21 The Connecting Factor of Nationality in Relation to the Principles of EU Law

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21.1 Introduction

The diverse traditions in personal and family law resulted in unique legal developments in the Member States of the European Union (EU). In the course of the determination of the applicable law in respect of civil law relations between EU citizens residing in different Member States, the differences in cultural traditions and the lack uniform law can become the source of many problems. The different paths of legal development resulted in the formation of unique legal institutions in the different legal systems involving the application of diverse connecting factors. The main question is: what lies at the root of the problem?

The complexity of such situations derives from the fact that due to the different paths of legal development, unique legal institutions have been formed and different substantive law rules have been adopted in the various Member States. What is more, it is the differences between the private international law rules of the Member States that may be considered to be at the root of such complex situations, since the application of the different connecting factors may lead to different results in respect of the applicable law. Assessing the question from the perspective of EU law, the possibility for a closer cooperation in private international law matters was ensured only with the entry into force of the Treaty of Amsterdam, at the same time, rules mostly affected cooperation in civil law matters,[1] while family law aspects were largely necglected. The increase in EU competences also had an impact on legislation as several secondary law instruments have been adopted and entered into force since then, for instance the Rome and Brussels Regulations,[2] a legislative process that resulted in the unification of laws of the Member States.

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1 *See*: Section B of Art. 65.

2 Council Regulation (EC) No. 44/2001of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters Official Journal L 012, 16/01/2001 P (Brussels I); Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000. Official Journal L 338, 23/12/2003 P. 0001-0029 (Brussels IIbis); the Parliament's and the Council's 864/2007/EK decree about the law applicable to the non-conctractual cases (Rome II); the Parliament's and the Council's 593/2008/EK decree about the law applicable for conctractual obligations (Rome I).

Following the entery into force of the Treaty of Lisbon, the unification of family law and the law of succession commenced gained new impetus.[3] However, so far the significant focus placed on the unification of private international law did not result in the unification of rules on the right to bear a name. The reason for this lies partly in attitude of the Member States as the traditions regarding the right to bear a name and the respective rules are deeply rooted in the national law and jurisprudence, therefore, the reluctance of the Member States to amend the systems currently in effect significantly hinders unification in this field.

Nevertheless, resolving the contradictions would be extremely important, for in the European context such discrepancies may impede the unhamperd functioning of the internal market, taking into account that fundamental freedoms, such as the free movement of persons and the freedom to provide services may be obstructed due to divergent domestic rules. The cases analyzed in the present study intend to shed light on this imperative. Dismantling the barriers to the establishment of the internal market is undoubtedly considered to be a fundamental goal of the EU, however, this may only be successfully achieved if the sensitivities of the Member States are respected in this special field of law.[4]

Due to the above, in the current circumstances the Court of Justice of the European Union as the other factor of legal approximation, is faced with problems that are generated by the collision of national laws since the beginning of the 90s and the CJEU had been seeking legal solutions with more or less success. Since a respective uniform, single European norm has not been adopted as of yet, each Member State applies its own domestic rules and the CJEU is under the duty to assess the compatibility of national laws with EU law. Nevertheless, this process of legal development is slow, involving several factors of uncertainty.

The aim of the current study is to introduce the case-law of the CJEU with respect to right of natural persons to bear a name pursuant to personal rights, compare the similarities and reveal the accidental contradictions.

Having a name is considered be the fundament of the identity of a human being and the name determines who the person really is, forming part of his or her personality. Sur-

3 Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (Rome VI); Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III); Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession;

4 M. Lehmann: 'What's in a Name? Grunkin-Paul and Beyond?', in *Yearbook of Private International Law*, Vol. X, 2008, 2009, sellier.european law publishers GmbH and Swiss Institute of Comparative Law, Munich, pp. 135-164, p. 138.

names express that a person is integrated into a particular family, since these are usually passed on from generation to generation pursuant to preset rules. Bearing a name has specific significance from the perspective of state operation as it shapes the public law status of the person concerned, namely, the name has relevance in determining who is entitled to vote and who is obliged to pay taxes and under what circumstances. Finally, the name is deemed to be a benchmark of social integration, for instance the spelling and pronounciation of the names of immigrants and refugees could be a source of numerous misunderstandings. In order to facilitate assimilation, several countries prescribe by law that the names of immigrants and refugees need to be 'naturalised' pursuant to the adequate ortographic rules of the new country.[5]

The cases examined concern different fields of law, demonstrating the complexity of the problem. Some cases pertain to the field of private international law, with the basic problem of which connecting factor should be applied in order to determine the normative law governing the right to bear a name in case of multiple citizens or citizens whose citizenship is different from their country of residence. In most cases two connecting factors come into conflict, namely the principle of citizenship and the principle of residence. These cases substantiate the tendency which has become ever so visible recently: the principle of residence prevails over the principle of nationality. Nevertheless, other private international law principles also emerge in the context of the analysed cases, such as the doctrine of vested rights, the principle of mutual recognition or legal institutions underpinning public policy.

At the same time, the connecting factor between facts of the cases is EU citizenship and the rights deriving from EU citizenship, such as the principle of equal treatment, free movement, residence rights and the freedom of establishment, the freedom to provide services, the principle of mutual recognition, therefore EU law is also relevant in these cases. These principles establish direct connecting links to EU law even if the determination of the rules in respect of the right to bear a name undoubtedly falls under the competence of Member States. Thirdly, the cases also involve human rights aspects as they concern the rights set out in the Charter of Fundamental Rights (the 'Charter'), such as the right to respect for family life, or those specified in the European Human Rights Convention (EHRC), such as the right to private life and the right to cultural identity. Consequently, we may state that the issue of the right to bear a name relates to different fields of law.

What is common in the cases presented below is that national courts turned to the CJEU in the framework of the preliminary ruling procedure with the question whether they had competence in the case concerned. The CJEU is responsible for assessing the compatibility of national law with EU law principles. The CJEU fulfilled its duty and

5 *See* Lehmann, *supra* note 4, pp. 136; Thomas Rauscher, *Internationales Privatrecht*, C.F. Müller Verlag, Heidelberg, 2009, p. 46.

declared in each respective case that the issue of bearing a name falls under the competence of the Member States, however, the provisions of national law and their application must comply with EU law.

21.2 Connecting Factors

In the context of the European conflict of law rules connecting factors play a significant role. The function of connecting factors is to resolve the collision between legal systems in conflict with each other and to determine the law applicable in the course of adjudging the facts.

Personal law is a basic connecting factor which facilitates the determination of the applicable law in legal relationships governed by personal, family and inheritance law. The two main connecting factors in case of natural persons, which have relevance from the aspect of the legal status and capacity of persons, are nationality and habitual residence.

The principle of nationality (*lex patriae*) expresses the public law relationship between a particular state and the natural person possessing the citizenship of such state. From the perspective of private international law, the principle of nationality indicates under which legal system the natural person belongs and what the rights and obligations of the person concerned are.[6]

Nationality governs the personal rights of the persons, including the right to bear a name, in those European states that belong to the civil law system.

Nationality as a connecting factor became widespread in the second part of the 19th century in parallel with the formation of the nation states. In respect of the newly formed nation states, nationality as a connecting factor indicated the close relationship of the person with the state.[7] Nationality as a connecting factor has permeated private international law thanks to the persuasive work of Pasquale Stanislao Mancini. The benefits of applying the nationality based connecting factor are that this connecting factor is transparent, easily verifiable through documents and ensures relative stability as acquiring the nationality of another state may be complex and lengthy. The disadvantage of this connecting factor is that in case of multiple citizenship different legal systems compete with each other, while the factor does not provide an answer to the dilemma of refugees and stateless persons either. Dual citizenship poses a special problem for private international law as regards the following question: the law of which state shall determine the legal status of the natural person concerned? The so-called principle of actual citizenship could provide a solution to the question. According to this principle, a closer connection may be determined between

6 *See* Rauscher, *supra* note 5, pp. 46.
7 *See* Rauscher, *supra* note 5, pp. 48-49.

the person and the state on the basis of the habitual residence of the person concerned. This principle is similar to the place of habitual residence.

Since the second part of the 20th Century, citizenship as a connecting factor has considerably lost its significance and has been gradually supressed. This is due to several reasons. Firstly, as a result of social and globalisation trends the role of migration and mobility has significantly increased. Due to the dismantling of the borders between European states, we are currently experiencing a massive flow of workforce from Member States and third states as well. There are several states that serve as target countries for immigrants, refugees and employees who have resided in the territory of the state for a longer period of time with their multigenerational families without possessing the citizenship of the host state.

Therefore, domicile or habitual residence better reflect the actual connection to the state concerned. The term of habitual residence is not determined exactly under private international law acts – save for certain exceptions. Regarding the definition of the term, statutory instruments and judicial case-law usually highlight among the necessary elements the permanence, stability and the intention to reside. In order to determine permanence the fulfilment of a certain period of time is essential, for instance the German judicial practice requires 6 continuous months of residence in the Member State and Ireland[8] assumes stability in case the close relationship is substantiated. Moreover, the intention of the person to stay and reside in the state is also required, for instance the Hungarian act on private international law sets out that in the course of determining residence the intention to settle down is indispensable.

In respect of the Hague Conventions and even EU law we may witness a shift from the application of the connecting factor of nationality towards the application of habitual residence. Since the Hague Convention of 1956 on the law applicable to maintenance obligations towards children,[9] the maintenance of the child shall be determined pursuant to habitual residence instead of citizenship. Taking into account the Child Protection Convention of 1996[10] and the Convention adopted in 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance[11] it seems clear that the connecting factor of nationality has been replaced by habitual residence regarding the law of international child protection.

8 The term 'habitually resident' is not defined in Irish law. In practice it means that you have a proven close link to Ireland. The term also conveys permanence – that a person has been here for some time and intends to stay here for the foreseeable future.

9 Convention of 24 October 1956 on the law applicable to maintenance obligations towards children; Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations.

10 Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measure for the protection of children.

11 Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance;Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

EU law also fails to determine precise criteria regarding habitual residence. Although there are legal instruments regulating the content of habitual residence in respect of a given field of law,[12] it is the CJEU that plays a major role in shaping the standards.[13]

In the majority of private international law rules, habitual residence represents an alternative besides citizenship. For instance, in the general competences provisions of the Brussels II bis regulation, citizenship and habitual residence are alternative causes determining the applicable jurisdiction. The importance of these alternative causes was confirmed by the CJEU in the *Hadadi* case.[14] In lack of choice of law, the Rome III regulation on the rules applicable to divorce and legal separation[15] offers the possibility for the married couples to choose habitual residence instead of nationality. According to the Rome II regulation on non-contractual obligations, the law of the country where both parties were habitually resident when the damage occured shall be applied as an exception under the principle of general connecting factor. In lack of choice of law, the Rome VI regulation on maintenance regulates that in the course of objective connection the habitual residence of the person entitled for maintenance shall be applied.

21.3 The Cases

21.3.1 The Garcia Avello *Case*

According to the facts of the *Carlos Garcia Avello v. Belgian State* case[16] the Spanish citizen Carlos Garcia Avello and the Belgian citizen Isabelle Weber got married in 1986 in Belgium where they had their permanent residence. They had two children who became Belgian

12 Council Directive of 28 March 1983 on tax exemptions applicable to permanent imports from a Member State of the personal property of individuals (83/183/EEC).
1. For the purposes of this Directive, 'normal residence' means the place where a person usually lives, that is for at least 185 days in each calendar year, because of personal and occupational ties or, in the case of a person with no occupational ties, because of personal ties which show close links between that person and the place where he is living. However, the normal residence of a person whose occupational ties are in a different place from his personal ties and who consequently lives in turn in different places situated in two or more Member States shall be regarded as being the place of his personal ties, provided that such person returns there regularly. This last condition need not be met where the person is living in a Member State in order to carry out a task of a definite duration. Attendance at a university or school shall not imply transfer of normal residence. 2. Individuals shall give proof of their place of normal residence by any appropriate means, such as their identity card or any other valid document.

13 *See* more the determination of the notion regarding the habitual residence of the child in several judgements: C-523/07, *A.* case, ECR 2009, I-02805; C-497/10 PPU, *Mercredik, Chaffe* case, ECR 2010, I-14309.

14 C-160/08 *Hadadi and Hadadi* case, ECR 2009, I-6871.

15 *See* the detailed analysis of Rome III and Rome VI regulations: D.T. Czigler and K. Raffai, 'Az európai integráció újabb állomása: egységesülő európai nemzetközi (kollíziós) családjog', 5-6 *Külgazdaság – Jogi Melléklet* (2013), pp. 43-69.

16 C-148/02 *Carlos Garcia Avello v. Belgian State* 2003, ECR I-11613.

and Spanish citizens. Pursuant to the provisions of the Belgian Civil Code the Belgian authorities issued the birth certificates for the children under the name of the father, namely under the surname of Garcia Avello. However, the Spanish embassy in Brussels registered Garcia Weber as the surname of the children pursuant to Spanish law, which is based on the connection of the father's name and the mother's maiden name. Referring to these legal provisions, the parents requested the competent Belgian authorities to amend the surname of the children to Garcia Weber. The Belgian authorities denied the request due to the fact that Belgian private international law rules prescribes the application of the principle of citizenship and in case of dual citizenship, if one of the citizenships is Belgian, the rules of Belgian substantive law shall prevail. The respective law provides for an exception only if the person concerned does not have a close relationship with the Belgian State, for instance the person lives in another Member State, in this case the name of the child may also be determined pursuant to foreign law. This rule could not be applied in the current case because the children are dual citizens and one of their citizenship is Belgian. The parents did not accept the decision and the Belgian State Council referred the case to the CJEU for a preliminary ruling.

The question of the Belgian authorities was whether it is contrary to the principles of EU law relating to European citizenship and to the free movement of persons, enshrined particularly in Articles 17 and 18 of the Treaty on the European Community (EC Treaty) if Belgian administrative authorities refuse the application to change the surname of minor children residing in Belgium who have dual Belgian and Spanish citizenship, which application is in compliance with the Spanish law and traditions but contrary to Belgian law. The authorities referred to the exception rule in respect of the lack of close relationship with the Belgian State and they also denoted that such rule could not be applicable to those dual citizens who have Belgian citizenship as these citizens shall be treated exclusively as Belgian citizens in respect of whom the Belgian law is the governing law. The authorities also emphasised that taking into account the traditions developed in the Belgian society, the differently formed surnames may raise questions regarding the origins of the children. Pursuant to the Belgian, Danish and Dutch governments, adopting rules in relation to the right to bear a name falls under the competence of Member States.

According to the CJEU, the question concerned could fall under the scope of EU law as the children possess union citizenship which has a direct connection with EU law. Moreover, regardless of the fact that the rules in relation to the right to bear a name fall under national competence, the rules must be applied in accordance with EU law.

One of the most important fundamental rights of union citizens is free movement and freedom of residence. Article 18 of the EC Treaty implies that the right to free movement is a fundamental right which is not bound to economic goals and EU citizens are entitled to exercise this right regardless of their place of residence, thus, moving from one Member

State to another is not considered a prerequisite for enjoying the benefits of the right to free movement.

The applicants also referred to Article 12 of the EC Treaty regarding the prohibition on discrimination on grounds of union citizenship, therefore, the CJEU had to assess whether prioritising Belgian citizenship against the citizenship of another Member State could be considered discriminatory. According to the interpretation of the CJEU, the prohibition on discrimination means that comparable situations shall not be treated differently and different situations shall not be treated identically. Nevertheless, the current case was characterised by this feature. The Belgian law contains indistinctive rules regarding Belgian citizens and foreign citizens residing in Belgium. Although dual citizens are in different position, they may face disproportionate obstacles if they acquire a surname in a Member State with different traditions and rules than the Members State providing their other citizenship. Moreover, favouring the law of one of the citizenships at the expense of the other is considered discriminatory. On the basis of the above reasons the CJEU found the decision of the Belgian authorities incompatible with Articles 12 and 17 of the EC Treaty.

Miklós Király notes that an intercultural tension emerges in the judgement[17] deriving from the diverse naming traditions of the two legal systems. This is supported by the argumentation of the Belgian authorities according to which the invariability of the names forms part of the social order and guarantees the identification of persons, consequently, derogation from the respective Belgian law is only possible in particularly justified cases with the permission of the king. The *Garcia Avello* case opened a new chapter in the relationship between EU law and private international law as the CJEU entered into a field previously upheld as the domaine réservée of Member States.[18]

21.3.2 The Grunkin and Paul *Case*[19]

Dorothee Paul and Stefan Grunkin, a married German couple residing in Denmark had a child whose name was registered as Leonhard Matthias Grunkin-Paul. The child is a German citizen and has been living in Denmark since his birth. Pursuant to the document issued by the competent Danish authorities, which certifies the name of the child, the surname Grunkin-Paul was given to the child and the same surname was entered into his Danish birth certificate. In the meantime, the couple divorced and the father returned to Germany, while the child stayed in Denmark with his mother. The competent authorities

17 M. Király, *Egység és sokféleség – Az európai Unió jogának hatása a kultúrára*, Új ember Kiadó, Budapest, 2007, p. 87.

18 *See* Lehmann, *supra* note 4, pp. 139.

19 C-353/06 *Leonard Matthias Grunkin-Paul v. Standesamt Niebüll* 2008, ECR I-07639.

entitled to issue the travel documents of the child are the German authorities on the basis of the citizenship of the child, nevertheless they refused to issue the documents containing the double surname of the child on the ground that German law does not ensure the application of surnames for German citizens.

According to German private international law the surname of the person is determined on the basis of the law of the citizenship of the person and German substantive law does not provide the possibility to give a double surname to the child deriving from the surnames of his mother and father. The authorities did not give effect to the request for judicial review submitted by the parents. The parents of child, who did not share a common surname, refused to determine the name of their child pursuant to German law.

The question of the German court referred for preliminary ruling was that whether, in light of the prohibition on discrimination set out in Article 12 of the EC Treaty and having regard to the right to free movement of all unions citizens as laid down by Article 18 of the EC Treaty, could the German provision be applicable to the conflict of laws providing that the law relating to names is exclusively governed by nationality and the law of the place of residence is ignored. In essence, the national court asked whether Articles 12 and 18 of the EC Treaty preclude the competent authorities of a Member State from refusing to recognise a child's surname, as determined and registered in a second Member State in which the child – who, like his parents, has only the nationality of the first Member State – was born and has been resident since birth.

Similarly to the *Garcia Avello* case, the CJEU first had to assess whether the situation of the child falls under the material scope of the EC Treaty. The CJEU confirmed and reinforced its findings adopted in the *Garcia Avello* case according to which the link with EU law may be established in respect of those children who are citizens of a Member State but resident in the territory of another Member State. Therefore, the child can rely, in principle, in respect of the Member State of which he is a citizen, on the right conferred by Article 12 of the EC Treaty not to be discriminated against on grounds of nationality and on the right, established by Article 18 of the 18 EC Treaty, to move and reside freely within the territory of the Member States. Having to use a surname, in the Member State of which the person concerned is a national, that is different from that conferred and registered in the Member State of birth and residence is liable to hamper the exercise of the right to move and reside freely within the territory of the Member States.

The CJEU reminded that it has already been declared in the *Garcia Avello* case that treating dual citizenship differently and unjustifiably preferring one citizenship over the other works to the detriment of the other, moreover as a result of the above, purely taking into account the rules of one national legal system relating to the right to bear a name could cause serious inconveniences to the person concerned both in his professional and private life. In this respect it is irrelevant whether the divergent surname derives from the dual citizenship of the person concerned or from the different rules regarding the determi-

nation of names which are applicable in the states of residence and nationality of the person concerned.

There are numerous situations in everyday life that require certification of identity mainly through the usage of passports. If the German authorities refuse the acceptance of a surname determined and registered in Denmark, then the authorities issue a passport to the child which contains another name than was previously registered. Consequently, each time he needs to certify his identity in Denmark he is faced with difficulties due to the fact that his surname indicated in his travelling document is different than his surname registered with the Danish authorities. Having regard to the specific situation of the child such inconveniencies occur frequently, since although he lives in Denmark with his mother he regularly spends longer periods of time in Germany when visiting his father. Every time the surname used in a specific situation does not correspond to that on the document submitted as proof of identity, *inter alia* with a view to obtaining benefits or an entitlement or to prove that examinations have been passed or skills acquired, or the surnames in two documents submitted jointly are not identical, such a difference in surnames is likely to give rise to doubts as to the person's identity and the authenticity of the documents submitted, or the veracity of their content.

The CJEU did not accept the argumentation of the German government according to which the exclusive linkage between surname and citizenship constitutes an objective criterion ensuring certainty and continuity. Such a criterion intends to achieve the equal treatment of persons possessing different citizenships and ensures the uniform determination of the names of persons sharing the same citizenship. Pursuant to the standpoint of the CJEU, these considerations aiming to facilitate public administration do not provide adequate grounds for justifying an impediment to the right to move and reside freely within the territory of the Member States.

As a result of the comparison of the two cases we may highlight several differences. The question was raised whether there was an actual international element in the *Garcia Avello* case at all, for the children had been living in Belgium since their birth and had not left the country – the Community dimension of the case could hardly be presumed.[20] While, in the *Grunkin-Paul* case a veritable private international law conflict evolved between the laws of the Member States of habitual residence and citizenship. In the latter case, this very international conflict expresses the link with EU law.

Underlining the private international law aspects of the case, it is also important to emphasize that the CJEU did not draw a distinction between the connecting principles and considers nationality and residence equally. Through its judgements the CJEU confirms the trend pursuant to which the previously dominant function of the connecting factor of nationality has lost its importance in determining the status of the natural person.

20 *See* Lehmann, *supra* note 4, pp. 144.

21.3.3 *The* Ilonka Sayn-Wittgenstein *Case*[21]

In the *Garcia Avello* and *Grunkin Paul cases* different legal solutions of different legal cultures clashed regarding the diverse methods for determining the name of natural persons. The main characteristic of the *Ilonka Sayn-Wittgenstein* case was a culmination of the conflict between social structures involving modern perspectives and traditional standpoints.

An Austrian citizen residing in Germany, Ilonka Kerekes, was adopted by a German citizen in 1991. As a result of the adoption the adoptee was given the surname and nobility title of the adoptive parent which was added to her birth name. The German authorities issued a driver's licence to her under the name of Ilonka Fürstin von Sayn-Wittgenstein and she also established a real estate company.[22] The Austrian authorities registered her new name into the Austrian birth register, also extending the validity of her passport in 2001 issued previously under her new name; moreover the Austrian consulate in Germany issued citizenship certifications.

In 2003 the Austrian Constitutional Court (Verfassungsgerichtshof) decided in a similar case that act of 1919 on the abolition of nobility forbids Austrian citizens to acquire a name including nobility prefixes. In 2007, following the judgement, in his decision the registrar in Vienna (Landeshauptmann von Wien) amended the surname to Sayn-Wittgenstein on the basis that the earlier registration was incorrect. The person concerned applied for legal remedy against the decision which was refused. Then, she turned to the Austrian Administrative Supreme Court (Verwaltungsgerichtshof) and requested the annulment of the decision. She argued that failing to recognize the consequences of name related aspects of adoption infringes the right to free movement as set out in Article 21 of the Treaty on the Functioning of the European Union (TFEU), since she needs to bear two different names in the two Member States concerned which may give rise to misunderstandings or disadvantages. She also pleaded that the right to respect for family rights pursuant to Article 8 ECHR was also infringed as the competent authorities intended to amend her name after having used it for 15 years. In addition, according to the applicant the freedom to provide services under Article 56 TFEU was also infringed, because she had previously registered an enterprise under that name.

The Austrian court sought to answer the question whether the Austrian rules, on the basis of which the recognition of nobility prefixes previously acquired through adoption in another Member State could be refused according to Austrian constitutional law, contravened Article 21 TFEU.

In the course of the proceedings, the Austrian government elaborated that act 1919 on the abolition of nobility is a rule situated at the constitutional level of the hierarchy of laws,

21 C-208/09 *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, ECR 2010, I-13693.

22 Princess Sayn-Wittgenstein.

introducing the principle of equality in parallel with the formation of the Austrian Republic. The government also mentioned that ignoring the principle would seriously breach the values making up the foundations of the Austrian legal system and finally, it would result in the infringement of Austrian public policy.[23]

The applicant disputed that Austrian public policy had actually been infringed in the specific case, as there is no real close connection between her and the Austrian state, taking into account that she has been living in Germany for many years, she resided there and pursues economic activity in Germany, therefore, if the adequate connection is lacking then public policy cannot be infringed.[24]

The CJEU stressed that the person's name determines the personality of the person and forms an essential component of private life which is granted by Article 7 of the Charter and indirectly by Article 8 of ECHR. The CJEU pointed out in its earlier case-law, especially the *Garcia Avello* and *Grunkin-Paul* cases that the different rules of the Member States in respect of surnames are capable of hindering union citizens in exercising their rights to free movement and residence.

The basic difference between these cases and the *Ilonka Sayn-Wittgenstein* case is that in case of the latter, both Austrian and German private international law prescribe the application of the principle of citizenship for the purposes of determining surnames. Although the connecting principles are the same, the substantive provisions differ in the sense that Austrian law considers the prefix 'Fürstin von' as a nobility prefix, while German law considers it an immanent component of the surname.

According to the Austrian and German governments, the case should not focus on the acceptance of the decision of another Member State because the case concerns the mistake of the Austrian authority since Austrian law did not ensure the application of nobility prefixes, not even at the time of registration, therefore, the Austrian authority merely corrected the originally erroneous registration in compliance with the effective law. The correction and the elimination of the nobility prefix could not seriously violate the rights of the person concerned as her surname has not been changed. Nobility prefixes serve the purpose of identifying the social status of a person, while surnames ensure the identification of the person who bears the given name. Taking into account that following the correction,

23 32nd point of the judgment.

24 The public policy clause is a special legal institution of private international law, an exceptional tool, by way of which the lawmaker would like to protect the basic values of the given legal system.
The content of the public policy is relative, it changes in time and place, thus, the law maker is generally regulating it by general clauses, which are filled with content by the law enforcement in the certain cases, when the possibilty of the public policy exception emerges. The requirements of the public policy objection: s*hinreichende Innlandsbeziehung*, which is present in connection with both some elements of the state of affairs and int he case of the protectable law system. Usually the nationality or the residence are these; it is evident that both the *offensichtliche Unvereinbarkeit* and the foreign law are harming a basic law, the law of discrimination, i.e. the ban of the negative judgment against the foreign law. T. Rauscher, *Internationales Privatrecht*, C.F. Müller Verlag, Heidelberg, 2009, pp. 130-132.

the central identification element of her surname remained unchanged, there could be no misunderstanding regarding her personal identification. Consequently, it falls under the competence of the Member State to decide whether it intends to admit the usage of nobility prefixes or not.

In its response the CJEU underlined that change of name forms part of the social order and the risk that a person needs to dissolve the doubts in relation to her identity clearly restrict her right to free movement. Nevertheless, on the grounds of objective reasons free movement may be restricted in case it is proportionate with the aims of domestic law. The act on the abolition of nobility belongs to the components of national identity which needs to be assessed in parallel the fundamental freedoms. In light of Austrian constitutional law it is clear that the act on the abolition of nobility forms part of Austrian public policy, and as such, it may be taken into account in the range of possible restrictions to the right to free movement.

The EU respects the national identity of the Member States, and the existence of a republic as a general form of government falls under this category. In the framework of national identity, the act on the abolition of nobility expresses the equal rights of Austrian citizens and the EU legal order guarantees the respect for such a right. A measure restricting an EU fundamental freedom can only be justified with reference to the protection of public policy in case the public order could not be ensured by any other measure and the measure itself complies with the criteria of proportionality. In the present case it could not be considered a disproportionate restriction that the Member State forbade the acquisition and usage of nobility titles or prefixes in order to guarantee equality between its citizens.

21.3.4 The Malgožata Runevič-Vardyn és Łukasz Pawel Wardyn *Cases*[25]

Similarly to the *Konstantinidis* case,[26] legal issues surrounding the transcription of surnames and given names stand in the focus of the CJEU's recent judgement.

Malgožata Runevič-Vardyn was born in Lithuania in 1977 as a Polish national and Lithuanian citizen. According to her standpoint, she was registered at the time of her birth as Małgorzata Runiewicz pursuant to her Polish origins. Her birth certificate was issued

25 C-391/09 *Malgožata Runevič-Vardyn and Łukasz Pawel Wardyn* ECR 2011, I-03787.

26 C-168/91 *Konstantinidis k. Stadt Altensteig Standesamt* ECR 1993, I-1191. This was the first contentious case in the jurisprudence of the European Court. According to the facts of the case, the name of the Greek citizen was transcribed with latin characters by the German authorities, and as a result, his name had changed. According to the applicant, this affected his economic activity, because he lost his clients. The European Court stated, that despite the fact that there is no Community rule, which would preclude the rewriting of names with latin characters, the disputed German practice does not comply with Community law, since the freedom of establishment contains the right to start economic activity which is significantly restricted if one's name is re-written and clients no longer recognize the person in question.

in Cyrillic script. The Lithuanian authorities issued her passport in 2002 and birth certificate in 2003 and they transcribed her name pursuant to Lithuanian grammatical rules, in other words her name was amended to Malgožata Runevič instead of Małgorzata Runiewicz. In 2007 she married a Polish citizen Łukasz Pawel Wardyn in Vilnius. In the marriage certificate the Lithuanian authorities transcribed the name of the husband pursuant to Lithuanian grammatical rules disregarding the diacritic signs in his name, therefore, his name was spelled Lukasz Pawel Wardyn in the Lithuanian official documents. Meanwhile, the wife's name was also entered into the marriage certificate in accordance with the Lithuanian rules of spelling, but differently than that of her husband. The letter 'w' and the diacritic signs were not included in her name and she war registered as Malgožata Runevič-Vardyn. The couple currently lives in Brussels with their child.

In 2007 the wife requested the Lithuanian authorities to amend her name in the birth certificate to Małgorzata Runiewicz, and in the marriage certificate to Małgorzata Runiewicz-Wardyn. She based her claim on Article 21 TFEU, referring to the fact that her right to free movement and residence was seriously restricted since her birth and marriage certificates do not reflect her Polish name and do not indicate her relationship with her husband or her son.

After her request was refused, the couple submitted a claim to the Vilnius court which turned to the CJEU with the question whether the domestic rule, which prescribes that surnames and given names of persons of foreign origin or citizenship must to be transcribed pursuant to the official grammatical rules of the Member State, is compatible with the directive on the principle of equal treatment between persons irrespective of racial or ethnic origin, the principle of prohibition on grounds of citizenship and the provisions regulating free movement and residence of persons in the territory of the EU.

The CJEU declared that the regulation of the surnames and given names does not fall under the scope of Directive 2000/43 on the principle of equal treatment between persons irrespective of racial or ethnic origin.[27] Regarding the scope the CJEU confirmed the reasoning set out in the *Garcia Avello* and *Grunkin-Paul* cases, moreover, it also emphasised that name is deemed to be a component of identity and personal life which is protected under the Charter of Fundamental Rights and the ECHR.

Regarding the subsequent change of the applicant's birth name, the CJEU stated that this cannot constitute treatment that is less favourable than that which he enjoyed before availing himself of the opportunities offered by the Treaty in relation to free movement of persons. The applicant's name which he was given by birth was transcribed identically in each official document, therefore the infringement of the right to free movement could not be established.

27 The EK Council directive from 29th of June, 2000, 2000/43/EK about the application of equal treatment without taking into account racial, ethnical aspect.

To the question that the joint surname of the wife spelled differently than the spelling pursuant to the husband's place of origin is capable of constituting serious inconveniences to the wife, the CJEU answered that this may constitute a restriction if it involves serious inconveniences at administrative, professional and private levels. For reasons of jurisdiction, it is up to the domestic court to determine whether these inconveniences amount to such a restriction and the court shall ensure the balance between the respect for private and family life and the protection of the official national language.

In respect of the spelling rules of the husband's name the CJEU highlighted that diacritic signs are often abandoned for technical reasons and those who do not know the specific foreign language do not even know what such signs exactly mean and for these persons it is doubtful that the lack of such signs would constitute real and significant inconveniences or would raise doubts regarding the identity of the person or in relation to the validity of the documents, therefore, it does not restrict the EU freedoms.

21.4 Conclusions

Irrespective of the differences, the cases introduced exhibit several similarities as the CJEU primarily sought to answer the question whether the right to bear a name regulated under domestic laws falls under the scope of EU law and how union law may be applied on the basis of the common connecting factor, i.e. EU citizenship. Originally, the concept of cultural identity formed an integral part of public international law dogmatics and could be connected to the protection of minorities. The issue of the cultural identity of natural persons has most recently infiltrated private international law and is becoming ever so relevant. Based on the cases presented above, we may state that this notion certainly affects EU law. Indirectly it also impacts on fundamental freedoms by allowing for their assessment from a new point of view. Nevertheless, we may arrive at a similar conclusion with respect to private international law. According to Eric Jayme,[28] the first author to use the terminus in the framework of private international law, the protection of cultural identity creates new relationships in the system of classical connecting factors. In our current multicultural society, the time has come to re-evaluate the principle of citizenship which as a connecting factor has lost its importance since the era of Mancini. The close relationship between the person and the respective nation must be expressed in the applicable domestic law (*Heimatrecht*) which does not necessarily mean unconditional concurrence with the law of citizenship or residence. The determination could be performed by the person concerned who would be in the position to choose the law capable of protecting the person's cultural identity. This principle mainly should be taken into account in family and inheritance law.

28 E. Jayme, *Internationales Privatrecht und Völkerrecht – Studien – Vorträge – Berichte*, C.F. Müller Verlag, Heidelberg, 2003, 41.

Following Jayme's approach, providing the possibility to the person concerned to choose the law that expresses his cultural values best certainly seems to be the appropriate solution.

The different traditions in respect of personal and family life resulted in a unique development of law in the Member States of the EU. The differences between cultural traditions and the lack of legal harmonization in this field generated problems in determining the surnames and given names of EU citizens originating from different Member States.

Regardless of the success achieved in the field of family law, the area of personal law, especially the right to bear a name, is still very complex since these rules are currently not affected by the harmonization activities of the EU. Nevertheless, even if these questions indirectly fall under the scope of EU law, they must be in compliance with EU principles. In all the cases presented above the basic issues related to compliance with national law, prohibition of discrimination, equal treatment, free movement, mutual recognition and mutual trust acquired significance.

For lack of uniform union law in this field, Member States shall apply their own rules, while the CJEU will be responsible for assessing the compatibility of such rules with EU law. This path of legal development is slow and involves several uncertainties. The real solution would be inclusion of this area of private international law and substantive law under the harmonization efforts of the Union. A unified register of names and the introduction of EU personal documents could result in a more transparent situation.