/law-topic/data-protection\\_en](https://ec.europa.eu/info/law/law-topic/data-protection_en), visited 29 March 2018; ‘Shaping the Digital Single Market’, *Europa*, [ec.europa.eu/digital-single-market/en/policies/shaping-digital-single-market](https://ec.europa.eu/digital-single-market/en/policies/shaping-digital-single-market), visited 29 March 2018.

<sup>83</sup> On the EU Copyright reform see Q. Schiermeier, ‘EU copyright reforms draw fire from scientists’, 556 *Nature* (2018), p. 14. On the EU e-Privacy Regulation see N. Singer, ‘The next privacy battle in Europe is over this new law’ *New York Times*, 27 May 2018, [www.nytimes.com/2018/05/27/technology/europe-eprivacy-regulation-battle.html](https://www.nytimes.com/2018/05/27/technology/europe-eprivacy-regulation-battle.html), visited 27 May 2018.

<sup>84</sup> L. Feiler, F. Forgó and M. Weigl, *supra* n. 3; P. Voigt and A. von dem Bussche, *The EU General Data Protection Regulation (GDPR)* (Springer 2017); S. Bhaimia, ‘The General Data Protection Regulation: the Next Generation of EU Data Protection’, *Legal Information Management* (2018) p. 21; N. Daško, ‘The General Data Protection Regulation (GDPR) – A revolution coming to European Data Protection Laws in 2018. What’s new for ordinary citizens?’, 23 *Comparative Law Review* (2017) p. 123; M.M. Caruana, ‘The reform of the EU data protection framework in the context of the police and criminal justice sector: Harmonisation, scope, oversight and enforcement’, *International Review of Law Computers & Technology* (2017).

<sup>85</sup> G. Greenleaf, ‘Global Data Privacy Laws 2017: ‘120 National Data Privacy Laws, including Indonesia and Turkey’, 145 *Privacy Laws & Business International Report* (2017) 45 *UNSWLRS* (2017) p. 4 – 7.

The GDPR is the second comprehensive data protection law of the EU replacing the Data Protection Directive 95/46/EC of 1995.<sup>86</sup> It is notable that the Directive is followed-up by a Regulation which – in accordance with Article 288 TFEU – establishes a full harmonisation of the data protection framework across the EU. Nevertheless, the GDPR mostly builds on the substantive core of the Directive, which in itself is heavily inspired by the original Convention 108 of the Council of Europe from 1981.<sup>87</sup> Hence, the GDPR has essentially the same substantive principles when it comes to the processing of personal data (Article 5), lawfulness of processing (Article 6), consent to use personal data (Article 7), and other fundamental rules. While this could suggest that Europe follows an overly conservative approach in this area,<sup>88</sup> the incrementally improved European standards influence most of the legislation in this area across the world today.<sup>89</sup> Despite the influence of the heritage on which the GDPR is based, the Regulation still contains some substantive innovations such as a ‘right to be forgotten’ which is an extended right to erase information that can be found in Article 17 GDPR.<sup>90</sup> Furthermore, a new ‘right to data portability’ in Article 20 allows data subjects to transfer data between services such as different social networks or other data-related systems.<sup>91</sup> While the right is important as a legal precondition to achieve the aim, it remains to be seen whether the economic circumstances will also facilitate its realisation. Equally controversial and much discussed is the new right to human review in cases of automated individual decision-making which relates to the context of machine learning and artificial intelligence that can be found in Article 22.<sup>92</sup> All of these new individual rights will have to prove relevance and usefulness

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<sup>86</sup> Directive 95/46/EC, *supra* n. 59.

<sup>87</sup> Council of Europe, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, ETS No. 108.

<sup>88</sup> Greenleaf, *supra* n. 83, p. 4. However, it has also been argued that the principles of the predecessors of the GDPR and hence the GDPR itself are built upon the United States Fair Information Practices from 1973. Cf. C. Hoofnagle et al, *supra* 80 p. 70-71.

<sup>89</sup> This number changes very quickly and was the one at the time of writing. For more see *Ibid.* p.2, and Greenleaf, *supra* n. 28.

<sup>90</sup> M. Fazlioglu, ‘Forget Me Not: The Clash of the Right to Be Forgotten and Freedom of Expression on the Internet’, 3 *International Data Privacy Law* (2013) p. 149; E. Frantziou, ‘Further Developments in the Right to Be Forgotten’, 14 *Human Rights Law Review* (2014) p. 761; O.J. Gstrein, *Das Recht auf Vergessenwerden als Menschenrecht* (Nomos 2016).

<sup>91</sup> L. Urquhart, N. Sailaja and D. McAuley, ‘Realising the right to data portability for the domestic Internet of things’, 22 *Pers Ubiquit Comput* (2018) p. 317.

<sup>92</sup> S. Wachter, B. Mittelstadt and L. Floridi, ‘Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation’, 7 *International Data Privacy Law* (2017) p. 76.

as the Regulation is being implemented across Europe and the world. The latter is necessary since Article 3 on the territorial scope also mandates operators outside of the EU to apply the GDPR if they target data subjects (identified or identifiable natural persons, not citizens according to Article 4(1)) who are in a Member State.<sup>93</sup> However, probably the most important aspect of the GDPR is that it results in more cooperation of national data protection authorities, which have now the possibility to apply much higher fines than before the introduction of the new legal framework.<sup>94</sup> This means that enforcing data protection is finally and literally ‘worth it’. In effect, this is probably also the main reason why the GDPR has the power to initiate a culture change for the management of personal data in the Digital Age.

The GDPR entered into force on May 25 2018<sup>95</sup> and applies, as per Article 2(1) GDPR ‘to the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system.’ While it is still being discussed what this definition entails in particular (which data is truly ‘personal’),<sup>96</sup> this very broad scope could be interpreted as relating to the publication of naturalisation data by the Member States. If such a publication is (also) done online, or in electronic form, this constitutes processing of personal data by automated means. However, even if the publication is done solely using traditional means (e.g. on paper in an official gazette or journal of the government), one is still compelled to argue that this is part of a filing system of the government, or at least intended to be part of a filing system. The rationale behind publication is to inform the public, and to create a ‘public record’ to provide the basis for proper public administration, which clearly depends on creating filing systems. While this also suggests that the GDPR is applicable to the publication of naturalisation information, Article 2(2)(a) GDPR contains possible exceptions. So the GDPR does not

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<sup>93</sup> European Data Protection Board, ‘Guidelines 3/2018 on the territorial scope of the GDPR (Article 3) - Version for public consultation’, *Europa*, [edpb.europa.eu/sites/edpb/files/files/file1/edpb\\_guidelines\\_3\\_2018\\_territorial\\_scope\\_en.pdf](https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_3_2018_territorial_scope_en.pdf), visited 26 November 2018.

<sup>94</sup> P.F. Nemitz, *Fines under the GDPR* (CPDP 2017 Conference Book). Pre-print available at SSRN: [ssrn.com/abstract=3270535](https://ssrn.com/abstract=3270535).

<sup>95</sup> n. 3 *supra*.

<sup>96</sup> O.J. Gstrein and G.J. Ritsema van Eck, ‘Mobile Devices as stigmatizing security sensors: the GDPR and a future of crowdsources ‘broken windows’’, 8 *International Data Privacy Law* (2018) p. 80.

apply ‘in the course of an activity which falls outside the scope of Union law.’ This raises the critical issue of whether the EU has any competence to govern the publication of personal naturalisation information by the Member States.

In the absence of CJEU case-law on this particular matter, it is possible to list the arguments for and against considering this issue as falling within the scope of EU law. To start with the contrarian arguments, the very essence of EU citizenship as an ‘additional’ status, as per Article 20 TFEU,<sup>97</sup> interpreted in the light of the Danish Declaration underlining the importance of ensuring that EU citizenship does not replace the nationalities of the Member States, as well as the Court’s tacit approval, in *Kaur*,<sup>98</sup> of the crucial role of the Member States’ *unilateral* determinations of the scopes of their citizenry for the purposes of EU law and EU citizenship, clearly point in the direction that the field of EU citizenship law is within the national domain of competences and regulation, as has been long passionately argued by Jessurun d’Oliveira, among many others.<sup>99</sup> Additional arguments in favour of such reading are supplied by the *Micheletti* case-law,<sup>100</sup> where the Court prohibited the Member States from failing to recognise the effects of each other’s nationalities as well as *Eman and Sevinger*, where the Court insisted that EU citizenship and the rights it brings, applies also outside of the territorial scope of EU law, thus having legal consequences on Aruba and other Overseas territories of the Member States excluded, *per se*, from the scope of the EU’s internal market.<sup>101</sup> In other words, at first glance it seems unquestionable that the EU cannot legislate on matters related to the acquisition of EU citizenship and that EU citizenship remains, to a large extent, within the domain of national regulation for the Member States to play with.

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<sup>97</sup> Szpunar and Blas López, *supra* n. 2.

<sup>98</sup> ECJ 20 February 2001, Case C-192/99, *The Queen v Secretary of State for the Home Department, ex parte: Manjit Kaur*.

<sup>99</sup> H.U. Jessurun d’Oliveira, ‘Union Citizenship: Pie in the Sky?’, in A. Rosas and E. Antola (eds.), *A Citizens’ Europe: In Search of a New Order* (Sage Publications 1995) p. 58. The ECJ case of *Tjebbes* (*supra* n. 19) is the last confirmation of this.

<sup>100</sup> ECJ 7 July 1992, Case C-369/90, *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria*.

<sup>101</sup> Case C-300/04, *supra* n. 8; L.F.M. Besselink, ‘Annotation of *Spain v. U.K., Eman en Sevinger*, and ECtHR Case *Sevinger and Eman v. The Netherlands*’, 45 *CMLRev.* (2008) p. 787.

To argue this way would amount to revealing only part of the truth, however. As with any other issue, which does not fall squarely within the scope of EU's legislative competences, the requirements of the duty of loyalty unquestionably apply, as the Court has aptly clarified in *Rottmann*.<sup>102</sup> The Member States are prohibited from putting any regulation in place that would obstruct the *effet utile* and the smooth functioning of EU citizenship as a supranational legal status – as per *Rottmann* – or as a bundle of rights, as the Court specified in *Ruiz Zambrano* and its progeny.<sup>103</sup> While the question of how far exactly the Member States need to go in undermining EU citizenship in order for the EU to be in the position to intervene remains open<sup>104</sup> – especially so since *Tjebbes* – it is beyond any reasonable doubt that the sphere of citizenship regulation is not a prohibited terrain for the Union.<sup>105</sup>

To summarise the two sides of the EU citizenship coin, while the Member States are free to regulate all the aspects of conferral and withdrawal of citizenship as they see fit, such regulation cannot undermine the essence of the status or jeopardise the enjoyment of EU citizenship rights by the holder of the supranational status. Two lessons can be drawn from this in the context of the currently prevailing practice of the publication of the personal data of new EU citizens by a number of the Member States. Such publication will not be within the scope of EU law, thus failing to trigger the GDPR, which is based on the general obligation of the EU and its Member States to establish 'rules relating to the

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<sup>102</sup> ECJ 2 March 2010, Case C-135/08, *Janko Rottmann v Freistaat Bayern*; D. Kochenov, 'Annotation of Case C-135/08, *Rottmann*', 47 *CMLRev.* (2010) p. 1831; G.-R. de Groot, 'Overwegingen over de *Janko Rottmann*-beslissing van het Europese Hof van Justitie', *Asiel & Migrantenrecht* (2010) p. 293; S. Iglesias Sánchez, '¿Hacia una nueva relación entre la nacionalidad estatal y la ciudadanía europea?', 37 *Revista de derecho comunitario europeo* (2010) p. 933.

<sup>103</sup> ECJ 8 March 2011, Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*. Cf. M. van den Brink, 'EU Citizenship and EU Fundamental Rights', 39 *LIEI* (2012) p. 273; D. Kochenov, 'A Real European Citizenship', 18 *CJEL* (2011) p. 56. Cf. M. van den Brink, 'The Origins and Potential Federalising Effects of the Substance of Rights Test', in C. Kochenov (ed.), *EU Citizenship and Federalism, The Role of Rights* (CUP, 2017) p. 85.

<sup>104</sup> Opinion of AG Sharpston in ECJ 8 March 2011, Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*; S. Platon, 'Le champ d'application des droits du citoyen européen après les arrêts [*Ruiz*] *Zambrano*, *McCarthy* et *Dereçi*', 48 *RTD eur.* (2012) p. 21; D. Kochenov, 'The Right to Have *What* Rights?' 19 *ELJ* (2013) p. 502; S. Iglesias Sánchez, 'Fundamental Rights and Citizenship of the Union at a Crossroads', 20 *ELJ* (2014) p. 464.

<sup>105</sup> Szpunar and Blas López, *supra* n. 2



protection of individuals with regard to the processing of personal data’ in Article 16 TFEU, and the Charter (particularly Articles 7 and 8 CFR) *only if*:

1. It does not constitute a violation of one of the rights of EU citizenship enjoyed by Europeans merely by virtue of possessing the status – similarly to the right to elect the members of the European Parliament, for instance, which was at issue in *Eman and Sevinger* and *Delvigne* and is now unquestionably within the scope of EU law.<sup>106</sup>
2. It does not disproportionately threaten the enjoyment of the status of EU citizenship as such, in which case EU law would kick in as per *Rottmann*.<sup>107</sup>

It is absolutely clear, in light of the above, that besides the fact that the national citizenship remains one of the core elements of a state, a cumulative reading of Articles 4(1) and (2) TEU, Article 9 TEU and Article 20 TFEU falls short of removing the issues of the conferral and withdrawal of EU Member States’ nationalities from the scope of EU law: after *Rottmann* and *Delvigne* such a narrow reading of the scope of the law would be very difficult to justify.<sup>108</sup>

This conclusion is equally in line with the findings of the Court in *Åkerberg Fransson*.<sup>109</sup> Here the Court found a nexus to EU law through the harmonisation of Value Added Tax in Member States despite the fact that taxation is a core national domain. In essence, we can deduce that the Court in Luxembourg might only intervene in publication matters relating to citizenship exceptionally. However, and as presented, it seems possible in cases

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<sup>106</sup> ECJ 6 October 2015, Case C-650/13, *Thierry Delvigne v Commune de Lesparre Médoc and Préfet de la Gironde*; K. Lenaerts and J.A. Gutiérrez-Fons, ‘Epilogue on EU Citizenship: Hopes and Fears’, in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) p. 751; S. Platon ‘The Right to Participate in European Elections and the Vertical Division of Powers in the European Union’, 3(3) *European Papers* (2018) p. 1245.

<sup>107</sup> Case C-135/08, *supra* n. 100; J. Shaw (ed.), ‘Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?’, 2011/62 *EUI Working Paper RSCAS* (2011).

<sup>108</sup> Also before the most recent case law, the literature pointed squarely in the direction of untenability of some moves in the nationality law of the Member States in the light of EU law: de Groot, *supra* n. 2; D. Kochenov, ‘EU Citizenship and the Internal Market: Illusions and Reality’, in L.W. Gormley and N. Nic Shuibhne (eds.), *From Single Market to Economic Union: Essays in Memory of John A. Usher* (OUP 2012) p. 245.

<sup>109</sup> ECJ 7 May 2013, Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*. Cf.: E. Hancox, ‘The meaning of “implementing” EU law under Article 51(1) of the Charter: *Åkerberg Fransson*’, 50 *CMLRev* (2013) p. 1411; O. Gstrein and S. Zeitzmann, ‘Die „Åkerberg Fransson“ – Entscheidung des EuGH – „Ne bis in idem“ als Wegbereiter für einen effektiven Grundrechtsschutz in der EU?’, 2 *ZEuS* (2013) p. 239.

where the essence of the rights resulting from EU citizenship is threatened by national conduct. In other words, while an intervention of EU law in this matter is unlikely, it seems not entirely impossible. The fact that the main issue at hand unquestionably pertains to the core sovereign functions of the state does not make it impossible to state without a case-by-case analysis of the concrete facts at hand, that the publication of the personal data of each EU citizen would always be out with the scope of EU law as per Article 2(2)(a) GDPR. In the light of the analysis above a much more flexible approach seems to be required, the demands of legal certainty notwithstanding.

The same reasoning unquestionably applies to other secondary law besides the GDPR. For example, Directive (EU) 2016/680 on the processing of personal data for law enforcement purposes in the Union has a similar exception as the GDPR which can be found in Article 2(3)(a).<sup>110</sup> Such exceptions would allow for the non-application of EU privacy standards to the publication of personal information of new EU citizens, yet, even at a more global level, the very fact that we are dealing with the conferral of EU citizenship, not merely a Member State nationality (at least in the cases when third country nationals naturalise) opens up a store of additional arguments in favour of applicability of EU law in this domain.<sup>111</sup>

### Council of Europe Standards

While the main focus of this publication is on the situation within the EU and its Member States, a very brief look at the data protection framework of the Council of Europe seems necessary after having established that the publication of naturalisation falls predominantly outside the scope of EU law with possible exceptions. Since the legal framework of the Council of Europe is applicable in all Member States of the EU (including in the UK after leaving the EU) and much of the EU data protection law is rooted in Council of Europe standards, it remains to be seen whether the regulatory framework of the Strasbourg organisation could cover the publication of naturalisation.

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<sup>110</sup> Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities [2016] ELI: [data.europa.eu/eli/dir/2016/680/oj](https://eur-lex.europa.eu/eli/dir/2016/680/oj).

<sup>111</sup> Cf. Kochenov, *supra* n. 106.

In particular Article 8 ECHR, which protects the right to privacy, might entitle individuals to file an application against the publication of naturalisation if their right to privacy, family life, or honour and reputation is infringed due to it. This provision is remarkably broad and comprehensive.<sup>112</sup> Depending on the case and assuming that all national remedies have been exhausted, it thus seems not entirely unreasonable that Council of Europe standards are applicable.

The key question in this regard is whether this specific publication is justifiable in light of Article 8(2) ECHR. Any of the 47 Council of Europe states could argue that the publication of personal information at naturalisation is provided for by a law and is fulfilling an aim necessary in a democratic society, particularly relating to ‘the interests of national security, public safety or the economic well-being of the country, [...] the prevention of disorder or crime, [...] the protection of health or morals, or [...] the protection of the rights and freedoms of others’. The most relevant criteria of how the Court of Human Rights (ECt.HR) applies this in practice are well known and remain amply summarised and retold.<sup>113</sup> It seems not entirely unlikely that the ECt.HR would accept such an argumentation of a Member State and therefore deem the publication of personal information of the newly-naturalised citizens necessary and proportionate in the light of the requirements of Article 8 ECHR. Additionally, it remains the case that the margin of appreciation doctrine plays a particularly significant role in areas where a consensus between Member States seems unlikely or non-existent.<sup>114</sup> As has been demonstrated throughout the previous sections, European states currently have very different approaches. As a result, it is therefore submitted that the critical application of the ECHR to this issue seems unlikely.

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<sup>112</sup> Hoofnagle et al, p. 70.

<sup>113</sup> See [www.echr.coe.int/Pages/home.aspx?p=press/factsheets&c](http://www.echr.coe.int/Pages/home.aspx?p=press/factsheets&c), visited 13 November 2018.

<sup>114</sup> Y. Arai-Takahashi, ‘The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg’s Variable Geometry’, in A. Føllesdal, B. Peters and G. Ulfstein (eds.), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (CUP 2013) p. 62; Y. Arai-Takahashi, *The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR* (Intersentia 2002) p. 1 – 5.

While privacy is often understood as a ‘right to be left alone’,<sup>115</sup> it is also a recurrently under-emphasized enabling element, which is essential for “an individual’s ability to participate in political, economic, social and cultural life.”<sup>116</sup> Given the absence of any specific case law relating to the precise topic of this article we can only outline the most prominent areas in which the ECt.HR currently interprets this right. Those areas are deprivation of citizenship, protection of personal data, surveillance in different forms (Mass surveillance, surveillance at the workplace, protection of the privilege of the legal profession), protection of reputation, and protection of one’s image.<sup>117</sup> Digging deeper in some selected areas which might be relevant for the discussion of citizenship, one recent important judgment in the area of deprivation of citizenship is *Ramadan v. Malta*, in which an Egyptian was denied Maltese citizenship after marrying a Maltese person. It was held by the ECt.HR that there was no infringement of Article 8 since there was a clear legal basis for the decision, a fair procedure and the Egyptian could still carry out his business on the island.<sup>118</sup> Another recent judgment in this area is linked to the topic of terrorism. In *K2 v. UK*,<sup>119</sup> a naturalised British citizen filed a complaint. He was deprived of his citizenship by the Home Secretary after he left the UK in breach of his bail conditions – a growing wave of citizenship deprivations in the UK.<sup>120</sup> The ECt.HR declared the application inadmissible giving several reasons, including that national remedies were still available in the case, that there was strong evidence that the man was most likely involved in terrorist activities, and that the applicant would not become stateless since he also had Sudanese citizenship. The fact that there is a huge discrepancy between the two statuses did not play a role here, which is the standard approach in current law: statelessness, quite strikingly, is viewed as a worse evil than a substandard nationality.<sup>121</sup> Continuing this short overview in the area of national security and mass

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<sup>115</sup> S. Warren and L. Brandeis, ‘The Right to Privacy’, 4 *Harvard L.R.* (1890) p. 193.

<sup>116</sup> United Nations, Human Rights Council Resolution on privacy in the Digital Age, A/HRC/34/L.7/Rev.1 22.03.2017, p. 3.

<sup>117</sup> For each of these areas see the detailed factsheets available at [www.echr.coe.int/Pages/home.aspx?p=press/factsheets&c](http://www.echr.coe.int/Pages/home.aspx?p=press/factsheets&c), visited 26 November 2018.

<sup>118</sup> ECtHR 21 June 2016, App. No. 76136/12, *Ramadan v Malta*.

<sup>119</sup> ECtHR 7 February 2017, App. No. 42387/13, *K2 v United Kingdom*.

<sup>120</sup> See, for an in-depth analysis, P. J. Spiro, ‘Expatriating Terrorists’, 82 *Fordham L. Rev.* (2014) p. 2169.

<sup>121</sup> D. Kochenov, J. Lindeboom, ‘Empirical Assessment of the Quality of Nationalities: The Quality of Nationality Index (QNI)’, 4 *European J.L. & Governance*, 2018, p. 314.

surveillance, the ECt.HR has delivered two notable judgments in *Big Brother Watch and Others v. UK*,<sup>122</sup> and *Centrum för Rättvisa v. Sweden* in 2018.<sup>123</sup> Those two judgments are similar in the sense that both cases relate to civil society organisations' complaints about surveillance carried out by states and in the light of the 2013 revelations of Edward Snowden.<sup>124</sup> Particularly in *Centrum för Rättvisa*, in which the court found no violation of Article 8 ECHR, the ECt.HR emphasized that clear and limited legal competences combined with robust oversight structures can make it possible that a state carries out surveillance for national security purposes. Although both of these judgments are not final at the time of writing, they can be read in contrast with the 2015 Grand Chamber judgment in *Zakharov v. Russia*,<sup>125</sup> in which the ECt.HR found that Russia is infringing on the right to private life of the applicant due to its wide ranging and unspecific access to telecommunications infrastructure enabling arbitrary monitoring of its citizens. Those more recent judgments complement existing interpretations of the right to privacy, and add new aspects to the findings in classical judgments relating to the publication of private information in cases such as *von Hannover v. Germany* which are essentially about the privacy of a publicly known person,<sup>126</sup> and *Mosley v. UK* which relates to the publication of sensitive pictures of the applicant in a national newspaper.<sup>127</sup> These cases might allow to infer tendencies of Strasbourg jurisprudence on the publication of personal data at naturalisation, such as a broad support for the protection of the informational sphere of the individual and the integrity of the family, as well as potential restrictions in areas where national security concerns prevail. However, referring again to the margin of appreciation doctrine as well as the fragmented situation in the individual Member States, the precise answer to the question discussed in this article cannot be directly deduced

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<sup>122</sup> ECtHR 13 September 2018, App. Nos. 58170/13, 62322/14 and 24960/15, *Big Brother Watch and Others v UK*.

<sup>123</sup> ECtHR 19 June 2018, App. No. 35252/08, *Centrum för Rättvisa v Sweden*.

<sup>124</sup> E. McAskill, 'Edward Snowden, NSA files source: "If they want to get you, in time they will"', *The Guardian*, 10 June 2013, <[www.theguardian.com/world/2013/jun/09/nsa-whistleblower-edward-snowden-why](http://www.theguardian.com/world/2013/jun/09/nsa-whistleblower-edward-snowden-why)>, visited 16 May 2018.

<sup>125</sup> ECtHR 04 December 2015, App. No. 47143/06, *Roman Zakharov v Russia*.

<sup>126</sup> ECtHR 24 June 2004, App. No. 59320/00, *Von Hannover v German*; ECtHR [GC] 7 February 2012, App. Nos. 40660/08 and 60641/08, *Von Hannover v Germany (no. 2)*; ECtHR 19 September 2013, App. No. 8772/10, *Von Hannover v Germany (no. 3)*.

<sup>127</sup> ECtHR 10 May 2011, App. No. 48009/08, *Mosley v UK*.

from existing ECt.HR case law and must be left to such general indications and speculation at this stage.

Still, the considerations of the legal framework of the Council of Europe should not end here. The potential regulatory implications of the oldest international legally binding instrument in the area of data protection, the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (or Convention 108), still need to be scrutinised<sup>128</sup> - especially since the Convention was modernised and updated in 2018.<sup>129</sup> The Convention is particularly interesting, since the Council of Europe's 47 states with approximately 800 million citizens it is open for 'third-countries' – and states such as Cabo Verde, Mauritius, Mexico, Senegal, Tunisia, and Uruguay have already become members,<sup>130</sup> while others such as Argentina, Burkina Faso, and Morocco show interest in joining at the time of writing.<sup>131</sup> This 'GDPR-lite' provides the essential building blocks for national data protection laws.<sup>132</sup> However, it is in many regards less detailed and contains no 'right to be forgotten', 'right to data portability', and some other more innovative individual rights of the GDPR.<sup>133</sup> Convention 108 follows a traditional data protection approach, which is only binding for the signing state, and therefore is in the context of this submission mainly interesting because of the basic principles it contains. These include 'lawfulness' (Article 5 (3)), 'fairness' (Article 5 (4)(a)), 'purpose limitation' (Article 5 (4)(b)), and 'data minimisation' (Article 5(4)(c)) among others.<sup>134</sup> According to Article 3 (1) of the consolidated version of Convention 108,<sup>135</sup> '[e]ach Party undertakes to apply [it] to data processing [...] in the public and private sectors, thereby securing every individual's right to protection of his or her personal data.' This has two important implications for the publication of naturalisation. First, the principles of the Convention

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<sup>128</sup> n. 85 *supra*.

<sup>129</sup> Ukrow, *supra* n. 4.

<sup>130</sup> See 'Chart of signatures and ratifications of Treaty 108', *Council of Europe*, [www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108/signatures?p\\_auth=BfbLJBUT](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108/signatures?p_auth=BfbLJBUT), visited 10 October 2018.

<sup>131</sup> Council of Europe, 'Mexico joins the data protection convention', 29 May 2018, [www.coe.int/en/web/portal/-/mexico-joins-the-data-protection-convention](http://www.coe.int/en/web/portal/-/mexico-joins-the-data-protection-convention), visited 10 October 2018.

<sup>132</sup> On the harmonisation of legal standards see Greenleaf, *supra* n. 28.

<sup>133</sup> Ukrow, *supra* n. 4, p. 245.

<sup>134</sup> *Ibid*, p. 243.

<sup>135</sup> See n. 85 *supra*.

108, especially those referred to above, unquestionably apply. In other words, when making information about naturalised citizens public, a state party to Convention 108 needs to carefully consider which information is published. Secondly, these rights also cover non-citizens of the country. Hence, while the framework of the Council of Europe, including the ECtHR judgments, is not as robust in terms of enforcement mechanisms as the one of the EU,<sup>136</sup> it can be argued that signatory states to Convention 108, and its modernised version, must carry out a careful assessment process when making information about naturalised citizens public.

#### United Nations Standards (UDHR and ICCPR)

Moving one level up the ladder of legal regulation from the Council of Europe to the UN, it is necessary to consider whether there is any legal guidance available on the UN-level on this subject. Since international law on citizenship *sensu stricto* is a truly rare animal,<sup>137</sup> the human rights framework could once more form the last resort for public authorities seeking guidelines to develop an approach to this subject or to individuals, who consider their privacy rights to be violated. Most importantly, Article 12 of the Universal Declaration of Human Rights (UDHR) on private and family life, as well as honour and reputation might be topical, as might Article 17 of the International Covenant on Civil and Political Rights (ICCPR), which provides similar substantive protection.

Promise of these instruments notwithstanding, when it comes to the protection of privacy on the UN level, these provisions remain rather general and abstract.<sup>138</sup> The UN Human Rights Committee has made an attempt to clarify the meaning of Article 17 ICCPR with General Comment No. 16 from 8 April 1988.<sup>139</sup> However, whether this short document

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<sup>136</sup> É. Lambert Abdelgawad, 'The Enforcement of ECtHR Judgments', in A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values* (OUP 2017).

<sup>137</sup> A. Sironi, 'Nationality of Individuals in Public International Law: A Functional Approach', in A. Annoni and S. Forlati (eds.), *The Changing Role of Nationality in International Law* (Routledge 2014) p. 54.

<sup>138</sup> UN, Human Rights Council, Report of the Special Rapporteur on the right to privacy Cannataci, A/HRC/37/62, Annex mn. 1 – 7.

<sup>139</sup> UN Human Rights Committee, CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation via <https://www.refworld.org/docid/453883f922.html>, visited 13 March 2019.

that is mostly relating to surveillance methods popular before the mass adoption of the Internet is still useful has been subject to vivid discussion. On the applicability of the UN privacy framework in the Digital Age a dedicated report of the UN High Commissioner for Human Rights after the Snowden revelations was presented in 2014.<sup>140</sup> Still and despite their formally comprehensive nature, the abstract level of the provisions remains challenging and has resulted in calls for new international instruments defining privacy more precisely and in-depth.<sup>141</sup> It is thus difficult to develop any meaningful guidance for detailed subjects such as the publication of personal data at naturalisation which might influence the private life, family life, honour or reputation of the subject. Additionally, the tools on the level of the UN are first and foremost directed toward the states who are bound to respect, protect and promote these laws. Hence, it is also states who traditionally are supposed to hold each other accountable. The provision of remedies for human rights violations on the international level is a complex issue.<sup>142</sup> It is submitted therefore, that the UN system might substantially cover publication of naturalisation very abstractly, but that this aspect together with the complexity of enforcement render it *de facto* inapplicable.

#### IV. Conclusions and recommendations

At the outset, the risk for a naturalised individual to suffer limitations of rights based on the publication of personal data should be taken very seriously and assessed closely. If legislation generally mandates the publication of the fact of naturalisation, exceptions are advisable for those, who can demonstrate that such publication considerably threatens the continued enjoyment of rights in the new as well as the other states of nationality and / or could negatively affect business or family interests. Furthermore, it should be considered which data in particular is being published. Is it merely the name of a person and perhaps their date and place of birth? Or more information, such as the home

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<sup>140</sup> United Nations, Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/27/37, 30 June 2014.

<sup>141</sup> United Nations, Report to the Human Rights Council of the Special Rapporteur on the right to privacy, A/HRC/34/60 24.2.2017, p. 17 – 21.

<sup>142</sup> S. Dinah, 'Human Rights, Remedies', *Max Planck Encyclopedia of Public International Law*, July 2006.



address, personal tax number, social security number and “special categories of personal data”, e.g. health-related information?<sup>143</sup>

When the decision on which data to publish is taken, the negative implications of combining all available data should be taken into account. As the United Nations Special Rapporteur on the right to privacy Cannataci rightly pointed out in his 2017 report to the General Assembly on Big Data and Open Data, the potential combination of such openly available information with other information (e.g. coming from ‘closed’ or confidential sources controlled by private or public entities) might result in serious privacy concerns once the sources are combined and an advanced data analysis is carried out.<sup>144</sup>

Additionally, due to the technological developments it becomes increasingly important to consider how such published data is perceived over time. While it may be perfectly legitimate and necessary to publish a fact (like naturalisation) and keep it in the public spotlight for a certain amount of time, an individual might equally face illegitimate repercussions if a dataset remains freely and openly available for an indefinite amount of time and without any consideration of purpose limitation. While paper publications get recycled, turn yellow, and end up micro-filmed and archived, websites remain on servers with backup mechanisms, become indexed by search engines, ‘cached’, or part of collections of web archives. This allows them to be widely and effortlessly available for a much longer time span and in perfect condition.<sup>145</sup>

However, because society keeps developing while the raw data (publication and associated information) remains the same, the context in which this information is interpreted and analysed changes over time.<sup>146</sup> Indeed, it might be worth considering whether there should be a mechanism with a similar effect as de-listing (the ‘right to be forgotten’) which was put in force by the CJEU in the *Google Spain* case for the index of

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<sup>143</sup> A very comprehensive definition of the term “special category of personal data” can be found in Art. 9 para. 1 GDPR.

<sup>144</sup> UN, Report of the Special Rapporteur on the right to privacy Cannataci, A/72/43103, mn. 104 – 108.

<sup>145</sup> V. Mayer-Schönberger, *Delete: The Virtue of Forgetting in the Digital Age* (Princeton University Press 2009) p. 16 – 50.

<sup>146</sup> Similar to the proverb ‘the beauty is in the eye of the beholder’ one feels tempted to state ‘the meaning of the data comes from the capacities of the processor and/or controller’.

search engines.<sup>147</sup> While the facts of the cases at hand do not seem comparable since the publication of naturalisation information is a matter of public administration, a strategy on how such publicised personal data is managed over time seems advisable when focusing on the individual and on privacy as a human right. *Google Spain* could provide a gate-way to discuss the issue of personal data and time in the digital age in a more nuanced and appropriate manner: whether to publish personal data or not is not the only question – a fundamental issue is *how* to publish and to what extent to make the publication available.

The described aspects of the amount of information provided and its ‘development’ over time show that any authority publishing information on naturalisation should have a strategy in place to address such human rights concerns. As a minimum starting point such a strategy should clearly specify at least the

1. Categories;
2. Amount (including its possible negative effects in the light of aggregation with information from other sources);
3. Accessibility;
4. And time management of the publication of personal data at naturalisation.

In the light of the analysis in the sections above, it is abundantly clear that opting for the default position of unrestricted publication of personal data of the new citizens at naturalisation is a deeply problematic choice boasting a sure potential of rights violations. Accordingly, we find it advisable for public administrations to carefully scrutinise and potentially re-consider their strategies managing the publication of personal data at naturalisation, potentially leading to significant changes in the approaches taken by the Member States hitherto insensitive to privacy standards potentially applicable in the domain of naturalisations. The upgraded European data protection framework, and the heightened attention to privacy resulting from it, create a welcome opportunity to

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<sup>147</sup> Case C-131/12, *supra* n. 27; O. Lynskey, ‘Control over Personal Data in a Digital Age: *Google Spain v AEPD and Mario Costeja Gonzalez*’, 78 *Modern Law Review* (2015) p. 522; I. Spiecker, ‘A new framework for information markets: *Google Spain*’, 52 *CMLRev* (2015) p. 1033; O.J. Gstrein, ‘The Right to be Forgotten in the GDPR and the aftermath of the “Google Spain” judgment (C-131/12)’, 1 *Privacy in Germany* (2017) p. 9; E. Frantziou, *supra* n. 88.

reassess traditional practices. As already mentioned earlier, the following three interrelated points might provide guidance in this exercise:

First, we propose that national practices of publication of naturalisation should be assessed and redesigned taking into account the possibilities of information management in the Digital Age, as well as the existing obligations of states in European and International Law. Whereas it had been cumbersome to search, combine, and analyse information in the pre-Internet era, new technologies facilitate these processes enormously. Hence, the risks of privacy infringements in this domain have grown considerably, which seems to make it advisable to consider general publication of such information carefully.<sup>148</sup> The growing number of EU Member States prohibiting the unrestricted default publication of the personal data of all the newly-naturalised citizens has thus taken the safest approach to the issue from the point of view of personal rights protection. As we have demonstrated based on the Irish and the Latvian examples, privacy-aware choices can stem from a well-informed critical discussion, considering very carefully all the interests involved.

Secondly, it is not only necessary to think about whether to publish personal data of the new citizens or not, but also to formulate, should a decision to publish be taken, a privacy-sensitive approach to what happens once the information is in the public domain. As we have shown, particularly the French and the Dutch approaches attempt to address this issue, albeit with a radically different degree of success. Generally however, by limiting the accessibility (not the existence of) such a publication – in the spirit of the *Google Spain* decision of the ECJ<sup>149</sup> – any naturalised individual should have the possibility to opt out of the public spotlight within the new country, which should be the default. By managing the access to this data appropriately, it is possible to strike a balance between the public information interest and individual rights.

Thirdly, it seems advisable for states to harmonise their practices in this area at least to some degree. While the current regulatory framework suggests that each country has

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<sup>148</sup> On 'Open Data' policies and challenges see n. 26 *supra*.

<sup>149</sup> Case C-131/12, *supra* n. 27.

discretion to decide for itself, the increasing harmonisation of the privacy framework in Europe and across the world raises the expectation of individuals to be subject to comparable standards based on sensible rules.<sup>150</sup> At the most basic level, the publication of the personal data of the new citizens should be prohibited at least when such publication could put their other citizenship(s) in danger, or cause similarly significant harm to them in other domains, such as family or business affairs. It is very easy to avoid inflicting serious harm upon those joining the collective of citizens by at least being aware of the far-reaching and harsh consequences of neglecting privacy rights. The common good standard to apply to all the Member States of the EU should embrace the ideal of avoiding unnecessary harm by embracing the privacy standards as a starting point. Where publication remains required the adoption of a proportionality text to take potential harms which such default option could cause would be the most logical way forward.

To conclude, it leaves no doubt that the current default practice of unconditional disclosures of private information of the newly-naturalised citizens in Europe is under strong pressure from privacy considerations and cannot continue unchanged. While the trend in the direction of taking privacy fully into account is already clearly decipherable, much more is to come, as the awareness is growing of the potential application of the strict the GDPR rules in this area, as well as the relevance of the revamped Council of Europe's Convention 108. A long road towards fully safeguarding the privacy rights of the newly-naturalised Europeans is thus ahead of us. The right direction is now clear.

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<sup>150</sup> On the harmonization of legal standards see Greenleaf, *supra* n. 28.