



UPPSALA
UNIVERSITET

Faculty of Law
Spring Term 2012

Master of Laws Thesis in Private International Law
30 ECTS

Your Europe – your name?

An analysis of the compatibility of Swedish private international law with European Union law in name matters

Author: Linnea Håkansson
Supervisor: Professor Maarit Jänträ-Jareborg



Table of Contents

Relevant Provisions	6
Abbreviations	11
1 Introduction	13
1.1 One person, multiple names and EU law	13
1.2 Purpose and delimitation of the topic	15
1.3 Method and sources	16
1.4 Definitions, terminology and translations	17
1.5 Contents	18
2 What's in a name?	19
2.1 What purpose does a person's name serve?	19
2.2 The legal nature of names	20
2.3 The role of EU private international law	21
3 Konstantinidis: A first step	24
3.1 Facts of the case	24
3.2 The ECJ's ruling	25
3.3 Analysis	26
3.3.1 Competence	26
3.3.2 The scope of Article 52 TEEC	27
3.3.3 Consequences for private international law rules	28
4 Garcia Avello: EU law applied broadly in a case with dual citizenship	28
4.1 Facts of the case	28
4.2 Belgian private international law and naming customs	30
4.3 The ECJ's ruling	30
4.4 Analysis	33
4.4.1 The scope of EC law	33
4.4.2 Discrimination on grounds of nationality	35
4.4.3 Consequences for private international law rules	36

5	Grunkin and Paul: A situation without dual citizenship	38
5.1	Facts of the case	38
5.2	The ECJ's ruling	39
5.3	Analysis	41
5.3.1	No dual nationality	41
5.3.2	Freedom of movement	42
5.3.3	A change of name	43
5.3.4	Consequences for private international law rules	44
6	Sayn-Wittgenstein: Public policy concerns at stake	45
6.1	Facts of the case	45
6.2	The ECJ's ruling	47
6.3	Analysis	50
6.3.1	Limits of Article 21 TFEU	50
6.3.2	An objective consideration and proportionality	50
6.3.3	Consequences for private international law rules	52
7	Runewiecz-Wardyn: A step back	53
7.1	Facts of the case	53
7.2	The ECJ's ruling	54
7.3	Analysis	57
7.3.1	Articles 18 and 21 TFEU	57
7.3.2	Justifications	58
7.3.3	Respect for national identity	59
7.3.4	Consequences for private international law rules	59
8	Swedish law of names	60
8.1	A change	60
8.2	General characteristics of the Names Act	61
8.3	Applicable law	62
8.4	When Swedish law is applied	65

8.5 Recognition of a name	68
8.5.1 Before the enactment of section 49 a	68
8.5.2 Section 49 a of the Names Act	69
9 A comparative outlook	70
9.1 Finnish law	71
9.1.1 Applicable law	71
9.1.2 Recognition of a name	72
9.2 Swiss law	73
9.2.1 Applicable law	73
9.2.2 Recognition of a name	74
10 Is Swedish law compatible with EU law?	75
10.1 An obstacle to the freedom of movement?	76
10.1.1 A recognition?	76
10.1.2 A restrictive measure?	79
10.1.3 Justified restrictions?	80
10.1.3.1 Connecting factors	80
10.1.3.2 An acquisition must have taken place	81
10.1.3.3 Family related acquisitions	82
10.1.3.4 Offensive names	84
10.1.3.5 Children under the age of 18 years	84
10.1.3.6 Nordic citizens	85
10.2 Discrimination on grounds of nationality?	85
10.2.1 Are persons with dual nationality treated differently?	85
10.2.2 Choice-of-law rules	88
11 Conclusions and final remarks	89
Bibliography	91

Relevant provisions

The Treaty on the Functioning of the European Union

(Fördraget om Europeiska Unionens Funktionssätt)

Article 18¹

Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.

Artikel 18

Inom fördragens tillämpningsområde och utan att det påverkar tillämpningen av någon särskild bestämmelse i fördragen, ska all diskriminering på grund av nationalitet vara förbjuden.

Europaparlamentet och rådet kan enligt det ordinarie lagstiftningsförfarandet anta bestämmelser i syfte att förbjuda sådan diskriminering.

Article 20²

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:
 - (a) the right to move and reside freely within the territory of the Member States;
 - (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;

¹ Ex Article 12 of the Treaty establishing the European Community (EC).

² Ex Article 17 EC.

- (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;
- (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

Artikel 20

1. *Ett unionsmedborgarskap införs härmed. Varje person som är medborgare i en medlemsstat ska vara unionsmedborgare. Unionsmedborgarskapet ska komplettera och inte ersätta det nationella medborgarskapet.*
2. *Unionsmedborgarna ska ha de rättigheter och skyldigheter som föreskrivs i fördragen. De ska bland annat ha*
 - a) *rätt att fritt röra sig och uppehålla sig inom medlemsstaternas territorier,*
 - b) *rösträtt och valbarhet vid val till Europaparlamentet samt vid kommunala val i den medlemsstat där unionsmedborgaren är bosatt, på samma villkor som medborgarna i den staten,*
 - c) *rätt till skydd inom ett tredjelands territorium, där den medlemsstat i vilken de är medborgare inte är representerad, av varje medlemsstats diplomatiska och konsulära myndigheter, på samma villkor som medborgarna i den staten,*
 - d) *rätt att göra framställningar till Europaparlamentet och att vända sig till Europeiska ombudsmannen samt rätt att vända sig till unionens institutioner och rådgivande organ på något av fördragets språk och få svar på samma språk.*

Dessa rättigheter ska utövas enligt de villkor och begränsningar som fastställs i fördragen och genom de åtgärder som beslutats med tillämpning av dessa.

Article 21³

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.
2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.
3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.

Artikel 21

1. *Varje unionsmedborgare ska ha rätt att fritt röra sig och uppehålla sig inom medlemsstaternas territorier, om inte annat följer av de begränsningar och villkor som föreskrivs i fördragen och i bestämmelserna om genomförande av fördragen.*
2. *Om en åtgärd från unionens sida är nödvändig för att uppnå detta mål och om inte befogenheter för detta föreskrivs i fördragen, får Europaparlamentet och rådet i enlighet med det ordinarie lagstiftningsförfarandet anta bestämmelser i syfte att underlätta utövandet av de rättigheter som avses i punkt 1.*
3. *I samma syften som avses i punkt 1 och om inte befogenheter för detta ändamål föreskrivs i fördragen, får rådet i enlighet med ett särskilt lagstiftningsförfarande besluta om åtgärder om social trygghet eller social skydd. Rådet ska besluta med enhällighet efter att ha hört Europaparlamentet.*

³ Ex Article 18 EC.

The Swedish Names Act

(Namnlagen SFS 1982:670)

Section 49 a

A person who has acquired a name in another State than Sweden within the European Economic Area or Switzerland through birth, a change of civil status or another family related relationship, has a right to acquire that name in Sweden by giving notice to the Swedish Tax Agency, if he or she at the time of the acquisition was a citizen of the other State or was habitually resident in the other State or had another special connection to the other State.

Approval according to subsection 1 shall be withheld in the case a forename could cause offence or might be expected to cause embarrassment to the bearer or in the case a name for some other reason is manifestly unsuitable as a forename.

Where the child under the age of 18 bears the name of the parent who does not have custody, that child may change his or her surname pursuant to subsection 1 only if the parent consents thereto or if a court has found the change of name to be in the child's best interest. In such a case, sections 45, 48 and 49 will be applicable.

49 a §

Den som har förvärvat ett namn i en annan stat än Sverige inom Europeiska ekonomiska samarbetsområdet eller i Schweiz genom födelse, ändrat civilstånd eller annat familjerättsligt förhållande har genom anmälan till Skatteverket rätt att förvärva det namnet också i Sverige, om han eller hon vid förvärvet i den andra staten var medborgare eller hade hemvist där eller hade annan särskild anknytning dit.

Första stycket ger inte rätt att som förnamn förvärva ett namn som kan väcka anstöt eller kan antas leda till obehag för den som ska bära det eller namn som av någon annan anledning uppenbarligen inte är lämpligt som förnamn.

Om ett barn under 18 år bär någon av föräldrarnas efternamn utan att denna förälder är vårdnadshavare, krävs för ett förvärv enligt första stycket som medför att barnet inte längre bär förälderns namn att föräldern har samtyckt till förvärvet eller att domstol har funnit att detta är förenligt med barnets bästa. I ett sådant fall tillämpas 45 §, 48 § och 49 § på motsvarande sätt.

Abbreviations

BGB	Bürgerliches Gesetzbuch (18.8.1896)
Dir	Direktiv (<i>The Swedish Government's terms of reference</i>)
Ds	Departementsserien (<i>Ministry Publication Series</i>)
EC	The Treaty establishing the European Community
ECHR	The Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	The Court of Justice of the European Union (previously the Court of Justice of the European Communities)
EEA	The European Economic Area
EGBGB	Einführungsgesetz zum Bürgerliches Gesetzbuch (18.8.1896)
EP	European Parliament
EU	European Union
IPRG	Bundesgesetz (18.12.1987) über das Internationale Privatrecht
NAG	Bundesgesetz (25.6.1891) betreffend die zivilrechtlichen Verhältnisse der Niedergelassenen und Aufenthalter
Prop	Proposition (<i>Government Bill of Sweden</i>)
RP	Regeringens Proposition (<i>Government Bill of Finland</i>)
SEK	Svenska Kronor (<i>Swedish Crowns</i>)
SOU	Statens Offentliga Utredningar (<i>Swedish Government Official Reports Series</i>)
TEEC	The Treaty establishing the European Economic Community
TEU	The Treaty on European Union
TFEU	The Treaty on the Functioning of the European Union
The Charter	The Charter of Fundamental Rights of the European Union
The Commission	The European Commission
The Council	The Council of the European Union
The Finnish Names Act	Släktnamnslag (9.8.1985/694)
The Hague Convention	The Hague Convention of 12 April 1930 on certain questions relating to the conflict of nationality laws
The (Swedish) Names Act	Namnslagen (SFS 1982:670)

1 Introduction

1.1 One person, multiple names and EU law

In 2006 the European Commission (the Commission) questioned the compatibility of Swedish law with European Union (EU) law in matters regarding names in one of its reasoned opinions.⁴ In this reasoned opinion, the Commission expressed the view that the Swedish authorities' decision to apply the same conflict rule to, on one hand, citizens with dual Swedish-Spanish citizenship and, on the other hand, citizens with only a Swedish citizenship, constituted discrimination based on nationality as well as an obstacle to the free movement of persons within the Union.⁵ In response to this, Sweden enacted changes to its national Names Act (*Namnlagen SFS 1982:670*)⁶, which had included the conflict rule that enabled Swedish authorities to apply Swedish law to persons with dual citizenship. The changes made to the Names Act came into force on the 1st of March 2012 but concerns have, however, already been raised that the changes are minimalistic and may not suffice to comply with EU law.⁷

Situations and legal relationships of a personal nature within the European Union have become truly internationalized due to the mobility of persons, migratory flows and the inter-tangling of populations.⁸ As many daily actions, both in the public and in the private spheres, require a person to provide evidence of his or her own identity, personal status and also evidence of the nature of the links between different family members, problems regarding names have emerged in cross-border situations in Europe. The situation is further complicated by the fact that the various legal cultures within the Union determine and recognize names in considerably different ways.⁹ This has resulted in creating the inconvenient situation where

⁴ The Swedish Ministry of Justice's case number Ju2007/9279/L2 and the European Commission's case number 2006/4454.

⁵ *Ibid.*

⁶ Translated in accordance with the Swedish Government Office's translation.

⁷ Hellner, *Sverige, EU och den internationella privaträtten*, SvJT 2011 p 411, footnote 73.

⁸ On the 1st of January 2010, 32.5 million non-nationals (persons who are not citizens of the country of residence) were living on the territory of an EU Member State. More than 12.5 million of these were citizens of another EU Member State.

See:

http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Migration_and_migrant_population_statistics

⁹ The possibility for a child to bear both of his or her parents' surnames is especially subject of conflicting rules in different Member States. It is specifically allowed or even imposed by law in some Member States, whereas in others, it is specifically prohibited, such as in Sweden. See section 8.4 of this thesis.

citizens of the Union might find themselves having different names in different Member States.

Although there are no harmonized substantive rules or unified conflict rules regarding names at EU level to date, fundamental EU rights have come to play an important role in matters concerning names. This is partly because EU rights have come exceedingly closer to national rights with regard to their enforceability.¹⁰ Rights derived from EU law have also grown in scope from their initial and limited target of economic integration to the political project of building a truly integrated Union. As a result, this has enabled the rise of a group of common, fundamental European rights. One example of this is the status of “EU citizenship” transferred upon citizens of any of the Member States. EU citizenship has effectively created an independent source of rights closely connected to matters regarding personal status and names in EU law. The EU citizenship introduces separate rights that are directly applicable to EU citizens and that they may invoke, if those rights are implicated, in their national courts.¹¹ Important examples, within the context of this thesis, include the rights of free movement and non-discrimination based on grounds of nationality, as enshrined in Articles 18 and 21 TFEU.¹²

With regard to the use of citizenship as an independent source of rights, along with the wish to remove obstacles to European integration, the Court of Justice of the European Union (the ECJ) has on several occasions decided on the issue of diverging names within the Union. Throughout a number of preliminary rulings, the ECJ has employed a liberal interpretation of European citizenship rights and frequently found that national laws of Member States, in particular conflict rules regarding the applicable law, have been incompatible with rules concerning the free movement of persons. The ECJ has also held in its case law that national conflict rules which subject surnames to the law of the country of citizenship and, in cases of dual nationality, gave priority to their State’s own citizenship, may violate EU rules regarding discrimination on grounds of nationality. These steps taken by the ECJ have not been uncontested as matters regarding names have close ties to public law and have traditionally only been a matter for national law. The ECJ thereby broke into territory which had until then

¹⁰ Jacobi, *A Fürstin by any other name? European citizenship and the limits of individual rights in the ECJ*, Columbia Journal of European Law, Vol. 17, p 644.

¹¹ Maas, *Unrespected, Unequal, Hollow? Contingent Citizenship and Reversible Rights in the European Union*, Columbia Journal of European Law, Vol. 15, p 265 and 270.

¹² Jacobs, *Citizenship of the European Union – A legal analysis*, European Law Journal, Vol. 13, p 591 and 595.

been the *domaine réservé* of the Member States, and as a result there were, to a certain extent, no longer well-established limits to EU law in name matters.

1.2 Purpose and delimitation of the topic

This Master of laws thesis, which will be submitted to the Faculty of Law of Uppsala University, has the overarching purpose of analyzing whether the Swedish Names Act, in its newly adapted state, is compatible with EU law regarding name matters. It is important to note that this thesis is limited to the discussion of the law concerning natural persons and the assessment of their forenames and surnames within the European Economic Area (EEA) and Switzerland. Implications of cross-border situations, which include citizens of other countries or questions related to intellectual property law that raise name matters, will not be addressed.

In order to analyze whether Swedish law is compatible with EU law, it is necessary to first establish what the current status of EU law is, as well as the extent of its scope. As was mentioned earlier, European Union law recognizes extensive rights for an individual to move and reside freely within the Union. In addition to this, EU-citizens are guaranteed not to be discriminated against on, *inter alia*, the basis of nationality. These constitutional rights have enabled the ECJ in its case law to establish that national law, in particular conflict rules regarding the applicable law, is not compatible with EU law. The ECJ's jurisprudence concerning name matters will therefore be analyzed in detail in order to clarify the current status of EU law. Although it is important for Sweden to live up to its obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and other international instruments in name matters, such as the United Nations Convention on the Rights of the Child¹³, and although these include relevant provisions, this thesis will not address these instruments. The objective of this thesis is purely to analyze whether Sweden complies with EU law, developed through the ECJ's case law, and not with other international obligations.

As most of the case law from the ECJ, as well as the Commission's reasoned opinion about Sweden, has concerned problems related to the law applicable to name matters as well as the recognition of names determined in another Member State, this thesis will be centered around

¹³ Sweden became a signatory to the United Nations Convention on the rights of the Child on the 26th of January 1990 and ratified the convention on the 29th of June the same year.
See: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

these areas of private international law. Questions regarding the jurisdiction of national courts in matters concerning names are outside the scope of this thesis.

With the overarching objective of this thesis in mind, this thesis will furthermore analyze and deduct the current status of Swedish private international law in name matters. This thesis will in particular address the situation that has been raised by the Commission when persons have dual citizenship. In order to gain perspective and enhance the understanding of the developments of private international law regulations of names, this thesis will compare Swedish law to Finnish law and Swiss law.

Finally, in order to determine whether the solutions offered by the changes enacted in 2012 in the Swedish Names Act suffice to comply with EU law, this thesis will compare the current state of Swedish name law with the ECJ's preliminary rulings. This analysis will be focused on the rights of EU citizens enshrined in Articles 18 and 21 TFEU.

1.3 Method and sources

As this thesis evaluates law on both EU level and national level, a variety of materials have been used. The analysis is conducted through a legal dogmatic method in order to deduct the current status of EU law and Swedish law. In parts, elements of a legal policy analysis are included.

When EU law is analyzed, primary EU legislation as well as complementary EU acts and legal literature is used. Since the focus of the evaluation will be on case law from the ECJ, it is suitable to adopt a chronological approach for a large part of the analysis, in order to trace the development of EU law regarding name matters. The ECJ's jurisprudence provides the backbone of this thesis and will be analyzed in as much detail as the scope of this thesis allows for. A thorough review of the factual backgrounds as well as the ECJ's rulings will therefore be provided in each case. The author of this thesis will also express her own reflections on each case and consider the relevance and bearing of each case on rules of private international law.

When Swedish law is analyzed in this thesis, primary sources of law are used, most notably the Swedish Names Act and its preparatory works. Relevant case law from Swedish courts

will also be addressed. As a part of this Master of Laws thesis, the author conducted an internship with the Division for EU Affairs at the Swedish Ministry of Justice. During her time as an intern at the Division, she was given the opportunity to have access to many of the Ministry's documents regarding the Swedish Names Act. Official governmental reports, relevant literature and memoranda compiled by the Swedish Government Offices will, thus, be used, and in particular Hellner's study conducted on behalf of the Swedish Ministry of Justice.¹⁴ A chronological method will be used to outline the changes made to the Swedish Names Act.

1.4 Definitions, terminology and translations

Private international law, or the conflict of laws, is the part of the law that determines the applicable law and which court may exercise jurisdiction when aspects of a private law relationship are connected to more than one State.¹⁵ The discipline also regulates whether foreign judgments and decisions may be recognized and enforced in a State.¹⁶ Private international law rules can, thus, be described as being of a technical nature as they themselves do not determine the merits of the case. To maintain consistency throughout this thesis, the term "private international law" will be used to refer to this discipline of law.

This thesis will frequently refer to the phrase "matters regarding names" or similar expressions. Issues that are primarily included in these expressions are the recognition by national courts or authorities of names, the spelling and changes made to a name, as well as the conditions that must be met in accordance with any national law in order to obtain a name in the first place. The expressions are general, meaning that they do not differentiate between the causes of a name acquisition, such as birth, marriage or divorce or gender change.

Throughout this thesis "nationality" and "citizenship" will be used synonymously. The author has based her definition of "nationality" on Article 2(a) of the European Convention of Nationality of 1997, which defines it as "the legal bond between a person and a State and does not indicate the person's ethnic origin".¹⁷ The author's decision is, furthermore, based on the fact that Swedish law does not differentiate between the two terms.

¹⁴ Ds (*Ministry Publication Series*) 2011:39, *Internationella namnfrågor*.

¹⁵ Bogdan, *Concise Introduction to EU Private International Law*, 2nd ed., p 3.

¹⁶ *Ibid.*

¹⁷ *The European Convention on Nationality*, The Council of Europe, Strasbourg, 6.XI.1997. Available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/166.htm>.

After the entry into force of the Treaty of Lisbon on the 1st of December 2009, the EU acquired the competences previously conferred on the European Community. European Union law has, thus, replaced Community law. EU law now includes all the provisions previously adopted under the Treaty on European Union as applicable before the Treaty of Lisbon. References to the Treaty establishing the European Community (EC) will nevertheless be used in this thesis where reference is made to case law of the ECJ before the entry into force of the Treaty of Lisbon or legislation enacted before this date.

Throughout this thesis, references will frequently be made to Swedish legislation, legal terms, as well as preparatory works consisting of preceding government bills and law committee reports. Most notably the Swedish Names Act. With regards to particular Swedish legal terms, the “Glossary for the Courts of Sweden” has been frequently used.¹⁸ Translations, where available in English, has been gathered from the Swedish Government Offices. This thesis will, furthermore, refer to sources in German and French. Where official translations have not been available in English, the author of this thesis has translated freely, striving to find the most appropriate terms. Where the translations are the author’s own, this is clearly indicated in footnotes.

1.5 Contents

This thesis is divided into eleven separate sections. With the objective of assessing whether Swedish law is compatible with EU law in mind, section two will provide the reader with relevant background information in order to clarify the legal nature of names, the differences in legislation in Member States regarding name matters and the role of EU private international law. Sections three to seven of this thesis are devoted to the analysis of the ECJ’s leading jurisprudence in name matters. These sections include an in-depth analysis of each one of the cases in order to establish what the current status of EU law is. Following this analysis, section eight of this thesis will look solely on Swedish law regarding names and will analyze the changes made to the Swedish Names Act in 2012. Section nine will thereafter provide the reader with a comparative analysis of Swiss law and Finnish law in relation to

¹⁸ *Glossary for the Courts of Sweden*, Internationella Kansliet och informationsavdelningen Domstolsverket, July 2010- revised April 2012. Available at: http://www.domstol.se/Publikationer/Ordlista/svenskengelsk_ordlista.pdf.

Swedish law in name matters. The compatibility of the Swedish Names Act with EU law, as regards the right to move and reside freely within the Union as well as the right not to be discriminated against on grounds of nationality, will thereafter be examined. The conclusions reached in this thesis, as well as the author's own final remarks, are summarized in section eleven.

2 What's in a name?¹⁹

2.1 What purpose does a person's name serve?

Every individual has a name. A name's foremost purpose is to distinguish and individualize a person from the rest. A name therefore constitutes a vital part of a person's identity.²⁰ A surname can additionally define integration into a specific family as many cultures traditionally hold that a surname is handed down from one generation to the next. Surnames may therefore serve as an important measure for cohesion and a person's sense of belonging to a particular family or community. A name may not only constitute an essential factor of psychological and personal identity, but also of ethnic and most likely, national identity.²¹ Due to the close link to the cohesion of communities that names have on a larger scale, they become not only associated with personal identity but also the identity, history, language and geopolitical aspects of a sovereign state. Names may therefore, for example, serve as a means to preserve the national language, enhance integration of immigrants by altering their name according to national standards and help preserve the nation's identity.²² A name also constitutes the very basic element on which a person can exercise fundamental rights and

¹⁹ The title refers to Juliet's famous line from Shakespeare's play "Romeo and Juliet", where she tells Romeo that a name is an artificial convention; "What's in a name? That which we call a rose by any other name would smell as sweet". See Shakespeare, *Romeo and Juliet*, (Act II, Scene II, 1-2). Available at: http://www.literaturepage.com/read/shakespeare_romeoandjuliet.html

²⁰ The European Court of Human Rights has described a name as the principal factor that individualizes a person in society. See the Court's judgment of 9 November 2010 in Case No 664/06, *Losonci Rose and Rose v Switzerland*, paragraph 51 ("*le nom, en tant qu'élément d'individualisation principal d'une personne au sein de la société, appartient au noyau dur des considérations relatives au droit au respect de la vie privée et familiale*").

²¹ C-391/09, *Malgożata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others*, Opinion of Advocate General Jääskinen delivered on 16 December 2010, paragraph 6.

²² Transliteration or assimilation of a name is very often offered as a solution to problems that may occur with foreign names in many countries. See Lehmann, *What's in a name? Grunkin-Paul and beyond*, Yearbook of Private International Law, Vol. 10, p 136.

duties in the public sphere, such as the duty to pay taxes or the right to vote.²³ In order for States to control these rights and obligations, and also to keep track of citizens, registers of civil status are established.²⁴ In order to simplify the administration of such civil status registers, States may have an interest in that names remain uniform. Compelling reasons therefore exist for States to limit the individual freedom of choosing, altering or changing a name by reference to, for example, considerations of an administrative nature, national public policy or name stability in general.

2.2 The legal nature of names

Due to the multiple purposes that a name serves, its legal nature is multifaceted. The issue of into which legal discipline names should be attributed, has been a matter of debate in Sweden as well as in other States.²⁵ The function of a name as a means to individualize a person has resulted in that private law and public law aspects are inter-twined.

Some scholars have argued that the rules governing the configuration, change and acquisition of a name are necessary in order to form a well-functioning social and public order.²⁶ From a private international law point of view, using nationality as a connecting factor in choice-of-law rules in name matters can symbolize a State's interest to make sure that names are configured and acquired in a manner consistent with their own laws.

The close ties that a name has with an individual's personal life and integrity, has furthermore resulted in that name matters are subjected to rules governing fundamental and human rights. The right to private life enshrined in Article 8 of the ECHR has, for example, been interpreted to include names and there is a vast amount of case law from European Court of Human Rights regarding the matter.²⁷ A person's freedom of choice regarding how his or her name

²³ Lehmann, *What's in a name? Grunkin-Paul and beyond*, Yearbook of Private International Law, Vol. 10, p 136.

²⁴ This is also the case in Sweden where there is a requirement that all citizens must be registered with their names along with their civil status in a national register. The national register of names and civil statuses are handled by the Swedish Tax Agency (*Skatteverket*) in Sweden. Regarding who is obliged to register in Sweden, see sections 2-5 of the Swedish Law on National Registration (*Folkbokföringslagen SFS 1991:481*).

²⁵ Höglund, *Namnslagen, En kommentar*, p 31.

²⁶ *Ibid.*

²⁷ In the case No. 16213/90, *Burghartz v Switzerland*, delivered on 22 February 1994, the European Court of Human Rights established that a surname is an inherent part of a person's personal life and family life. Surnames are, thus, protected under Article 8 ECHR. A person's forename has also been held to be protected under Article 8 ECHR. See the European Court of Human Rights' judgment delivered on 11 July 2002 in Case No. 28957/95, *Christine Goodwin v. United Kingdom*.

should be formed and acquired may, thus, be perceived as an inherent human right. In a private international law context, the human rights aspect of a name speaks in favor of flexible choice-of-law rules, where domicile or habitual residence should be used as a connecting factor rather than nationality. It also speaks in favor of generous rules regarding the recognition of names.

Names are also undoubtedly linked to family law. Names mainly result from the change of a civil status which is family related, such as marriage or divorce. The private international law aspects of names may, nonetheless, operate independently of such rules regarding civil status. The law applicable to the marital status of a person may therefore not always be the law applicable to the name derived thereof. Pursuant to Swedish law, a person's name is perceived as separate from marital status and not merely as an effect of that status. The applicable private international law rules related to civil status and names, thus, differ.²⁸ An alternative standpoint would have been to view names as dependent upon civil status and be governed by the same law. This standpoint has, however, for a long time been perceived as an undesirable way of regulating names in Sweden.²⁹

2.3 The role of EU private international law

Before Sweden became a Member State of the EU, its private international law rules were described as being shattered and a “patchwork” of laws, which regulated single sub-queries of different legal fields.³⁰ Following Sweden's accession to the EU in 1995, a vast amount of Swedish private international law regulations have, however, come to include an EU dimension.³¹ Since the entry into force of the Treaty of Lisbon on 1 December 2009, the adoption at EU level of measures for the unification of private international law rules is

²⁸ Personal names were for the first time regulated in the same Act in an earlier version of the Swedish Names Act (*SFS 1963:521 Namnlag*). Before that, a married woman's acquisition of a name was, for example, regulated in the predecessor of the current Swedish Marriage Code (*SFS 1920:405 Giftermålsbalken*). Names were, thus, arguably more closely dependent on civil status at the time. For more information see prop (*Government Bill of Sweden*) 1981/82:156 p 13.

²⁹ Bogdan, *Några anteckningar till svensk internationell namnrätt*, Tidskrift för Sveriges Advokatsamfund, 1977 p 45.

³⁰ Hellner, *Sverige, EU och den internationella privaträtten*, SvJT 2011 p 388. There were ambitions to codify private international law rules in family matters, see SOU (*Swedish Government Official Reports Series*) 1987:18. Compelling reasons, however, existed not to regulate these matters, see prop 1989/90:87 p 9.

³¹ Hellner, *Sverige, EU och den internationella privaträtten*, SvJT 2011 p 388.

governed by Title V (Articles 67-89) of Part III of the Treaty on the Functioning of the European Union (TFEU).³²

It is within the Member States' competence to organize their system of recording civil statuses as well as surnames and forenames. There are, however, current plans to recognize the effects of civil status documents, such as names, at EU level. In December 2010 the Commission launched a consultation process with the Member States and national constituents in their Green Paper "*Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records*"³³. The Commission had, nonetheless, already earlier emphasized the importance of facilitating the recognition of different types of documents as well as the mutual recognition of civil status.³⁴ The aim of the Green Paper from 2010 was to launch a debate on matters relating to the freedom of movement of public documents as well as the recognition of the effects of civil status records, with a view of developing EU policies and legislative proposals in these areas.³⁵ The Green Paper specifically addressed the problem of discrepancies of names that may occur within the Union. The Commission emphasized that the attribution of names is a basic element in a person's identification and that it should be possible to guarantee the continuity and permanence to all EU citizens in this respect.³⁶ A legislative proposal regarding the recognition and enforcement of the effects of civil status, and therefore possibly also name matters, is planned for 2013.³⁷ It is, nonetheless, uncertain whether or not the proposal will include private international law aspects.³⁸

³² These provisions replaced Title IV (Articles 61-69) of the EC Treaty under which many important measures were adopted in the sphere of private international law.

³³ COM (2010) 747 final, Green Paper – "*Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records*", 12 December 2010.

³⁴ COM (2003) 401 final, Communication from the Commission to the Council and the European Parliament – "*Area of freedom, security and justice: assessment of the Tampere programme and future orientations*", 2 June 2004, p 11.

³⁵ COM (2010) 747 final "*Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records*", 12 December 2010, section 2.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ Although it is not possible to predict what detailed regulations the Commission may have had in mind when issuing the Green Paper, it may, however, be worth addressing the studies undertaken prior to the issuance of the Green Paper. Before the issuance, the Commission ordered a study on the options available for resolving the problems that citizens of EU Member States may encounter due to the differing legislation in Member States as regards to the recognition of civil status. Regarding the problems with diverging names, one of the reports suggested various policy options to solve the matter. Firstly, it proposed that a mutual recognition of registrations carried out by the State of nationality would be introduced. Secondly, a mutual recognition of the original registration was proposed. Thirdly, more liberal choice of name regimes whereby the Member States' substantive laws would be changed, was suggested. Fourthly, a legislative initiative introducing a European law on names was suggested. Lastly, a "certificate of name" that could be shown to authorities in all Member States

The Swedish Ministry of Justice stated in response to the consultation launched by the Commission's Green Paper that on "the issue of mutual recognition of civil status records, Sweden welcomes the attention paid to underlying problems and needs"³⁹. The Ministry of Justice, nonetheless, noted that the Commission's draft solutions were vague in their scope and also to a certain degree unclear.⁴⁰ The Swedish Ministry of Justice therefore stated that "Sweden does not wish to see an automatic recognition arrangement and does not regard a general solution for all types of status record as possible"⁴¹. It was instead iterated that a way forward might "be to work on private international law instruments on each sub-area"⁴².

The Swedish Parliament, through its Committee on Civil Affairs, furthermore noted that the mutual recognition of civil status records was not possible to take a definite stand on since the Green Paper did "not include any actual proposals".⁴³

was proposed. No single policy was mentioned to be preferred over the other one. It is not unlikely that one of these policies will be embraced and suggested by the Commission in 2013 as a solution to avoid discrepancies of names. See "*Final Report for the European Commission, DG JLS- Directorate-General for Justice, Freedom and Security*", on the project No. JLS/2006/C4/004 conducted by von Freyhold, Vial & Partner Consultants-Wissenschaftliche Berater und Gutachter, p 648. Available at:

http://ec.europa.eu/civiljustice/publications/docs/study_ms_legislation_country_reports_en.pdf

³⁹ The Swedish Ministry of Justice's view on the Commission's Green Paper. Available at:

http://ec.europa.eu/justice/newsroom/civil/opinion/files/110510/public_authorities/sweden_minjust_en.pdf

⁴⁰ The Swedish Parliament's view on the Commission's Green Paper. Available at:

http://ec.europa.eu/justice/newsroom/civil/opinion/files/110510/public_authorities/sweden_parliament_en.pdf

⁴¹ The Swedish Ministry of Justice's view on the Commission's Green Paper. Available at:

http://ec.europa.eu/justice/newsroom/civil/opinion/files/110510/public_authorities/sweden_minjust_en.pdf

⁴² *Ibid.*

⁴³ The Swedish Parliament's view on the Commission's Green Paper. Available at:

http://ec.europa.eu/justice/newsroom/civil/opinion/files/110510/public_authorities/sweden_parliament_en.pdf

3 Konstantinidis: A first step

3.1 Facts of the case

The case of *Konstantinidis*⁴⁴ is the first case where the ECJ ruled that national measures related to names, were incompatible with the freedoms protected under EC law. The case concerned a Greek national, Christos Konstantinidis (the applicant), who resided in Germany where he worked as a self-employed masseur as well as an assistant hydrotherapist.⁴⁵ Pursuant to his Greek birth certificate, his name was “Χρήστος Κωνσταντινίδης”.⁴⁶ In 1983 he married a German national and the German authorities registered his name as “Christos Konstadinidis”.⁴⁷ He later applied to have the entry of his surname changed to “Konstantinidis”, as this version indicated a more accurate pronunciation of his name. “Konstantinidis” was also the way his name had been transcribed in Roman characters in his Greek passport.⁴⁸

German rules in force at the time, nonetheless, prescribed that the name on a marriage certificate must correspond to that appearing on a birth certificate.⁴⁹ Since the name appearing on the applicant’s birth certificate was “Χρήστος Κωνσταντινίδης”, his name was transliterated, in accordance with ISO Standard 18, and changed by the Amtsgericht Tübingen (the Court having jurisdiction to order the rectification of entries in the situation).⁵⁰ As a result, the applicant’s name was transcribed appearing as “Hréstos Kónstantinidés”.⁵¹ The applicant objected to the transliteration arguing that it distorted the pronunciation of his name.⁵² The Amtsgericht Tübingen stayed the national proceedings and referred the case to the ECJ for a preliminary ruling, asking whether it was contrary to Articles 5 and 7 of the Treaty establishing the European Economic Community (TEEC) to allow a name to be

⁴⁴ C-168/91, *Christos Konstantinidis v Stadt Altensteig- Standesamt and Landratsamt Calw.-Ordnungsamt.*, Judgment of the Court 30 March 1993.

⁴⁵ *Ibid* paragraph 3.

⁴⁶ *Ibid.*

⁴⁷ *Ibid* paragraph 4.

⁴⁸ *Ibid.*

⁴⁹ *Ibid* paragraph 2, which refers to Article 2 of the Convention on the Representation of Names and Surnames in Registers of Civil Status of 13 September 1976 (Bundesgesetzblatt 1976 II, p 1473), which came into force in Germany on 16 February 1977.

⁵⁰ C-168/91, *Christos Konstantinidis v Stadt Altensteig- Standesamt and Landratsamt Calw.-Ordnungsamt.*, Judgment of the Court 30 March 1993, paragraph 5.

⁵¹ *Ibid.*

⁵² *Ibid* paragraph 6.

entered in the registers of civil status in a spelling differing from the phonetic transcription, whereby the name's pronunciation is modified and distorted.⁵³ The referring court also asked whether such a fact constituted an interference with the freedom of establishment and freedom to provide services laid down in Articles 52, 59 and 60 TEEC.⁵⁴

3.2 The ECJ's ruling

In its terse ruling, the ECJ only answered the referring Court's question as regards Article 52 TEEC. The ECJ stated, firstly, that Article 52 TEEC constituted one of the fundamental legal provisions in the Community.⁵⁵ By prohibiting any discrimination on grounds of nationality resulting from national laws, regulations or practices, Article 52 TEEC sought to ensure, as regards the right to establishment, that a Member State accords to nationals of other Member States, the same treatment as it accords to its own nationals.⁵⁶

The ECJ thereafter considered whether the German national rules in force at the time relating to the transcription in Roman characters of a Greek name, were capable at placing the applicant at a disadvantage in comparison with the way in which a German national would have been treated in the same circumstances.⁵⁷ The ECJ asserted that although it was for the Member States to adopt legislative or administrative measure laying down detailed rules for the transcription of names, such rules may be regarded as incompatible with Article 52 TEEC if they caused inconvenience of such a degree that they interfered with the applicant's freedom to exercise his right of establishment.⁵⁸ The ECJ held that such interference would occur if a Greek national is obliged by national legislation of the State in which he or she is established in, in the pursuit of his occupation, to use a spelling of his name which modifies its pronunciation and if the distortion exposes him to the risk that potential clients may confuse him with other persons.⁵⁹ The ECJ, thus, concluded that it was contrary to Article 52 TEEC for a Greek national to be obliged, under the applicable national legislation, to use a

⁵³ C-168/91, *Christos Konstantinidis v Stadt Altensteig- Standesamt and Landratsamt Calw.-Ordnungsamt.*, Judgment of the Court 30 March 1993, paragraph 8.

⁵⁴ *Ibid* paragraph 8 subparagraph 2.

⁵⁵ *Ibid* paragraph 11.

⁵⁶ *Ibid* paragraph 12.

⁵⁷ *Ibid* paragraph 13.

⁵⁸ *Ibid* paragraphs 14-15.

⁵⁹ *Ibid* paragraph 16.

spelling of his name whereby its pronunciation is modified and the resulting distortion exposes him to the risk that potential clients may confuse him with other persons.⁶⁰

3.3 Analysis

3.3.1 Competence

Konstantinidis marks the first step of the ECJ's embarked journey of ruling that national legislation and customs related to names, although lying within the competence of Member States, may violate EC law. The ECJ was, however, careful to stress that the way in which Member States organize the registration of their populations fell outside the scope of EC law at the time.⁶¹ The ECJ had also underlined that the system chosen to transcribe names is a matter for national authorities. Even though EC law did not explicitly regulate these matters at the time of the judgment, the ECJ found itself competent to impose a limit on national sovereignty in this regard.⁶²

The ECJ's brief statement about how it established its competence is not made more easily accessible when analyzing the lengthy opinion delivered by Advocate General Jacobs. Jacobs expressed the view that Community law applied when a person goes to another Member State in order to exercise the rights conferred on him by the free movement provisions of Articles 48 to 66 TEEC.⁶³ According to Jacobs, the fact "that the rules governing the writing of names in public registers are in principle a matter for national law rather than Community law does not *of course* [author's emphasis] mean that any discrimination in those rules is removed from the ambit of the Treaty"⁶⁴. This bold statement, which effectively must be said to disregard Member States' national sovereignty to a certain extent, is *not* re-iterated in the ECJ's final judgment. The ECJ, as mentioned above, was careful not to employ a "federalist" attitude. The Court kept its reasoning "short and sweet" in this regard: if a national regulation interfered with the rights enshrined in the TEEC, by causing a national such a degree of

⁶⁰ C-168/91, *Christos Konstantinidis v Stadt Altensteig- Standesamt and Landratsamt Calw.-Ordnungsamt.*, Judgment of the Court 30 March 1993, paragraph 17.

⁶¹ *Ibid* paragraph 14.

⁶² A comprehensive discussion regarding whether the ECJ's step in this direction was appropriate with regards to fundamental general principles of EU law, such as the principles of subsidiarity and proportionality, is outside of the scope of this thesis.

⁶³ C-168/91, *Christos Konstantinidis v Stadt Altensteig- Standesamt and Landratsamt Calw.-Ordnungsamt.*, Opinion of Advocate General Jacobs delivered on 9 December 1992, paragraph 21.

⁶⁴ *Ibid*.

inconvenience that it interfered with his freedom of establishment, the ECJ may exercise their jurisdiction.⁶⁵

3.3.2 The scope of Article 52 TEEC

As the ECJ considered itself competent to examine whether the border of impeding the freedom of establishment had been crossed, or at least to examine where the border lied, it analyzed the scope of Article 52 TEEC.⁶⁶ The ECJ had concluded that Article 52 TEEC was violated if the transcription had distorted the name, the applicant was forced to use a new name and, as a result, the applicant ran the risk of confusion of identity by his *potential* customers. The emphasis was, thus, put on the *potential* risk of confusion of identity in the ECJ's ruling. It has been pointed out by one scholar that this emphasis meant that a deformation *as such* was not a violation of EC law at the time, but if the deformation amounted to the *risk of confusion of identity* it was a violation.⁶⁷ This would effectively mean that if the German authorities would have registered the applicant's name in a distorted way, but this distorted name would have been used consistently for all the years the applicant worked and resided in Germany, it would not have been a violation of EC law and Article 52 TEEC.⁶⁸

The ECJ did not analyze the substantive result of the particular transcription system ISO Standard 18 and whether it actually amounted to give rise to a potential risk of confusion of identity, as Advocate General Jacobs did in his opinion.⁶⁹ The ECJ instead held that it was for the national Court to determine. It was, however, noted by critics that the fact that the applicant waited seven years before he launched his complaints, means that he had not suffered such inconvenience.⁷⁰

What is significant about the ruling is that the ECJ did not refer to the prohibition against discrimination enshrined in Article 7 TEEC. The Court reasoned that the potential injury

⁶⁵ C-168/91, *Christos Konstantinidis v Stadt Altensteig- Standesamt and Landratsamt Calw.-Ordnungsamt.*, Judgment of the Court 30 March 1993, paragraph 15.

⁶⁶ Lawson, *Christos Konstantinidis v Stadt Altensteig- Standesamt and Landratsamt Calw.-Ordnungsamt.*, *Judgment of the Court (Sixth Chamber) 30 March 1993*, Common Market Law Review, Vol. 31, p 401.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ C-168/91, *Christos Konstantinidis v Stadt Altensteig- Standesamt and Landratsamt Calw.-Ordnungsamt.*, Opinion of Advocate General Jacobs delivered on 9 December 1992, paragraphs 25-30.

⁷⁰ Lawson, *Christos Konstantinidis v Stadt Altensteig- Standesamt and Landratsamt Calw.-Ordnungsamt.*, *Judgment of the Court (Sixth Chamber) 30 March 1993*, Common Market Law Review, Vol. 31, p 401.

caused by the German practice to the professional activities of the applicant were enough for the Court to assume a possible violation of Article 52 TEEC. The question concerning discrimination was, thus, avoided.

3.3.3 Consequences for private international law rules

The preliminary ruling in the case of *Konstantinidis* illustrates the initial step taken by the ECJ in establishing competence in name matters. The importance of the case is, nonetheless, limited as regards private international law rules in name matters, since these were not directly at stake in the case. The judgment did not include a comprehensive discussion of whether it was more appropriate to apply Greek naming rules instead of German substantive rules to the applicant's name. Neither did it address whether the applicant's Greek name should have been recognized without a transliteration. The case can, however, be said to have implicitly raised the question whether a Member State may subject an immigrant to its own law on name matters on the ground that the State is the immigrant's new domicile or habitual residence.⁷¹

4 Garcia Avello: EU law applied broadly in a case with dual citizenship

4.1 Facts of the case

Almost ten years after the ruling of *Konstantinidis* had been delivered, the case of *Garcia Avello*⁷² reached the ECJ. The *Garcia Avello*-case is an illustration of how EU citizenship and the rights of free movement were interpreted by the Court as reducing the scope from which EC law was excluded. The concerned persons' dual citizenship played an important role when the ECJ reached this conclusion.

⁷¹ Bogdan, *Concise Introduction to EU Private International Law*, 2nd edition, p 27.

⁷² C-148/02, *Carlos Garcia Avello v État Belge*, Judgment of the Court 2 October 2003.

The case of *Garcia Avello* concerned the surname borne by two children resident in Belgium.⁷³ Their mother, Ms. I. Weber, a Belgian national, had married the children's father, Mr. Garcia Avello, who was a Spanish national.⁷⁴ The two children had dual Belgian and Spanish citizenship and were born in Belgium.⁷⁵ In accordance with Belgian law, the Belgian Registrar of Births, Marriages and Deaths entered the patronymic surname "Garcia Avello" as the children's surname on their birth certificates.⁷⁶ The children had, however, also been registered with the consular section of the Spanish Embassy in Brussels under the surname "Garcia Weber" pursuant to Spanish law.⁷⁷

The parents of the children, acting in their capacity as the legal representatives of their children, applied to the Belgian Minister for Justice⁷⁸ and requested that their children's surnames be changed to "Garcia Weber" in accordance with Spanish naming customs.⁷⁹ The Minister for Justice rejected the application and noted that any request for the mother's surname to be added to the father's, is rejected on the ground that, in Belgium, children bear their father's surname.⁸⁰ The applicants soon thereafter brought an application for an annulment of the Minister's decision before the Conseil d'État (the Supreme Administrative Court in Belgium) on the grounds that the decision infringed both the Belgian Constitution and Article 18 EC (now Article 21 TFEU) since it treated children with only Belgian nationality and those with dual nationality, in the same manner without any objective justification.⁸¹ The Conseil d'État decided to stay the proceedings and referred the question to the ECJ for a preliminary ruling.⁸²

⁷³ C-148/02, *Carlos Garcia Avello v État Belge*, Judgment of the Court 2 October 2003, paragraph 13.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid* paragraphs 13-14.

⁷⁷ *Ibid* paragraph 16.

⁷⁸ Pursuant to Article 2 of Chapter II of the Belgian Law of 15 May 1987 on surnames and forenames, any person who has cause to change his or her surname or forename shall submit a reasoned application to the Belgian Minister for Justice.

⁷⁹ C-148/02, *Carlos Garcia Avello v État Belge*, Judgment of the Court 2 October 2003, paragraph 15.

⁸⁰ *Ibid* paragraph 18.

⁸¹ C-148/02, *Carlos Garcia Avello v État Belge*, Judgment of the Court 2 October 2003, paragraph 19.

⁸² The Conseil d'État did this after setting aside Article 43 EC as being irrelevant in so far as freedom of establishment is not in issue with regard to minor children as it had been in the case of *Konstantinidis*.

4.2 Belgian private international law and naming customs

At the time of the judgment, the third paragraph of Article 3 of the Belgian Civil Code provided that the laws governing personal status and capacity, shall apply to Belgian nationals even if they are habitually resident outside of Belgium.⁸³ This provision constituted the basis on which Belgian courts applied the rule that personal status and capacity are determined by the national law governing such persons. Whenever Belgian authorities were encountered with a Belgian national who at the same time had one or more additional nationalities, they would give precedence to the person's Belgian nationality. According to the Belgian State, this naming custom was derived in accordance with the customary rule of origin codified by Article 3 of the Hague Convention of 12 April 1930 on certain questions relating to the conflict of nationality laws (the Hague Convention), under which a person having two or more nationalities may be regarded as a national by each of the States whose nationality he or she possesses.⁸⁴

4.3 The ECJ's ruling

The ECJ firstly examined if the situation in issue fell within the scope of Community law and, in particular, of the Treaty provisions on citizenship of the Union. The ECJ held that since the applicants' children possessed the nationality of two Member States of the Union, they also enjoyed the status of Union citizenship pursuant to Article 17 EC.⁸⁵ Noting that citizenship of the Union is destined to be the fundamental status of nationals of Member States, the ECJ clarified that this status allows nationals of Member States who find themselves in the same situation to enjoy within the material scope of the EC Treaty, the same treatment in law irrespective of their nationality.⁸⁶

Similarly to the ECJ's ruling in the case of *Konstantinidis*, the Court underlined that the rules governing a person's surname came within the competence of the Member States.⁸⁷ The ECJ, nonetheless, stated that when exercising that competence, the Member States must comply with EC law and in particular the Treaty provisions on the freedom of every citizen of the Union to move and reside in the territory of the Member States.⁸⁸ The ECJ carefully

⁸³ C-148/02, *Carlos Garcia Avello v État Belge*, Judgment of the Court 2 October 2003, paragraph 6.

⁸⁴ *Ibid* paragraph 8.

⁸⁵ *Ibid* paragraphs 27 and 21.

⁸⁶ *Ibid* paragraphs 22-23.

⁸⁷ *Ibid* paragraphs 25.

⁸⁸ *Ibid*.

highlighted in this respect that citizenship of the Union, as established by Article 17 EC, is not intended to extend the material scope of the EC Treaty to internal situations that have no link to EC law.⁸⁹ The situation in issue did, however, provide a link to Community law according to the ECJ as “the children were nationals of one Member State and lawfully resident in another”⁹⁰. The ECJ, therefore, held that the matter did come within the scope of EC law and that the children of the applicants in the main proceedings could rely on the right not to suffer discrimination on grounds of nationality regarding the rules governing their surname pursuant to Article 12 EC.⁹¹

The Court thereafter examined whether Articles 12 *and* 17 EC precluded the Belgian authorities from turning down an application for a change of surname. The ECJ first of all noted that it had been settled in previous case law that the principle of non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way.⁹² In the case at hand, persons who had in addition to their Belgian nationality, the nationality of another Member State, were as a general rule treated in the same way as persons who had only Belgian nationality. The ECJ’s analysis therefore addressed the question whether persons with only a Belgian nationality and persons with dual nationality, were in fact different and, thus, allowed the applicants’ children to assert their right to be treated differently. The ECJ held that, in contrast to “mono-Belgians”, Belgian nationals who also held Spanish nationality, had different surnames under the two legal systems concerned.⁹³ The children in the present case were, moreover, refused to bear the surname resulting from the application of the law of the Member State which determined the surname of their father, i.e. Spanish law.⁹⁴ The ECJ noted that such discrepancy in surnames is liable to cause serious inconvenience for those concerned, both in their professional life as well as in their private life. The children were, hence, likely to face difficulties benefitting in one of the Member States of which they are a national from the legal effects of diplomas or documents drawn up in the other Member State.⁹⁵ These difficulties

⁸⁹ C-148/02, *Carlos Garcia Avello v État Belge*, Judgment of the Court 2 October 2003, paragraph 26.

⁹⁰ *Ibid* paragraph 27.

⁹¹ *Ibid* paragraph 29.

⁹² *Ibid* paragraph 30.

⁹³ *Ibid* paragraph 35.

⁹⁴ *Ibid*.

⁹⁵ *Ibid* paragraph 36.

amounted to circumstances in which the applicants' children may plead difficulties and distinguish them from Belgian nationals who are identified by only a single surname.⁹⁶

Since the ECJ had found that the Belgian measure in fact impeded the applicants' children's right not to be discriminated against because of their nationality, the Court examined whether the practice could have been justified based on objective considerations independent of the nationality of the persons concerned. The Belgian Government had justified its contested measure on the basis that the principle of the immutability of surnames is a fundamental principle of social order and that the Belgian King can authorize a change of surname in exceptional circumstances.⁹⁷ The Belgian Government, supported by the Netherlands government, also argued that the infringement of the rights of the children of the applicants was reduced as those children could rely on the surname conferred in accordance with Spanish law in every other Member State other than Belgium.⁹⁸ The Danish Government additionally argued that the contested Belgian practice contributed to the integration of persons who were both Belgian and Spanish nationals in Belgium.⁹⁹

None of these justifications were accepted by the ECJ. The ECJ held that the principle of immutability of surnames as a means designed to prevent risks of confusion as to identify persons, is not indispensable to the point that it could not adapt itself to a practice of allowing children who hold dual citizenship to take a surname which is composed of elements other than those provided for by the law of one of their States of citizenship.¹⁰⁰ The Court, moreover, held that the objective of integration pursued by the contested Belgian practice, was neither necessary, nor even appropriate, for promoting the integration within Belgium of nationals of other Member States.¹⁰¹

The ECJ also held that the refusal by the Belgian authorities to recognize the children's Spanish surnames was disproportionate to the pursued objective. The Court based its reasoning on the fact that the Belgian authorities allowed for exceptions and that a surname may be conferred in accordance with foreign law where there are few connecting factors to

⁹⁶ C-148/02, *Carlos Garcia Avello v État Belge*, Judgment of the Court 2 October 2003, paragraph 37.

⁹⁷ *Ibid* paragraph 40.

⁹⁸ *Ibid*.

⁹⁹ *Ibid*.

¹⁰⁰ *Ibid* paragraph 42.

¹⁰¹ *Ibid* paragraph 43.

Belgium.¹⁰² An exception had, however, not been granted in the case at hand. The ECJ, thus, concluded that the Belgian refusal to grant an application for a change of surname made on behalf of minor children resident in Belgium and having dual citizenship of Belgium and of another Member State, violated Articles 12 and 17 EC.

4.4 Analysis

4.4.1 The scope of EC law

It is not easy to ascertain to what extent and in which manner Articles 18, 17 and 12 EC each played a role in the ECJ's conclusion to regard the situation in *Garcia Avello* as falling within the material scope of EC law. The EC, and now the EU, has always only had the competence conferred upon it, known as its "attributed competence".¹⁰³ As EC law stood at the time of the ECJ's ruling in *Garcia Avello*, and still stands today, the rules governing a person's surname were matters coming within the competence of the Member States.¹⁰⁴ National rules regarding names did therefore not as such fall within the material scope of the EC Treaty. The ECJ had, however, already held in its ruling in the case of *Konstantinidis* that Member States must comply with EC law when exercising their competence in name matters.

EU law and EC law have not been considered applicable to internal situations in matters concerning names. This means that a situation must provide a link to EU law for EU law to become applicable. In case law preceding the judgment of *Konstantinidis*, where a national had not previously exercised his or her rights of movement outside of his or her Member State, the ECJ repeatedly held that the matter did not fall within the scope of EC law.¹⁰⁵ The ECJ has described these situations as "wholly internal".¹⁰⁶ "Wholly internal" situations were, thus, held *not* to have a link to EC law.

¹⁰² C-148/02, *Carlos Garcia Avello v État Belge*, Judgment of the Court 2 October 2003, paragraph 44.

¹⁰³ Craig & Búrca, *EU law: Text, Cases and Materials*, 5th ed., p 73.

¹⁰⁴ Verlinden, *European Court of Justice, Judgment of October 2, 2003, Case 148/02, Carlos Garvia Avello v. État Belge (The State of Belgium)*, Columbia Journal of European law, Vol. 11, p 710.

¹⁰⁵ See, for example, C-180/83, *Hans Moser v Land Baden-Württemberg*, Judgment of 28 June 1984 paragraphs 17-20, where the ECJ held that a purely hypothetical prospect of employment in a Member State for a national of another Member State, did not establish a sufficient connection to Community law.

¹⁰⁶ C-180/83, *Hans Moser v Land Baden-Württemberg*, Judgment of 28 June 1984, paragraph 20.

The ECJ, however, seemed to have reconsidered its position regarding “wholly internal” situations in *Garcia Avello*.¹⁰⁷ The ECJ established that a link to EC law was at hand in the case since the children of the applicants were nationals of one Member State and lawfully resident in the territory of another Member State.¹⁰⁸ In the case, both of the children had nonetheless resided in Belgium ever since their birth. Both of them also had Belgian nationality. There was no physical migration as the children themselves had not left Belgium. Even though the children had not resided outside of Belgium, the ECJ argued that a *potential* move to Spain might cause problems for the children in the future. It has been suggested that the ECJ thereby perceived the problem as a potential breach of the right of free movement in the future.¹⁰⁹ A possible motivation for the ECJ’s ruling may be that persons with dual nationality may make more use of their freedom of movement within the EU.¹¹⁰

Advocate General Jacobs argued in his opinion that the person affected by the refusal to change the children’s surname was the father, Mr. Garcia Avello, who was a Spanish national who had exercised his freedom of movement by coming to live and work in Belgium.¹¹¹ The ECJ, however, did not explicitly follow Jacob’s line of argument. Would the outcome have been different if the case did not concern minor children, but adults possessing dual citizenship? This is difficult to call into question since the ECJ did not explicitly identify the father as affected by the refusal to change the children’s surnames in its final ruling.

More situations with cross-border dimensions had developed in Europe between the judgments of *Konstantinidis* and *Garcia Avello*. There had also been pressure from scholars to re-think the ECJ’s previous standpoint of “wholly internal situations”.¹¹² Due to these factors, it has been suggested that the ECJ took a functional approach and favored the nationality of the Member State that at the time allowed the persons concerned to enjoy the greatest benefit of the fundamental rights guaranteed by the EC Treaty.¹¹³ The ECJ can, however, be criticized for having decided on a basically internal case as the majority of factors, except the

¹⁰⁷ Verlinden, *European Court of Justice, Judgment of October 2. 2003, Case 148/02, Carlos Garvia Avello v. État Belge (The State of Belgium)*, Columbia Journal of European law, Vol. 11, p 713.

¹⁰⁸ C-148/02, *Carlos Garcia Avello v État Belge*, Judgment of the Court 2 October 2003, paragraph 27.

¹⁰⁹ Verlinden, *European Court of Justice, Judgment of October 2. 2003, Case 148/02, Carlos Garvia Avello v. État Belge (The State of Belgium)*, Columbia Journal of European law, Vol. 11, p 713.

¹¹⁰ *Ibid.*

¹¹¹ C-148/02, *Carlos Garcia Avello v État Belge*, Opinion of Advocate General Jacobs delivered on 22 May 2003, paragraph 50.

¹¹² Craig & Búrca, *EU law: Text, Cases and Materials*, 5th ed., p 829.

¹¹³ Lehmann, *What’s in a name? Grunkin-Paul and beyond*, Yearbook of Private International Law, Vol. 10, p 144-145.

dual citizenship, pointed to the fact that Belgian law would have been the most appropriate one. The ECJ clearly applied EU law broadly when deciding in an area that had previously fallen strictly within Member State discretion.

4.4.2 Discrimination on grounds of nationality

In its ruling, the ECJ held that the right of non-discrimination based on grounds of nationality in Article 12 EC could be invoked since the children enjoyed the status of EU citizenship pursuant to Article 17 EC. The ECJ, thus, did not attribute independent bearing to Article 17 EC as it was only used as a means to establish that Article 12 EC may be invoked.¹¹⁴

Although the right of EU citizens to move and reside freely within the EU according to Article 18 EC was cited in the question referred to the ECJ, the Court did not explicitly refer to the provision. It was, nonetheless, held that a “serious inconvenience” was needed in order to establish that the Belgian measure was discriminatory.¹¹⁵ The Court stated that the result of Belgium’s action is likely to cause the children “serious inconvenience” when future diplomas and documents might be used in different Member States with different surnames. The presence of the right of free movement is, thus, just below the surface. As was mentioned above in this thesis, the ECJ’s statement concerning “serious inconvenience” has been interpreted as an implicit reference to the children’s potential exercise of their right to free movement.¹¹⁶ The idea of “potential freedom of movement” had, however, not yet been settled under EC law at the time of the ECJ’s ruling in *Garcia Avello*.¹¹⁷ It is therefore difficult to ascertain how Article 18 EC had an impact on the conclusion that the Belgian practice was discriminatory.

¹¹⁴ This view has also been expressed by Lehmann and Bogdan. See Lehmann, *What’s in a name? Grunkin-Paul and beyond*, Yearbook of Private International Law, Vol. 10, p 144-145, as well as Bogdan, *EG-fördragets direkta inverkan på medlemsstaternas internationella namnrätt: några funderingar kring EG-domstolens Avello-dom*, SvJT 2003, p 1060.

¹¹⁵ C-148/02, *Carlos Garcia Avello v État Belge*, Opinion of Advocate General Jacobs delivered on 22 May 2003, paragraph 36.

¹¹⁶ Kruger & Beaumont, *Dual Nationality = Double Trouble?*, Journal of Private International Law, Vol. 7, p 611.

¹¹⁷ As late as in May 2011, the ECJ held that the right of free movement is not applicable to an EU citizen who has never exercised this right, who has always resided in a Member State of which he or she is a national and who is also a national of another Member State. See C-434/09, *Shirley McCarthy v Secretary of State for the Home Department*, judgment of the Court on 5 May 2011, paragraph 57.

It is noteworthy that the special protection provided with reference to non-discrimination in EU law has been pointed out as strongly resembling a privilege in itself.¹¹⁸ Regarding this, it must be questioned whether it is accurate to confer privileges, that are generally only conferred upon non-Belgian EU nationals, upon persons who had been born in Belgium, resided there their entire life and who were also Belgian nationals. This question was discussed within the Belgian Parliament after the ruling in *Garcia Avello*. Following the judgment, Belgium enacted changes to its private international law in name matters, resulting in more liberal rules regarding the recognition of foreign names.¹¹⁹ Prior to that enactment, the Belgian Parliament raised the question whether persons with dual citizenship should be allowed a choice of the applicable law to their name matters.¹²⁰ The idea of allowing persons with dual citizenship, where one of them is Belgian, greater party autonomy was, however, struck down. A majority of the representatives of the Parliament were of the opinion that such an advantage would have been discriminatory against persons with only a Belgian citizenship.¹²¹

4.4.3 Consequences for private international law rules

In the case of *Konstantinidis*, questions regarding private international law were not directly addressed. In the case of *Garcia Avello*, on the contrary, questions regarding conflict rules were a central aspect of the judgment.

In its ruling, the ECJ has been interpreted as reproaching Belgium for not taking into consideration the double nationality of the children of the applicants in a procedure for a change of name.¹²² From this point of view, the ECJ therefore did not reproach Belgium for *not* applying Spanish substantive law to the determination of the name of the children. The ECJ did not either condemn the Belgian substantive law concerning names or indicate that limping name relationships should be prevented through a more flexible application of Belgian law. The ECJ instead held that Belgium should take into account the Spanish nationality of the children when deciding their name. The Court's ruling is therefore silent on the matter whether this should be done by applying Spanish law or by a flexible interpretation

¹¹⁸ Muir Watt, *European Federalism and the "New Unilateralism"*, Tulane Law Review, Vol. 82, p 1989.

¹¹⁹ See Article 39 of the Belgian Code of Private International law of 2004 (*Loi du 16 juillet 2004 portant le Code de droit international privé*). An English translation of the Belgian Code is available at:

<http://www.ipr.be/data/B.WbIPR%5bEN%5d.pdf>.

¹²⁰ Ds (*Ministry Publication Series*) 2011:39, *Internationella namnfrågor*, p 74 footnote 99.

¹²¹ *Ibid.*

¹²² Lehmann, *What's in a name? Grunkin-Paul and beyond*, Yearbook of Private International Law, Vol. 10, p 144-145.

of Belgian material law concerning the change of a name. The Court thereby only considered the end result, which was held to be discriminatory towards the children. One commentator, however, suggested that the difference between applying Belgian substantive law in a way that recognizes the name, and for the Belgian authorities to apply Spanish law, is only a formal difference.¹²³ The end result would effectively have been the same in both situations: pursuant to an obligation in EU law, effect is given to Spanish naming customs due to the children's connection to Spain.¹²⁴

The ECJ held that Belgium violated Articles 12 and 17 EC, because the application for a change of surname was not granted “which the children were entitled to”¹²⁵. This statement suggests, although rather implicitly, that a right to acquire a name pursuant to another Member State's naming customs, is sufficient to grant them the right to bear the same name in another Member State. Some commentators have even suggested that the *Garcia Avello* judgment makes it clear that in the case of dual nationality, the two Member States' substantive laws are equal.¹²⁶ The conflict of laws system should therefore provide the concerned persons with a choice of law concerning the law applicable to their name matters. If greater party autonomy was provided, a person with dual nationality could thus choose the law of the country he or she feel most connected with. This possibility would also be in line with emerging developments in which greater choice of law is favored in private international law rules.¹²⁷

Although the Belgian authorities had followed a traditional rule concerning double nationality in Article 3 of the Hague Convention, and thereby given precedence to the Belgian nationality, the ECJ briefly stated that Article 3 does not impose an obligation but simply provides an option for the contracting States to give priority to their own nationality. Critics have nonetheless pointed to the fact that Article 5 of the same Hague Convention refers to the criterion of the most effective nationality.¹²⁸ The sole transnational dimension of the case at

¹²³ Lehmann, *What's in a name? Grunkin-Paul and beyond*, Yearbook of Private International Law, Vol. 10, p 144-145.

¹²⁴ *Ibid.*

¹²⁵ C-148/02, *Carlos Garcia Avello v État Belge*, Judgment of the Court 2 October 2003, paragraph 45.

¹²⁶ Verlinden, *European Court of Justice, Judgment of October 2. 2003, Case 148/02, Carlos Garvia Avello v. État Belge (The State of Belgium)*, Columbia Journal of European law, Vol. 11, p 715.

¹²⁷ Kruger & Beaumont, *Dual Nationality = Double Trouble?*, Journal of Private International Law, Vol. 7, p 614.

¹²⁸ Verlinden, *European Court of Justice, Judgment of October 2. 2003, Case 148/02, Carlos Garvia Avello v. État Belge (The State of Belgium)*, Columbia Journal of European law, Vol. 11, p 712.

hand was limited to the children's Spanish citizenship. This fact appears to provide credit to the claim that Belgian substantive law should have regulated the children's surname. The ECJ, nonetheless, did not point to the fact that Belgian nationality would possibly have been the most effective one.

Much of the trouble amounting to the discrepancy in the children's names was attributable to the fact that the relevant Belgian conflict rules used nationality as a connecting factor. May a Member State use nationality as a connecting factor in its private international law rules after the ruling in *Garcia Avello*? It has been noted by scholars that restrictions on using nationality as a connecting factor were not an apparent and deliberate consequence of the ECJ's ruling.¹²⁹ An optimal solution in the case at hand would, however, not either have been if Belgian conflict rules had used the children's domicile or habitual residence as a connecting factor. The end result would still have been unsatisfactory since Belgian substantive law most likely would have been applied and, thus, the surname "Garcia Weber" would not have been permitted.

5 Grunkin and Paul: A situation without dual citizenship

5.1 Facts of the case

Following the ruling in the case of *Garcia Avello*, the ECJ delivered a preliminary ruling a case concerning name matters in *Grunkin and Paul*¹³⁰. The case concerned Leonhard Matthias Grunkin-Paul, the son of Dr. Paul and Mr. Grunkin.¹³¹ All of them were of German nationality but had resided in Denmark where Leonhard was born.¹³² Leonhard was initially registered with the single surname "Paul" by the Danish authorities, but the name was later changed to "Grunkin-Paul" at the request of his parents.¹³³ "Grunkin-Paul" was also the name

¹²⁹ Bogdan, *EG-fördragets direkta inverkan på medlemsstaternas internationella namnrätt: några funderingar kring EG-domstolens Avello-dom*, SvJT 2003 p 1062-1063.

¹³⁰ C-353/06, *Stefan Grunkin and Dorothee Regina Paul v Standesamt Niebüll*, Judgment of the Court 14 October 2008.

¹³¹ *Ibid* paragraph 5.

¹³² *Ibid*.

¹³³ *Ibid* paragraph 6.

entered in his Danish birth certificate.¹³⁴ When the parents wished to have the name “Grunkin-Paul” registered with the German registry office, the authorities refused to recognize the surname as it had been determined in Denmark on the ground that, under Article 10 of the Einführungsgesetz zum Bürgerliches Gesetzbuch (EGBGB)¹³⁵, the surname of a person is to be determined by the law of the State of his or her nationality, i.e. German law.¹³⁶ According to German law a child is not allowed to bear a double-barreled surname composed of the surnames of both the father and the mother. Pursuant to §1617 of the German Civil Code, Bürgerliches Gesetzbuch (the BGB), the determination of a child’s surname whose parents bear different surnames is decided by declaration by the parents before a registrar choosing either the father’s *or* the mother’s surname. Appeals brought by Leonhard’s parents against the decision by the German authorities were dismissed and the case was eventually referred to the ECJ for a preliminary ruling.¹³⁷

5.2 The ECJ’s ruling

The ECJ, first of all, stated that the rules governing a person’s surname are matters coming within the competence of the Member States but that the Member State, nonetheless, must comply with EC law when exercising that competence, unless what is involved is an internal situation that has no link to EC law.¹³⁸ The ECJ referred to its ruling in *Garcia Avello* in which the Court had established that children who are nationals of one Member State and who are lawfully resident in the territory of another, provides such a link to EC law.¹³⁹ The Court, thus, concluded that Leonhard could rely on the rights conferred upon him by the EC Treaty.¹⁴⁰

¹³⁴ C-353/06, *Stefan Grunkin and Dorothee Regina Paul v Standesamt Niebüll*, Judgment of the Court 14 October 2008, paragraph 6.

¹³⁵ The Law introducing the Civil Code.

¹³⁶ C-353/06, *Stefan Grunkin and Dorothee Regina Paul v Standesamt Niebüll*, Judgment of the Court 14 October 2008, paragraph 3.

¹³⁷ A significant feature of this case is that it has reached the ECJ twice. The initial reference to the ECJ was, however, never decided on the merits. The second time the case reached the ECJ, it concerned the German registry’s refusal to register the name “Grunkin-Paul”. This time the ECJ also determined the merits of the case. See C-353/06, *Stefan Grunkin and Dorothee Regina Paul v Standesamt Niebüll*, Judgment of the Court 14 October 2008, paragraph 9.

¹³⁸ C-353/06, *Stefan Grunkin and Dorothee Regina Paul v Standesamt Niebüll*, Judgment of the Court 14 October 2008, paragraph 16.

¹³⁹ *Ibid* paragraph 17.

¹⁴⁰ *Ibid* paragraph 18.

The ECJ thereafter examined whether the conduct of the German authorities could have constituted discrimination based on nationality pursuant to Article 12 EC. The ECJ briefly concluded that this was not the case.¹⁴¹ Since the child and his parents only had German nationality, the determination of Leonhard's surname by German authorities, in accordance with German law, could not have constituted discrimination on grounds of nationality.¹⁴²

The ECJ instead ruled that national legislation, which places certain of the nationals of the Member State at a disadvantage because they have exercised their freedom to move and reside in another Member State, is a restriction on the freedoms conferred by Article 18(1) EC.¹⁴³ The ECJ referred to its ruling in *Garcia Avello* and iterated that a discrepancy in surnames is liable to cause serious inconvenience if the concerned person has to use different surnames in different Member States.¹⁴⁴ The ECJ thereafter held that such serious inconvenience may also arise in a situation at hand and that the discrepancy does not have to have arisen as the result of dual citizenship.¹⁴⁵

The ECJ thereafter analyzed if the obstacle to the freedom of movement of persons could be justified by being based on objective considerations and proportionate to the legitimate aim pursued.¹⁴⁶ The German Government had argued that it was justified to use nationality as a connecting factor for the determination of surnames as it is an objective criterion that makes it possible to determine a person's surname with certainty and continuity, to ensure that siblings have the same surname and to preserve relationships between members of an extended family.¹⁴⁷ The German government had furthermore underlined that it ensured that persons of the same nationality are treated in the same manner and that their surnames are determined in an identical manner.¹⁴⁸ Finally, the German government also argued that its national legislation did not allow for double-barreled surnames for practical reasons and in order to ensure that the next generation of a family must not be forced to give up part of a surname.¹⁴⁹ The ECJ rejected all of these arguments. It held, firstly, that the connecting factor of

¹⁴¹ C-353/06, *Stefan Grunkin and Dorothee Regina Paul v Standesamt Niebüll*, Judgment of the Court 14 October 2008, paragraph 20.

¹⁴² *Ibid.*

¹⁴³ *Ibid* paragraph 21.

¹⁴⁴ *Ibid* paragraphs 22-23.

¹⁴⁵ *Ibid* paragraph 24.

¹⁴⁶ *Ibid* paragraph 29.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid* paragraph 30.

¹⁴⁹ *Ibid* paragraph 35.

nationality will not ensure that a person's surname may be determined with continuity and stability in the case at hand and that Leonhard will be forced to use a different name every time he crossed the border between Denmark and Germany.¹⁵⁰ Secondly, the ECJ held that an issue of siblings having the same name does not arise in the present case. Thirdly, the ECJ stated that considerations of administrative convenience could not suffice to justify an obstacle to freedom of movement such as that in the case.¹⁵¹ Finally, the ECJ recognized that German law does not wholly preclude the possibility of conferring double-barreled surnames on children of German nationality.¹⁵² Where one of the parents has the nationality of another State, the parents may choose to form the child's surname in accordance with the law of that State.¹⁵³ The ECJ, thus, decided that in the circumstances such as those in the case, Article 18 EC precluded the authorities of a Member State from refusing to recognize a child's surname as determined and registered in a second Member State in which the child was born and had been resident since birth.¹⁵⁴

5.3 Analysis

5.3.1 No dual nationality

When the circumstances in the case of *Grunkin and Paul* are contrasted to the circumstances in *Garcia Avello*, one of the apparent differences is that Leonhard did not possess dual German-Danish citizenship. He only had German nationality, whereas the children in the case of *Garcia Avello* possessed both Spanish and Belgian citizenship. The absence of a dual nationality influenced the ECJ's judgment in *Grunkin and Paul* in two ways: the applicability of Community law and whether discrimination based on grounds of nationality could be established.

Firstly, the absence of a dual citizenship had an effect on the applicability of the EC Treaty. Compared to the ECJ's ruling in *Garcia Avello*, the Court did not struggle as much to establish that Leonhard's case fell within the scope of the EC Treaty. Since it had been established in the ECJ's ruling in *Garcia Avello*, that a link to Community law exists when children who are nationals of one Member State are lawfully resident in the territory of

¹⁵⁰ C-353/06, *Stefan Grunkin and Dorothee Regina Paul v Standesamt Niebüll*, Judgment of the Court 14 October 2008, paragraph 32.

¹⁵¹ *Ibid* paragraph 36.

¹⁵² *Ibid* paragraph 37.

¹⁵³ *Ibid*.

¹⁵⁴ *Ibid* paragraph 39.

another Member State, the Court held that Leonhard could rely on the rights conferred upon him by the EC Treaty.¹⁵⁵

Critics have, nonetheless, remarked that the situation in *Grunkin and Paul* may have been even more internal than that in *Garcia Avello*.¹⁵⁶ From the point of view of Germany, Leonhard's connection to Denmark was weak since Leonhard and his parents were all German citizens. Leonhard also resided successively in Germany. In *Garcia Avello* the Spanish nationality of the two concerned children had connected them to the name they wanted to have registered in Belgium. In Leonhard's case the mere fact that he was habitually resident in Denmark was decisive. The ECJ did not take into account for how long or how often Leonhard would reside in Germany, when it regarded that the matter fell within the scope of EC law.¹⁵⁷ If the Court would have addressed such facts, the situation may have appeared as an internal German case.

Secondly, the absence of dual citizenship influenced the ECJ's finding that the German authorities' refusal to recognize his Danish-registered surname did not constitute discrimination based on grounds of nationality. The ECJ held that since Leonhard had German nationality he could not be treated in a different manner than other German nationals with a single citizenship. Effectively, the application of the German conflict rule, which referred to German substantive law, was not discriminatory.

5.3.2 Freedom of movement

In the case of *Garcia Avello*, Article 18 EC, which enshrined the freedom to move and reside within the Union, had been used to establish a link to Community law.¹⁵⁸ In the ECJ's ruling in *Grunkin and Paul*, Article 18 EC was used to establish a material breach of EU law as Article 12 EC was not applicable.¹⁵⁹ This suggests that when Article 12 EC cannot be applied

¹⁵⁵ C-353/06, *Stefan Grunkin and Dorothee Regina Paul v Standesamt Niebüll*, Judgment of the Court 14 October 2008, paragraphs 17-18.

¹⁵⁶ Lehmann, *What's in a name? Grunkin-Paul and beyond*, Yearbook of Private International Law, Vol. 10, p 144.

¹⁵⁷ *Ibid*. The Court only later considered the duration and frequency of his stays in Germany when the ECJ determined the scale of complications that would face Leonhard due to the fact that he had different names in different Member States.

¹⁵⁸ C-353/06, *Stefan Grunkin and Dorothee Regina Paul v Standesamt Niebüll*, Judgment of the Court 14 October 2008, paragraphs 25 and 27.

¹⁵⁹ *Ibid* paragraphs 21-28.

due to its static requirement of nationality, Article 18 EC is broader and may be used to rebuff various national laws.¹⁶⁰

At the time of the rulings in the cases of *Garcia Avello* and *Grunkin and Paul*, Article 18 EC allowed citizens of the Union to travel across borders not only for economic purposes but also for a range of other purposes and allowed Union citizens to take up residency in another Member State.¹⁶¹ The extensive scope of Article 18, thus, meant that a large amount of situations could constitute an obstacle to moving and residing freely within the Union. It has also been argued that Article 18 EC could just as well have been applied to the two children's situation in *Garcia Avello*.¹⁶² It is, nonetheless, not without concerns one should observe the ECJ's choice of applying Article 18 EC in *Grunkin and Paul*. If the right to move and reside freely within the Union is stretched to the extreme, it has been suggested that it may be used as a weapon against virtually *any* provisions that may diverge between the Member States.¹⁶³ The EU could thereby intervene in other areas, not just in matters regarding names, where it has no competence.

5.3.3 A change of name

One peculiarity of *Grunkin and Paul* is that the case does not concern the recognition by German authorities of a name registered at birth, but a name change. The surname given to Leonhard at birth was not "Grunkin-Paul", but "Grunkin Paul".¹⁶⁴ Although it may appear as if he possessed a double surname, that was not the case. His surname was "Paul" and "Grunkin" was registered as a "middle name" (*mellemlavn*) pursuant to Danish law.¹⁶⁵ Some months after his birth, his surname was changed to "Grunkin-Paul" at his parents' request and a Danish birth certificate was issued with that surname. This change was possible since he was habitually resident in Denmark and Danish private international law, using habitual residence as a connecting factor, could be applied in order to establish that Danish substantive law regarding name changes was applicable. As a result, the interpretation of the ECJ's judgment may be limited to the recognition of *a name change* and not a name registered at birth.

¹⁶⁰ Lehmann, *What's in a name? Grunkin-Paul and beyond*, Yearbook of Private International Law, Vol. 10, p 145.

¹⁶¹ *Ibid.*

¹⁶² *Ibid* p 146.

¹⁶³ *Ibid.*

¹⁶⁴ C-353/06, *Stefan Grunkin and Dorothee Regina Paul v Standesamt Niebüll*, Opinion of Advocate General Sharpston delivered on 24 April 2008, paragraph 22.

¹⁶⁵ *Ibid.*

5.3.4 Consequences for private international law rules

The judgment has been interpreted as having a negative effect on nationality as a criterion when determining the applicable law.¹⁶⁶ The ECJ did not, however, establish in its ruling that the use of a person's habitual residence would be preferred as a criterion. Article 18 EC should therefore not be interpreted as ruling out nationality completely as a connecting factor in private international law rules establishing the applicable law.

The ECJ's ruling in *Grunkin and Paul* additionally opened up the question whether limping name relationships should be "cured" by recognizing foreign name decisions.¹⁶⁷ Recognition of foreign judgments regarding names would be an appealing way of solving discrepancies of names. It would also reduce the risk of Member States if they were to apply foreign law in a wrongful way.¹⁶⁸ One major problem if the case would be interpreted as speaking in favor of the recognition of names, is, however, that the judgment does not set out precise conditions that are usually set out in classical private international law rules regarding recognition and enforcement. No grounds, such as public policy, were submitted before the ECJ that might have possibly precluded the recognition of Leonhard's surname in Germany. The ruling, thus, gives little guidance as to what extent and in which manner names should be recognized.¹⁶⁹ This suggests that EU law allows Member States to impose a different regime than recognition, to solve problems related to discrepancies of names, if they wish to do so.¹⁷⁰

¹⁶⁶ Lehmann, Mattias, *What's in a name? Grunkin-Paul and beyond*, Yearbook of Private International Law, Vol. 10, p 149.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ C-353/06, *Stefan Grunkin and Dorothee Regina Paul v Standesamt Niebüll*, Opinion of Advocate General Sharpston delivered on 24 April 2008, paragraph 38.

¹⁷⁰ Lehmann, Mattias, *What's in a name? Grunkin-Paul and beyond*, Yearbook of Private International Law, Vol. 10, p 149.

6 Sayn-Wittgenstein: Public policy concerns at stake

6.1 Facts of the case

In the ECJ's ruling in the case of *Sayn-Wittgenstein*¹⁷¹, the approach adopted by the ECJ in previous case law concerning names in finding that national measures may violate the rights of EU citizens, came to a halt. The Court found that a State's national constitutional identity might justify a Member State's restrictive measures. The case of *Sayn-Wittgenstein* is also an illustration of the, sometimes strained, relationship between EU law and the national constitutions of Member States.

The case of *Sayn-Wittgenstein* concerns an Austrian national, Mrs. Sayn-Wittgenstein (the applicant) who resided in Germany.¹⁷² The applicant was born in Vienna, Austria, in 1944 and held an Austrian citizenship. In 1991 the German citizen Mr. Lothar Fürst von Sayn-Wittgenstein adopted the applicant. The adoption did not have any effect on the applicant's nationality and she remained an Austrian citizen. At the time of the adoption the applicant was living in Germany and still did so at the time of the ECJ's judgment.¹⁷³ She was economically active in Germany, as well as in other countries, in the luxury real estate sector. In her work she would use the name "Ilonka Fürstin von Sayn-Wittgenstein" when selling castles and luxurious houses.¹⁷⁴

In 1992 the District Court of Worbis in Germany (*Kreisgericht Worbis*) pronounced, in a supplementary order to the adoption, that the applicant had acquired the surname "Fürstin von Sayn-Wittgenstein".¹⁷⁵ This name was registered in the Austrian register of civil status and she was issued with a German driving license in that name. The applicant also formed a company in Germany under the same name. She was also issued with an Austrian passport and two certificates of nationality in the same name.¹⁷⁶

¹⁷¹ C-208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, Judgment of the Court 22 December 2010.

¹⁷² *Ibid* paragraph 2.

¹⁷³ *Ibid* paragraph 20.

¹⁷⁴ *Ibid* paragraph 21.

¹⁷⁵ *Ibid* paragraph 22.

¹⁷⁶ *Ibid* paragraph 24.

In 2003, however, the Constitutional Court in Austria (*Verfassungsgerichtshof*) held in a case similar to that of the applicant, that the Austrian Law on the abolition of the nobility¹⁷⁷, which enjoys constitutional status and implements the principle of equal treatment, precludes an Austrian citizen from acquiring a surname which includes a former title of nobility by means of an adoption by a German national who bears such a title as a constituent element of his name.¹⁷⁸ Pursuant to the Law on the abolition of the nobility, Austrian citizens are not authorized to bear titles of nobility, including those of foreign origin. The same judgment also established that Austrian law does not permit surnames to be formed according to rules that are different for men and women, which had been the case of Mrs. Sayn-Wittgenstein when acquiring the element “Fürstin” as part of her name.¹⁷⁹

As a result of the landmark ruling, the Landeshauptmann von Wien prompted a correction of Mrs. Sayn-Wittgenstein’s name as it appeared in her birth certificate issued following her adoption.¹⁸⁰ The Landeshauptmann von Wien was of the view that her surname should be changed from “Fürstin von Sayn-Wittgenstein” to “Sayn-Wittgenstein”.¹⁸¹ A decision was issued in 2007, that the applicant’s name must be corrected and entered in the register of civil status as “Sayn-Wittgenstein”.¹⁸²

The applicant appealed to the Administrative Court (*Verwaltungsgerichtshof*) in Austria and requested an annulment of the decision of the Landeshauptmann von Wien.¹⁸³ The Administrative Court stayed the proceedings and referred a question to the ECJ asking whether Article 21 TFEU precludes legislation of a Member State, pursuant to which the surname of an adult adoptee determined in another Member State is refused recognition in so

¹⁷⁷ The entire name of the law is the “Law on the abolition of the nobility, the secular orders of knighthood and of ladies, and certain titles and ranks” (*Gesetz über die Aufhebung des Adels, der weltlichen Ritter- und Damenordern, und gewisser Titel und Würden StGBI. 1/1920*).

¹⁷⁸ C-208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, Judgment of the Court 22 December 2010, paragraph 25. Following the First World War, both Austria and Germany became republics, abolishing the nobility and all the privileges and titles pertaining thereto. For Austrian nationals, it has been unlawful since then, as a matter of constitutional law, to bear any title of nobility. See C-208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, Opinion of Advocate General Sharpston delivered on 14 October 2010, paragraph 1.

¹⁷⁹ C-208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, Judgment of the Court 22 December 2010, paragraph 25.

¹⁸⁰ *Ibid* paragraph 26.

¹⁸¹ *Ibid*.

¹⁸² *Ibid* paragraph 27.

¹⁸³ *Ibid* paragraph 28.

far as it contains a title of nobility which it is not permissible under the constitutional law of the former Member State.¹⁸⁴

6.2 The ECJ's ruling

Since the applicant had made use of her freedom to move and reside in another Member State, the ECJ held that she was entitled to rely on the freedoms conferred upon her as a citizen of the Union in accordance with Article 21 TFEU.¹⁸⁵ The ECJ iterated the rule established in *Grunkin and Paul* that national legislation which places certain of the nationals of the Member State at a disadvantage because they have exercised their freedom to move and reside in another Member State, is a restriction to the freedoms conferred by Article 21(1) TFEU.¹⁸⁶ The Austrian and German Governments, however, argued that the case in *Sayn-Wittgenstein* must be distinguished to the situation in *Grunkin and Paul* as the surname “Fürstin von Sayn-Wittgenstein” had never been lawfully registered from the beginning.¹⁸⁷ The two Governments based their claims on the fact that both German and Austrian choice-of-law rules pointed out Austrian substantive law as the applicable law to determine the name of the applicant. In their opinion, since former titles of nobility and the particle “von” and the feminine form “Fürstin” is unlawful under Austrian law, the German District Court of Worbis did not have the power to establish the surname of the applicant as it did.¹⁸⁸ The ECJ did not address this argument explicitly in its ruling.

It was also submitted by intervening governments, that the applicant would not suffer any inconvenience if her surname was to be corrected in the Austrian civil status register.¹⁸⁹ They were of the opinion that the applicant would not be forced to use a different surname in different States since the applicant's central identifying element “Sayn-Wittgenstein” would remain.¹⁹⁰ The ECJ agreed that the risk of causing “serious inconvenience” because of a

¹⁸⁴ C-208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, Judgment of the Court 22 December 2010, paragraph 35.

¹⁸⁵ *Ibid* paragraph 39. The ECJ noted that the applicant would additionally have been entitled to rely on the freedoms conferred under Article 56 of the TFEU, which contains the right to provide services, as she engages in professional activity in Germany and provides services to recipients in one or more other Member States. The ECJ decided, nonetheless, not to rule on this matter as the referring court has essentially only asked about the interpretation of Article 21 of the TFEU.

¹⁸⁶ C-208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, Judgment of the Court 22 December 2010, paragraph 53.

¹⁸⁷ *Ibid* paragraphs 57-59.

¹⁸⁸ *Ibid* paragraph 58.

¹⁸⁹ *Ibid* paragraph 59.

¹⁹⁰ *Ibid*.

divergence between two names used for the same person, was not as grave in the case at hand as it had been for Leonhard in the case of *Grunkin and Paul*. The Court, however, held that since the applicant had lived for a considerable time in Germany under a particular name, she had left many traces of a formal nature in both the public and the private sphere.¹⁹¹ The name “Fürstin von Sayn-Wittgenstein” was also not held to be equivalent to “Sayn-Wittgenstein”, as the words “Fürstin von” were regarded as a constituent element of the name lawfully acquired in the applicant’s State of habitual residence, namely Germany.¹⁹² The usage of the two different names would, thus, potentially cause “serious inconvenience” according to the ECJ.¹⁹³ Consequently, the Court held that the refusal by the Austrian authorities to recognize all the elements of the applicant’s surname as determined in Germany was a restriction to the freedoms enshrined in Article 21 TFEU.¹⁹⁴

Since an obstacle to the freedom of movement of persons can be justified if it is based on objective considerations and is proportionate to the legitimate objective, the ECJ examined whether the Austrian measure could be justified. Governments which submitted observations to the ECJ in the case were of the opinion that an objective consideration could be invoked since the Law on the abolition of the nobility enjoyed constitutional status and implemented the principle of equal treatment in Austria.¹⁹⁵ The ECJ accepted that the Law on the abolition of the nobility could be taken into account when a balance is struck between legitimate interests and the right of free movement of persons.¹⁹⁶ The ECJ categorized this kind of argument as a public policy argument.¹⁹⁷ The ECJ stated that objective considerations relating to public policy are capable of justifying a refusal to recognize the surname of one of its nationals as registered in another Member State. The Court, however, noted that the concept of public policy as justification for derogation from a fundamental freedom must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State and without any control by EU institutions.¹⁹⁸ Public policy may, thus, only be relied upon when there is a genuine and sufficiently serious threat to a fundamental interest of society.¹⁹⁹

¹⁹¹ C-208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, Judgment of the Court 22 December 2010, paragraph 63.

¹⁹² *Ibid* paragraph 64.

¹⁹³ *Ibid* paragraphs 62 and 67.

¹⁹⁴ *Ibid* paragraph 71.

¹⁹⁵ *Ibid* paragraph 82.

¹⁹⁶ *Ibid* paragraph 83.

¹⁹⁷ *Ibid* paragraph 84.

¹⁹⁸ *Ibid* paragraph 86.

¹⁹⁹ *Ibid*.

The specific circumstances, which may justify recourse to the concept of public policy, may vary from one Member State to another and from one era to another according to the ECJ. The ECJ, moreover, underlined that the observance of the principle of equal treatment as a general principle of law is something which EU law undeniably seeks to ensure.²⁰⁰ This right is enshrined in Article 20 of the Charter of Fundamental Rights of the European Union (the Charter) and the objective of observing the principle of equal treatment is compatible with EU law without a doubt according to the Court.²⁰¹

The ECJ, nonetheless, emphasized that measures that restrict a fundamental freedom may be justified on public policy grounds *only* if they are necessary for the protection of the interests which they are intended to secure and only in so far as those objectives cannot be attained by less restrictive measures.²⁰² The ECJ established that it is not indispensable for the restrictive measure issued by the Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected.²⁰³ On the contrary, the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State.²⁰⁴ The ECJ also referred to Article 4(2) TEU which states that the EU is to respect the national identities of its Member States and may include the status of the State as a Republic.²⁰⁵ The ECJ therefore concluded that it did not appear as disproportionate for a Member State to seek to attain the objective of protecting the principle of equal treatment by prohibiting any acquisition, possession or use, by its nationals, of titles of nobility or noble elements which may create the impression that the bearer of the name is holder of such a rank.²⁰⁶ According to the Court, the Austrian authorities did not go further than what was necessary in order to ensure the attainment of the fundamental constitutional objective.²⁰⁷ The Austrian measure was therefore not regarded as a measure unjustifiably undermining the freedom of EU citizens to move and reside within the Union.²⁰⁸

²⁰⁰ C-208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, Judgment of the Court 22 December 2010, paragraph 89.

²⁰¹ *Ibid.*

²⁰² *Ibid* paragraph 90.

²⁰³ *Ibid* paragraph 91.

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid* paragraph 92.

²⁰⁶ *Ibid* paragraph 93.

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid* paragraph 94.

6.3 Analysis

6.3.1 Limits of Article 21 TFEU

In the ECJ's ruling in the case of *Garcia Avello*, the right of EU citizens to move and reside freely within the Union enshrined in Article 18 EC (now Article 21 TFEU) had merely been used to establish a *link* to EU law. In the case of *Garcia Avello* the contested Belgian measure violated the right of non-discrimination enshrined in Article 12 EC and not the freedom of movement. In *Grunkin and Paul*, however, the right to move and reside freely within the Union was for the first time extended to ensure that Member States recognize a name registered in another country. This may imply that Article 21 TFEU is a "safety net" used whenever other categories of rights conferred by EU law, such as the right of non-discrimination, do not grant relief when discrepancies in names have occurred or potentially may occur.²⁰⁹ If this is a valid observation, the ECJ can be said to have limited the size of the "safety net" in *Sayn-Wittgenstein* as it was concluded that public policy concerns may justify a refusal to recognize noble elements of a name and, thus, justify a restriction to the rights conferred by Article 21 TFEU.

6.3.2 An objective consideration and proportionality

The legitimate objective pursued by the Austrian national law was to protect the principle of equal treatment.²¹⁰ The ECJ held that there was "no doubt"²¹¹ that the objective of observing the principle of equal treatment is compatible with EU law since Article 20 of the Charter also protects the principle of equal treatment. The ECJ did not elaborate further on this point, which is puzzling since it presumes that the principle of equal treatment serves the same purpose in EU law and national Austrian law.²¹²

The ECJ held that the national Austrian measure was of constitutional nature such as to express the national identity of Austria as a republic. Since the EU, pursuant to Article 4(3) TEU, is to respect the national identities of its Member States, which includes the status of the State as a Republic, it did not appear disproportionate for Austria to impose restrictive

²⁰⁹ Besselink, *Case C-208/09, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien, Judgment of the Court (Second Chamber) of 22 December 2010*, Common Market Law Review, p 684.

²¹⁰ C-208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, Judgment of the Court 22 December 2010, paragraph 93.

²¹¹ *Ibid* paragraph 89.

²¹² Besselink, *Case C-208/09, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien, Judgment of the Court (Second Chamber) of 22 December 2010*, Common Market Law Review, p 684.

measure to the freedom of movement according to the ECJ. It has, nonetheless, been suggested that the constitutional identity only played a subsidiary role in the ECJ's ruling.²¹³ If this is true, an expression of national identity inherent in the constitutional and national identity of Member States, may thus not always be able to justify obstacles to the freedom of movement.²¹⁴ The reference to Article 4(2) TEU in the ECJ's ruling may rather be representative of the ECJ's concern not to step on sovereign interests, than to establish a general rule that public policy concerns, such as those in the case, may justify an obstacle to the right of EU citizens to move and reside freely within the Union. It is, however, the first time a case regarding name matters construes a public policy exception to the citizenship-based right derived from Article 21 TFEU. Such an exception had also been hinted in the ECJ's ruling in *Grunkin and Paul* but the Court did not elaborate on the matter since none of the concerned parties had raised the issue.²¹⁵ It is therefore not clear to what extent national identity and the public policy of a particular State, may justify restrictions to the freedom of movement.

The brevity of the ECJ concerning why it decided to rule on the proportionate nature of the national measure is perplexing. Advocate General Sharpston noted that the final decision on proportionality must be for the competent national court since there are a number of factual and legal issues that may need to be verified.²¹⁶ Sharpston, for example, emphasized that it must be verified whether it were established that the legal position in 1992 was such that the applicant, the German Court and the Austrian authorities could justifiably believe that the applicant's surname was to be determined by German law alone. If this was the case, then a rectification 15 years later might well seem disproportionate according to Sharpston.²¹⁷ The ECJ, nonetheless, did not regard this in their ruling.

It is interesting to note that the ECJ referred to existing parallel rules in EU law in its analysis relating to the determination of an objective consideration and when assessing if the Austrian measure was proportionate.²¹⁸ It is, however, unclear whether such a reference is necessary in

²¹³ Besselink, *Case C-208/09, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien, Judgment of the Court (Second Chamber) of 22 December 2010*, Common Market Law Review, p 684.

²¹⁴ *Ibid.*

²¹⁵ C-353/06, *Stefan Grunkin and Dorothee Regina Paul v Standesamt Niebüll*, Judgment of the Court 14 October 2008, paragraph 38.

²¹⁶ C-208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, Opinion of Advocate General Sharpston delivered on 14 October 2010, paragraph 68.

²¹⁷ *Ibid.*

²¹⁸ Article 4(3) TEU and Article 20 of the Charter.

order for a national measure, relating to name matters, to be justifiable as an obstacle to the freedom of movement.

6.3.3 Consequences for private international law rules

Similarly to the situation in the case of *Grunkin and Paul*, the case of *Sayn-Wittgenstein* concerned the recognition of a change of name. What, nonetheless, contrasts the latter case from *Grunkin and Paul*, is that it was contested whether the name “Fürstin von Sayn-Wittgenstein” was ever in a duly form registered in Germany. It remains highly questionable whether the Wobis Court was competent to determine the applicant’s change of name as both German and Austrian law designated Austrian law as the applicable law.

The ECJ, however, did not address whether it mattered if the name had ever been lawfully registered. As was mentioned above, Advocate General Sharpston was of the opinion that the question whether the name had ever been lawfully registered, should be addressed in the analysis of the national measure’s proportionate nature. The ECJ’s negligence is, however, most likely based on the fact that it regarded the proportionality as a question to be answered by German or Austrian law and not EU law.²¹⁹ This was the opinion of Advocate General Sharpston.²²⁰ It is, thus, difficult to know whether it matters if a name has been lawfully registered. Consequently, at least a register of name, which at the time appeared to be lawful, should be recognizable in another Member State. As Sharpston underlines in her opinion, it should be possible for a citizen of the Union to rely on the protection of legitimate expectations in name matters, when the matter falls within the scope of EU law.²²¹

²¹⁹ C-208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, Opinion of Advocate General Sharpston delivered on 14 October 2010, paragraph 51.

²²⁰ *Ibid* paragraphs 52-53. Sharpston, however, noted that it was by no means clear that both Austrian and German choice-of-law rules pointed to Austrian law as the applicable substantive law. Sharpston noted that Austrian law seemed in fact to have considered that the name of an adoptee was to be determined pursuant to the law of adopting party’s nationality, i.e. German law. Additionally, Austrian case law suggested that it may not have been clear before the landmark case was delivered in 2003, whether an Austrian adopted by a German could take the latter’s surname, even if it contained noble elements.

²²¹ C-208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, Opinion of Advocate General Sharpston delivered on 14 October 2010, paragraph 56.

7 Runiewicz-Wardyn: A step back

7.1 Facts of the case

The most recent case concerning name matters in the ECJ's case law is the case of *Runiewicz-Wardyn*²²². In this case the ECJ refers for the second time to the national identities of the Member States within the context of citizenship and free movement. The case demonstrates a “hands-off” approach by the ECJ since it ruled that it is for the national courts to decide whether national measures constitute a restriction to the freedom of movement. The case concerns the interpretation of Articles 18 and 21 TFEU as well as Article 2(2) (b) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.²²³

The reference for a preliminary ruling had been made in proceedings involving Malgożata Runevič-Vardyn (the first applicant), a Lithuanian citizen, and her Polish husband, Łukasz Paweł Wardyn (the second applicant). At the time of the judgment, the couple resided with their son in Belgium.²²⁴

The first applicant, Mrs. Runevič-Vardyn, was born in Vilnius, Lithuania.²²⁵ She held a Lithuanian citizenship but she belonged to the Polish minority in Lithuania.²²⁶ Her parents had given her the Polish forename “Małgorzata” and her Polish father's surname “Runiewicz”.²²⁷ Her name had, however, been registered as “Malgożata Runevič” in accordance with Lithuanian spelling rules in her birth certificate of 1977.²²⁸ In 2003, a new birth certificate was issued with the same name by the Vilnius Civil Registry Division. “Malgożata Runevič” was also the name recorded on her Lithuanian passport issued to her in 2002.²²⁹ The Civil Registry Office of the city of Warsaw, however, issued a Polish birth

²²² C-391/09, *Malgożata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others*, Judgment of the Court 12 May 2011.

²²³ *Ibid* paragraph 1.

²²⁴ *Ibid* paragraphs 2 and 21.

²²⁵ *Ibid* paragraph 15.

²²⁶ *Ibid*.

²²⁷ *Ibid* paragraph 16.

²²⁸ *Ibid* paragraph 17.

²²⁹ *Ibid*.

certificate to her in 2006. This time, her name was recorded pursuant to the rules governing the spelling of the Polish language, i.e. “Małgorzata Runiewicz”.²³⁰

The first applicant worked and resided in Poland for some time and married the second applicant in 2007 in Lithuania.²³¹ The Vilnius Civil Registry Division issued their marriage certificate which recorded the second applicant’s name as “Lukasz Pawel Wardyn”. The recorded name of the second applicant, thus, excluded diacritical modifications which are used in Polish letters.²³² It is, however, noteworthy that the Lithuanian authorities did not alter the second applicant’s surname, even though the letter “W” does not exist in the Lithuanian alphabet. Both the forename and the surname of the first applicant were, moreover, recorded using only Lithuanian characters as “Malgožata Runevič -Vardyn”.²³³

In 2007 the first applicant submitted a request to the Vilnius Civil Registry Division to have her name, as it appeared on her Lithuanian birth certificate and marriage certificate, changed in accordance with Polish spelling rules.²³⁴ The Civil Registry Division, nonetheless, refused to amend her name since the applicable national rules did not allow her name to be governed by Polish spelling rules.²³⁵ Both of the applicants brought an action before the Lithuanian national court, where they argued that the refusal of the Lithuanian authorities to transcribe their names in a form which complies with the rules governing Polish spelling in their marriage certificate and the first applicant’s birth certificate, constituted discrimination against EU citizens. The national Court referred the matter to the ECJ for a preliminary ruling.

7.2 The ECJ’s ruling

The ECJ held, firstly, that the situation did not come within the scope of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.²³⁶

²³⁰ C-391/09, *Malgožata Runevič-Vardyn and Lukasz Pawel Wardyn v Vilniaus miesto savivaldybes administracija and Others*, Judgment of the Court 12 May 2011, paragraph 19.

²³¹ *Ibid.*

²³² *Ibid* paragraph 20.

²³³ *Ibid.*

²³⁴ *Ibid* paragraph 22.

²³⁵ *Ibid* paragraph 23.

²³⁶ *Ibid* paragraphs 45 and 48. This was due to the narrow scope of Article 3(1)(h) of the directive, which states that the directive applies to all persons, in both the public and private sectors, including public bodies, in relation

The ECJ thereafter examined whether the situation came within the material scope of EU law.²³⁷ The Court stated that since both applicants were EU citizens, their status as such enabled them to enjoy the same treatment in law irrespective of their nationality within the material scope of the TFEU.²³⁸ The ECJ, moreover, held that situations falling within the material scope of EU law include those, which involve the exercise of the fundamental freedoms guaranteed by the TFEU, in particular those involving the freedom to move and reside within the territory of Member States as conferred by Article 21 TFEU.²³⁹

The ECJ thereafter examined if an obstacle to the freedom of movement was at hand pursuant to Article 21 TFEU. The Court did not address Article 18 TFEU and the right of EU citizens not to be discriminated against on grounds of nationality enshrined therein. Regarding the first applicant, who is a Lithuanian citizen, the Court ruled that Article 21 TFEU did not preclude the authorities of a Member State to enter a person's name only in accordance with the official national language.²⁴⁰ It was, therefore, not a violation to refuse to amend her forename and maiden name on the certificates issued in Lithuania in accordance with Polish spelling rules.²⁴¹

Regarding the second applicant, the ECJ held that it is only for the national court to decide whether the refusal of the authorities of a Member State to amend the marriage certificate so that his name is entered in a manner which complies with the spelling rules of Poland, is liable to cause "serious inconvenience", within the meaning of Article 21 TFEU.²⁴² The ECJ, nonetheless, held that the refusal of the authorities of a Member State to amend the marriage certificate in such a way that the names of the second applicant are entered with diacritical marks, i.e. "P", did not constitute a restriction on the freedoms conferred by Article 21 TFEU.²⁴³ The ECJ based this on the fact that diacritical marks are often omitted in many daily actions and that this is in many situations due to objective constraints inherent in computer

to access to– and supply of goods and services which are available to the public. The situation at hand was not considered to fall within the ambit of "services".

²³⁷ C-391/09, *Malgozata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others*, Judgment of the Court 12 May 2011, paragraphs 58-62.

²³⁸ *Ibid* paragraph 61.

²³⁹ *Ibid* paragraph 62.

²⁴⁰ *Ibid*.

²⁴¹ *Ibid* paragraph 71.

²⁴² *Ibid* paragraph 78.

²⁴³ *Ibid* paragraph 82.

systems.²⁴⁴ In addition to this, the ECJ noted that people who are unfamiliar with a foreign language often misunderstand diacritical marks. It was therefore unlikely, according to the ECJ, that the omission of such marks could, in itself, cause actual and serious inconvenience for the persons concerned within the meaning of Article 21 TFEU.²⁴⁵

Although the ECJ found that it is for the national court to establish whether the refusal of the competent authorities to amend the marriage certificate is liable to cause “serious inconvenience”, the Court emphasized that such inconvenience could be justified where the national measure is based on objective considerations and is proportionate to the legitimate objective of the national provisions.²⁴⁶ A number of governments submitted observations to the ECJ and expressed that it is legitimate for a Member State to ensure that the official national language is protected in order to safeguard national unity and preserve social cohesion.²⁴⁷ The Lithuanian government especially stressed that the Lithuanian language constitutes a constitutional asset which preserves the nation’s identity, contributes to the integration of citizens, and ensures the expression of national sovereignty, the indivisibility of the State, as well as the proper functioning of the services of the State and the local authorities.²⁴⁸

Regarding the objective nature of the national measure, the ECJ emphasized that EU law does not preclude the adoption of a policy for the protection and promotion of a language of a Member State, which is both the national, and the first official language in that State.²⁴⁹ The ECJ also held that, pursuant to Article 3(3) TEU and Article 22 of the Charter, the Union must respect its rich cultural and linguistic diversity.²⁵⁰ The ECJ, furthermore, underlined that Article 4(2) of the Treaty on European Union (TEU) provides that the EU must respect the national identity of its Member States, which includes the protection of a State’s official national language.²⁵¹ The ECJ, thus, concluded that the objective pursued by national rules designed to protect the official national language by imposing the rules which govern the

²⁴⁴ C-391/09, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others*, Judgment of the Court 12 May 2011, paragraph 81.

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid* paragraph 83.

²⁴⁷ *Ibid* paragraph 84.

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid* paragraph 85.

²⁵⁰ *Ibid* paragraph 86.

²⁵¹ *Ibid.*

spelling of that language, constitutes a legitimate objective capable of justifying restrictions on the rights protected under Article 21 TFEU.²⁵²

The ECJ, moreover, held that measures which restrict a fundamental freedom, such as that provided for in Article 21 TFEU, may be justified by objective considerations only if they are necessary for the protection of the interests which they are intended to secure and only in so far as those objectives cannot be attained by less restrictive measures.²⁵³ In this respect, the ECJ referred to Article 8 of the ECHR as well as Article 7 of the Charter, and held that a person's surname is a constituent element of his identity and of his private life.²⁵⁴ The ECJ, however, concluded by stressing that it is for the national court to establish whether the refusal to amend the surname of the couple in the main proceedings reflects a fair balance between the right of the applicants to respect for their private and family life and the legitimate protection by of a Member State's official national language.²⁵⁵ The ECJ, however, held that the Lithuanian authorities' decision to alter the first applicant's surname from "Wardyn" to "Vardyn" on the marriage certificate, seemed disproportionate since the authorities entered the name "Wardyn" in respect of the second applicant.²⁵⁶

7.3 Analysis

7.3.1 Articles 18 and 21 TFEU

What is remarkable about the ECJ's ruling is that the Court seemed to perceive the prohibition of discrimination based on grounds of nationality as a right "contained" in the right of freedom of movement in Article 21 TFEU.²⁵⁷ The ECJ therefore, did not examine Article 18 TFEU to a full extent. On the contrary, Advocate General Jääskinen had regarded the two rights in Articles 18 and 21 TFEU separately. Jääskinen viewed the right of non-

²⁵² C-391/09, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others*, Judgment of the Court 12 May 2011, paragraph 87.

²⁵³ *Ibid* paragraph 88.

²⁵⁴ *Ibid* paragraph 89.

²⁵⁵ *Ibid* paragraph 91.

²⁵⁶ *Ibid* paragraphs 17-22 and 92. The second applicant's surname had been altered from its Polish form, "Łukasz Paweł Wardyn", to "Łukasz Paweł Vardyn". Since the Lithuanian alphabet does not include the letter "W", this alteration suggests that only the diacritical marks were omitted. His wife's name (the first applicant's name) had on the contrary been altered from "Małgorzata Runiewicz-Wardyn" to "Malgožata Runevič-Vardyn", suggesting that her full name was transcribed in accordance with Lithuanian spelling rules. The difference between the two applicants is that the husband (the second applicant) is a Polish citizen, while the wife (the first applicant) belongs to the Polish minority in Lithuania but holds only a Lithuanian citizenship.

²⁵⁷ C-391/09, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others*, Judgment of the Court 12 May 2011, paragraph 65. The Court noted that Article 21 TFEU "contains... a prohibition of any discrimination on grounds of nationality".

discrimination and freedom of movement as two distinct rights derived from the fact that a person bears the status of EU citizenship pursuant to Article 20 TFEU.²⁵⁸

The ECJ's silence as regards Article 18 TFEU and the Court's derivation of a right of non-discrimination from Article 21 TFEU makes it difficult to establish how the two rights are related to each other. It has been suggested that the ECJ's apparent unwillingness to rule on the matter in Article 18 TFEU is representative of the sensitive facts in the case, a respect for national identity, the division of competence as well as an institutional balance.²⁵⁹

7.3.2 Justifications

It is worth noting that, contrary to the ECJ's findings that it is for the national court to decide whether the national measure may be justified, Advocate General Jääskinen found that the Lithuanian measures did not constitute the adequate and necessary means of achieving the objective of protecting the national language.²⁶⁰ Jääskinen, furthermore, found that less restrictive measures could be adopted in order to ensure the rights of persons to a greater extent.²⁶¹ Jääskinen based his argument on the fact that the Lithuanian legislation already allowed letters that did not exist in the national language to be used in documents indicating the civil status of a national of another Member State, such as the letter "W".²⁶²

Since the ECJ adopted a "hands-off" approach in the matter, it is difficult to determine whether the national measure could have been justified. The undertone of the ECJ's statements, nonetheless, seems to suggest that national measures may be justified based on, for example, administrative reasons as many computer systems find it difficult to enter names with diacritical marks.

²⁵⁸ C-391/09, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others*, Opinion of Advocate General Jääskinen delivered on 16 December 2010, paragraph 68. The Advocate General, furthermore, extensively examines the rights conferred upon an EU citizen in Article 18 and 21 TFEU separately. See paragraphs 88-99 for Article 21 TFEU and paragraphs 69-87 for Article 18 TFEU.

²⁵⁹ Van Eijken, *C-391/09 Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others*, *Common Market Law Review*, Vol. 49, p 826.

²⁶⁰ C-391/09, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others*, Opinion of Advocate General Jääskinen delivered on 16 December 2010, paragraph 101.

²⁶¹ *Ibid.*

²⁶² *Ibid.*

7.3.3 Respect for national identity

Keen emotions were involved in the case of *Runiewicz-Wardyn*, both for the Lithuanian State and the concerned individuals.²⁶³ The case is clearly an illustration of the sensitive historical and geopolitical factors in Lithuania and Poland. The attention drawn to the strained Polish-Lithuanian relations regarding spelling have even reached beyond the walls of court rooms.²⁶⁴ Although Lithuania and Poland are linked through a common history, within the Poland-Lithuania Union as well as the Russian Empire, tensions have arisen since the interwar period in the region of Vilnius in Lithuania.²⁶⁵ The fact that the ECJ did not to rule on whether the national measures were justified or not, is remarkable since the ECJ submitted the invocation of a national constitutional rule to a proportionality test in the case of *Sayn-Wittgenstein*.²⁶⁶ Perhaps a sudden epiphany had hit the ECJ that it may invoke hard feelings, especially when a matter concerns the national identity of a Member State, if it considered itself to have the last say whenever a national rule touches upon EU law.

7.3.4 Consequences for private international law rules

The ECJ's ruling distinctively signals an unwillingness of the Court to intrude on sensitive sovereign interests. As a result, the ECJ's ruling is a step back in the Court's previous approach, since it gives very little guidance regarding the development of the relationship of EU citizenship rights and the Member States' private international law rules. A vague hint is, nonetheless, given by the Court: objectives relating to the perseverance of a national language and administrative reasons may justify restrictive national measures in name matters.

²⁶³ C-391/09, *Malgożata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others*, Opinion of Advocate General Jääskinen delivered on 16 December 2010, paragraph 5.

²⁶⁴ See for example two articles published by The Economist on the strained relationships between Poland and Lithuania, available at:

<http://www.economist.com/node/21549987>, and

<http://www.economist.com/blogs/easternapproaches/2012/02/poland-and-lithuania>.

²⁶⁵ C-391/09, *Malgożata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others*, Opinion of Advocate General Jääskinen delivered on 16 December 2010, paragraph 5.

²⁶⁶ Van Eijken, *C-391/09 Malgożata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others*, *Common Market Law Review*, Vol. 49, p 826. The Advocate General had, however, suggested in his opinion that the question should have been left for the national Court.

8 Swedish law of names

8.1 A change

The Swedish Names Act (*Namnlagen SFS 1982:670*) has been criticized on a number of occasions during the past years.²⁶⁷ The criticism has not only dealt with the Act's private international law provisions, but also other matters, such as its anachronistic nature.²⁶⁸ A parliamentary committee of inquiry is currently examining the Act, in its entirety, and necessary changes are to be proposed at the latest on the 1st of March 2013.²⁶⁹ Pending this examination, problems arising from the Act's private international law provisions nonetheless urged a separate investigation as the European Commission in 2006 had questioned its compatibility with EU law in one of its reasoned opinions.²⁷⁰

In this reasoned opinion, the Commission claims that Sweden has not fulfilled its obligations pursuant to Articles 18, 20 and 21 TFEU as well as directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of Member States.²⁷¹ This claim was based on the fact that Swedish authorities applied the same choice-of-law rule to persons with dual Swedish-Spanish citizenship and persons possessing only a Swedish citizenship. This, in the Commission's opinion, amounts to discrimination based on nationality as well as an obstacle to the free movement of persons within the Union. Concerns regarding the fact that the Swedish Names Act did not take into account the naming customs of other countries to a satisfactory extent when a person has dual citizenship, had also been raised by the Swedish Tax Agency (*Skatteverket*) as well as the Swedish Patent and Registration Office (*Patent och Registreringsverket*) as early as in 2005.²⁷² Following a legislative process initiated by the Swedish Ministry of Justice, section 49 a was introduced into the Names Act in an attempt to make Swedish law more compatible with EU law. The new section came into force on the 1st of March 2012.

²⁶⁷ Dir (*The Swedish Government's terms of reference*) 2009:129. *En översyn av namnlagen*, p 6.

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid.*

²⁷⁰ COM 2006/4454, Ju2007/9279/L2.

²⁷¹ *Ibid.*

²⁷² Ds (*Ministry Publication Series*) 2011:39, *Internationella namnfrågor*, p 9.

The Swedish Names Act and its predecessors have never included an exhaustive regulation of the private international law aspects of names.²⁷³ Private international law aspects concerning name matters have either only been regulated partly, or not at all.²⁷⁴ In the following sections, this thesis will highlight the private international aspects that are regulated to date concerning the choice-of-law rules and the recognition of foreign-established names. Prior to this examination, it is, however, necessary to look at some of the general characteristics of the Names Act in order to understand the Act's structure.

8.2 General characteristics of the Names Act

There are three different types of names that a person can bear according to the Names Act: forenames, “middle names”²⁷⁵ and surnames. These names can be acquired in three ways. Firstly, there are what has become known as “automatic” acquisitions of names. Only surnames may be acquired this way. Automatic acquisitions include, amongst others, the situation when a child acquires a surname that both his or her parents bear.²⁷⁶

Secondly, in family related matters, both a surname and a forename may be acquired or changed, by giving notice²⁷⁷ to the Swedish Tax Agency.²⁷⁸ Names acquired and changed by giving notice to the Swedish Tax Agency, have become known under the term “family related” acquisitions.²⁷⁹ These include acquisitions or changes of names that have not occurred automatically pursuant to the Names Act, but that have a close connection to family constellations. One example is when a spouse has chosen to retain his or her own surname upon marriage and acquires the other spouse's surname only later on after giving notice to this effect.²⁸⁰ This change will be carried out after giving notice to the Swedish Tax Agency. Another important example in the context of this thesis is that a “middle name” is acquired by

²⁷³ Private international law aspects of names have not been regulated elsewhere either. See Ds 2011:39, *Internationella namnfrågor*, p 21. There were, however, plans to regulate the international aspects of names to a full extent in preparatory works to the 1982 version of the Names Act. See prop 1981/82:156 p 48.

²⁷⁴ Ds (*Ministry Publication Series*) 2011:39, *Internationella namnfrågor*, p 21.

²⁷⁵ The concept of “middle names” will be further explained in section 8.4 of this thesis.

²⁷⁶ Section 1 subsection 1 of the Names Act.

²⁷⁷ Freely translated from the Swedish term “*anmälan*”.

²⁷⁸ Pursuant to section 36 points 1-2 of the Names Act, a notice is given in written form to either the Swedish Social Insurance Agency (*Försäkringskassan*), the minister of a wedding ceremony, or, when baptized within the Church of Sweden, the baptizer.

²⁷⁹ Freely translated from the Swedish term “*familjerättslig*”. The term is not defined in the Names Act but preparatory works has referred to this term before the enactment of the Names Act in 1982. The term is, to date, only explicitly mentioned in section 49 a of the Names Act.

²⁸⁰ Section 10 subsection 1 of the Names Act. See sections 1-10 of the Names Act for further examples.

giving notice to the Swedish Tax Agency.²⁸¹ The way in which a “middle name” can be acquired and the effects of such a name, will be discussed in section 8.4 of this thesis.

Lastly, an acquisition or change of surname may be made through an application²⁸² to the Swedish Patent and Registration Office. These changes or acquisitions have become known as “administrative” acquisitions. They include changes that cannot be acquired pursuant to the rules regarding automatic– and family related acquisitions of surnames.²⁸³ The Patent and Registration Office, in contrast to a notice given to the Swedish Tax Agency, review these applications and a fee, which amounts to 1800 Swedish Kronor (SEK), accompanies each application.²⁸⁴

8.3 Applicable law

The Swedish Names Act does not include an exhaustive regulation regarding choice-of-law rules when a situation has an international dimension to it. The introduction of section 49 a into the Names Act did not alter the state of choice-of-law rules and in this regard *status quo* remained.

Questions regarding names are, in Swedish law, qualified as belonging to issues regarding personal status and capacity, which are governed by the so-called “personal law”.²⁸⁵ As a result, name matters are considered to be most appropriately determined by the legal system which the concerned person has had the closest connection to at the time of the acquisition or change of name.²⁸⁶ It has been a matter of long-term debate in private international law whether the law of a person’s nationality (*lex patriae*) or the law of the person’s habitual residence (*lex domicilii*) should govern a person’s personal matters.²⁸⁷ Swedish law has traditionally been perceived as belonging to the group of countries where nationality is used as the determining factor, even if a person’s habitual residence as a connecting factor has

²⁸¹ Section 29 subsection 2 and section 15 of the Names Act.

²⁸² Freely translated from the Swedish term “*ansökan*”.

²⁸³ Section 11 of the Names Act.

²⁸⁴ Section 39 subsection 2 of the Names Act, as well as section 1 of the Swedish Names Decree (*SFS 1982:1136 Namnförordningen*). On the 29th of May 2012, 1800 SEK was equivalent to 210.395 EUR pursuant to the Swiss Bank Credit Suisse’s currency converter available at:

<http://www.oanda.com/convert/classic?user=creditsuisse>

²⁸⁵ Bogdan, *Svensk internationell privat- och processrätt*, 7e upplagan, p 147, prop 1982/83:38 p 12 as well as SOU 1979:25 p 219-220.

²⁸⁶ Bogdan, *Svensk internationell privat- och processrätt*, 7e upplagan, p 147.

²⁸⁷ *Ibid* p 148.

become increasingly more important in later developments. Nationality is, nonetheless, used as a connecting factor when determining the applicable law in name matters in Sweden.

Swedish law is applicable to an acquisition of a name in accordance with sections 50-52 of the Names Act. The rules are based on the country of origin principle and differentiate between categories of persons based on the person's nationality. The provisions explicitly differentiate between five categories of persons: (1) Swedish citizens who are habitually resident²⁸⁸ in Denmark, Finland or Norway; (2) Danish, Finnish and Norwegian citizens habitually resident in Sweden; (3) stateless persons habitually resident in Sweden, or if lacking a habitual residence, if they are currently resident in Sweden; (4) foreign nationals adopted in Sweden, regardless of their habitual residence; as well as (5) other foreign nationals that are habitually resident in Sweden.

Swedish law is not applied to Swedish citizens habitually resident in Denmark, Norway and Finland, pursuant to section 50 of the Names Act. According to section 51, the Act is, on the contrary, applied to Danish, Norwegian and Finnish nationals habitually resident in Sweden. This general rule is also mirrored in the laws regulating names in Denmark, Norway and Finland, so that their respective laws govern Swedish citizens habitually resident in these countries.²⁸⁹ This is due to the cooperation and coordination of legislative measures among the countries which took place in the beginning of the 1980s where the States agreed, informally, that the place of a person's habitual residence would be used as a connecting factor in name matters in order to encompass coherence in the private international laws regarding names among the four States.²⁹⁰

The Swedish Names Act is applicable to stateless persons who are habitually resident in Sweden or if they are not habitually resident in any State, if they are currently resident in Sweden, pursuant to section 52 of the Names Act.

²⁸⁸ "Habitual residence" has been translated from the Swedish term "*hemvist*" as this conforms with translations used in various EU instruments. See for example Article 4(1)(a) in Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I").

²⁸⁹ Ds 2011:39, *Internationella namnfrågor*, p 27.

²⁹⁰ *Ibid.*

The Names Act is, furthermore, applicable to foreign nationals adopted in Sweden who wish to retain their original surname, or acquire their adoptive parents' surname, regardless of whether they are habitually resident in Sweden or have a Swedish citizenship.²⁹¹

The Names Act does not explicitly state when Swedish law is applicable to name matters of remaining foreign nationals who are habitually resident in Sweden. A foreign national “may”, however, demand that Swedish law should be applied to his or her name acquisition pursuant to section 51 subsection 2 of the Names Act. Although it is not explicitly stated in the Names Act, it also follows, *e contrario*, from section 51, that foreign nationals may request to have foreign law applied by Swedish authorities to their acquisition of a name.²⁹² The application of foreign law by Swedish authorities is, nonetheless, limited to family related– and automatic name acquisitions. The right to have foreign law applied by Swedish authorities in name matters has not been interpreted to apply to citizens who possess a foreign citizenship in addition to their Swedish citizenship.²⁹³ The right to have foreign law applied to a person's name matter does also not apply to Danish, Finnish and Norwegian citizens who are habitually resident in Sweden.²⁹⁴

For the limited situations when Swedish authorities apply foreign law, the Names Act does not include express provisions about classical private international law exceptions, such as *ordre public*, or mandatory international rules that have to be applied regardless of whether or not foreign law is applicable. It is, however, possible that the express prohibition against surnames that may cause offence, contained in section 12 point 5 of the Names Act, will also be applied when foreign law is applicable. This has been suggested by the case with the protection of highly individualistic²⁹⁵ surnames. The Swedish Tax Agency has, nonetheless, pointed out that it *does not* apply a review in cases when foreign law is applied and that the protection for individualistic names is not regarded when foreign law is applied.²⁹⁶

²⁹¹ Sections 2-4 as well as section 51 subsection 3 of the Names Act.

²⁹² Ds 2011:39, *Internationella namnfrågor*, p 28.

²⁹³ *Ibid.*

²⁹⁴ *Ibid.*

²⁹⁵ Translated freely from the Swedish term “*egenartade*”.

²⁹⁶ Ds 2011:39, *Internationella namnfrågor*, p 30. The fact that a strict review is most likely not conducted by the Swedish Tax Authority in accordance with section 12 points 5 and 6 of the Names Act, has also been pointed out by Olle Abrahamsson. See Abrahamsson, *Skall man få heta vad som helst? En namnlagsutredares dilemma*, *Studia Anthroponymica Scandinavica: Tidskrift för nordisk personnamnsforskning*, p 154.

There is no distinct rule in the Names Act concerning the applicable law to name matters of Swedish citizens who are habitually resident abroad, but who are not habitually resident in Denmark, Norway or Finland. When section 50 of the Names Act is read *e contrario*, it however, follows that the Names Act *is* applicable to Swedish nationals habitually resident in other countries than these three Nordic States.²⁹⁷

The Names Act does not explicitly state whether Swedish law is applicable to Swedish citizens who hold an additional citizenship. Neither does the Names Act establish whether those persons' Swedish citizenship would be preferred above their foreign one, when deciding if Swedish law is applicable to their name matters. In practice, nonetheless, precedence is given to those persons' Swedish citizenship and Swedish law is applied to their name matters.²⁹⁸ It has, however, been pointed out in leading legal literature that these persons should have a choice regarding the applicable law.²⁹⁹ This position has, nonetheless, been contradicted by Swedish case law.³⁰⁰

Lastly, it might be worth noting that situations when Swedish law is applicable to a person's name matters coincide with the jurisdiction of Swedish authorities pursuant to section 51 of the Names Act.

8.4 When Swedish law is applied

When Swedish law is applied to a person's name matters, this consequently means these matters are subjected to the restrictions set out in the substantive rules of the Names Act. As was mentioned above, a Swedish citizen who is habitually resident in another country than Sweden, Denmark, Norway or Finland, can therefore only acquire a name in Sweden in accordance with the rules in the Names Act. Likewise, this is also the case for Swedish citizens who hold an additional citizenship. In the context of this thesis, some of the most relevant restrictions in the substantive rules in the Names Act will be underlined below.

²⁹⁷ Bogdan, *Svensk internationell privat- och processrätt*, 7e upplagan, p 175 cont.

²⁹⁸ Ds 2011:39, *Internationella namnfrågor*, p 29.

²⁹⁹ Höglund, *Namnlagen, En kommentar*, p 236.

³⁰⁰ Ds 2011:39, *Internationella namnfrågor*, p 29. Regarding case law, see for example the Swedish case RÅ 2005 ref. 30.

Swedish substantive law does not allow a person to bear a “double surname” (*dubbelnamn*) as a surname pursuant to section 12 subsection 3 of the Names Act.³⁰¹ What is meant by a “double surname” is, however, not defined in the Names Act. Preparatory works have defined “double surnames” as surnames that consist of two names, of which both amount to a surname on their own.³⁰² Many of these “double surnames” are combined by a hyphen, for example “Andersson-Larsson”.³⁰³ The prohibition against “double surnames” is in direct conflict with, for example, Spanish and Portuguese naming traditions where children bear a surname from each one of its parents, for example “Garcia Avello”.³⁰⁴

A possible solution when a person wishes to acquire a “double surname” pursuant to Swedish law is to have one of the surnames be a “middle name” (*mellannamn*). Spouses may, for example, keep their own surname as a “middle name” when acquiring the other spouse’s surname.³⁰⁵ Parents may also, pursuant to section 25 of the Names Act, choose to designate their child with one of the parent’s surname and the other parent’s surname as a “middle name”.

The possibility of acquiring a “middle name” was introduced in the changes made to the Swedish Names Act in 1982.³⁰⁶ The majority of consulted bodies expressed the view that this possibility was sufficient enough to take Spanish and Portuguese naming traditions into consideration.³⁰⁷ A problem is, however, that a “middle name” pursuant to Swedish law, cannot be passed on to the carrier’s spouse or children.³⁰⁸ Since, according to, for example, Spanish naming traditions, it is each parent’s “first” surname which is supposed to be passed

³⁰¹ Double surnames have for a long time been regarded as an undesirable form of a name in Swedish law. Already in 1901, when what was to become an early form of the Names Act was prepared, a deprecatory position was adopted towards double surnames, even though an explicit prohibition against them was not adopted until 1982. The foremost critique against double surnames in Swedish law is that they are ungainly and are difficult to manage from an administrative point of view. Even before the explicit prohibition against double surnames was introduced in Swedish law, the Swedish Patent and Registration Office were very reluctant to allow double surnames. See Ericsson, *Namnlagen. Namnskick och namnrätt med lagkommentar*, p 17 and p 52. Also see prop 1981/82:156 p 59.

³⁰² SOU 1979:25 p 83 and prop 1981/82:156 p 15.

³⁰³ Ericsson, *Namnlagen. Namnskick och namnrätt med lagkommentar*, p 17.

³⁰⁴ In the author’s opinion the prohibition against “double surnames” seems rather unbalanced since newly formed surnames, such as “Seydayébdulcelil”, “Diclekahraman”, “Shakibimomtaz” and “Ukaabdulhak” that are difficult to handle from a Swedish administrative point of view have been allowed. See Abrahamsson, *Skall man få heta vad som helst? En namnlagsutredares dilemma*, Studia Anthroponymica Scandinavica: Tidskrift för nordisk personnamnsforskning, p 151.

³⁰⁵ Section 24 of the Names Act.

³⁰⁶ In the 1963 version of the Names Act, it was possible to acquire an additional surname (“*tilläggsnamn*”). See Dir (*The Swedish Government’s terms of reference*) 2009:129. *En översyn av namnlagen*, p 6.

³⁰⁷ Prop 1981/82:156 p 202, 203 and 235.

³⁰⁸ Ds 2011:39, *Internationella namnfrågor*, p 33.

on to the child, this is not possible since the “first” surname is always regarded as a “middle name” in Swedish name law.³⁰⁹ If, for example, Mr. Andersson Garcia wishes to pass on the surname “Andersson”, this is not possible since it is regarded as a “middle name” according to Swedish law.³¹⁰

Another possible way to attempt to conform to, for example, Spanish naming traditions is to change a surname pursuant to section 14 subsection 2 of the Names Act. A surname may be changed if “exceptional reasons”³¹¹ are at hand in the case. A strong connection to another State, such as an additional citizenship, may constitute an “exceptional reason”.³¹² An application for a change of a surname is sent to the Swedish Patent and Registration Office who reviews the application. An application is, nonetheless, only reviewed if a fee is provided, which, in June 2012, amounted to 1 800 Swedish Kronor (SEK), i.e. approximately 200 Euros.³¹³ This fee may only be waived in case there are “extraordinary reasons”³¹⁴. If an application is granted so that a person may bear a “double surname”, the two names will, however, be regarded as one entity and may not easily be separated.³¹⁵

The Swedish legislator has strived to take into consideration connections to other States than Sweden that a person may have in a few other provisions in the Names Act. Firstly, pursuant to section 15 of the Names Act, a change of a surname’s gender form is not regarded as a “change” to a different surname. There is, hence, room for foreign naming traditions where females and males of the same family acquire different versions of the same surname.

Pursuant to section 34 of the Names Act, approval shall be withheld in the case a name could cause offence, might be expected to cause embarrassment to the bearer or if a name, for some other reason, is manifestly unsuitable as a forename. Case law has affirmed that a foreign

³⁰⁹ Ds 2011:39, *Internationella namnfrågor*, p 33. The prohibition against double surnames does not, however, include names acquired before January 1983. The two surnames can in those cases be acquired automatically or by giving notice to the Swedish Tax Agency pursuant to sections 1-10 of the Swedish Names Act or through an application to the Patent and Registration Office.

³¹⁰ It has been pointed out by the Chairman of the committee of inquiry of the Swedish Names Act, Olle Abrahamsson, that the concept of “middle names” should be re-considered since the rules are complex and cause confusion for the public. Abrahamsson has also underlined in this respect that the prohibition against “double surnames” also should be re-examined. See Abrahamsson, *Skall man få heta vad som helst? En namnlagsutredares dilemma*, *Studia Anthroponymica Scandinavica: Tidskrift för nordisk personnamnsforskning*, p 159-160.

³¹¹ Translated freely from the Swedish term “*synnerliga skäl*”.

³¹² Ds 2011:39, *Internationella namnfrågor*, p 35.

³¹³ See section 1 subsection 2 of the Swedish Name Decree (*SFS 1982:1136 Namnförordningen*).

³¹⁴ Translated freely from the Swedish term “*särskilda skäl*”.

³¹⁵ Ds 2011:39, *Internationella namnfrågor*, p 35.

citizenship or other strong connections to a foreign country may justify that person can bear a name that could cause offence, embarrassment or be manifestly unsuitable. In the case RÅ 1985 2:8, a child named “Nadia Bent Mohamed Moncef”, which was the name stated in her Tunisian passport, was allowed to bear the name in Sweden even though the name gave the impression that “Bent Mohammed Moncef” constituted three male names.

8.5 Recognition of a name

8.5.1 Before the enactment of section 49 a

The question regarding whether a foreign-established name may be recognized in Sweden is of importance since a Swedish citizen has limited possibilities of acquiring a name pursuant to foreign naming customs in Sweden. Before the enactment of section 49 a in 2012, the Names Act was silent on the possibility of having a foreign-established name recognized in Sweden. There were, however, certain statements in the preparatory works to the Names Act that were guiding as how to determine the recognition of foreign-established names and these will be highlighted below. When a name has been acquired in another State than Sweden, one should differentiate between three situations: (1) when a foreign national has acquired a name abroad, (2) when a Swedish national has done so, and (3) when a person with dual Swedish and foreign citizenship has done the same.

In the preparatory works related to the 1982 version of the Names Act it was stated that, in relation to foreign nationals who had acquired or changed their name in another State than Sweden, the name would be noted down by the Swedish Tax Agency and the foreign name would be recognized.³¹⁶

In the case where a Swedish national had acquired a name abroad, the preparatory works stated that there are were no compelling reasons speaking in favor of recognizing such a name in Sweden, even though the person at the time of acquisition was habitually resident in the State where the name had been acquired.³¹⁷ It was, nonetheless, pointed out that if such a person would want to acquire the same name in Sweden, the Swedish Patent and Registration Office should have been able to take into account in their review that there had been a lawful

³¹⁶ Prop 1982/83:38 p 12 and regarding names acquired in Iceland, see prop 1984/85:124 p 73.

³¹⁷ Prop 1982/83:38 p 11.

acquisition of the same name abroad.³¹⁸ Names acquired in Norway, Denmark or Finland by Swedish nationals were however, recognized without an explicit statutory basis.³¹⁹

When a Swedish citizen with an additional citizenship had acquired a name in another State than Sweden, precedence was given to their Swedish nationality. These individuals were, thus, treated in the same manner as persons who were only Swedish nationals and if they had acquired a name in another State, it was not recognized in Sweden.

Since there were no explicit rules regarding the circumstances in which a name acquired in another State than Sweden would be recognized in Sweden, there were also no rules regarding when such a name would to be refused recognition, even if, in principle, it would have been recognizable. The preparatory works were silent on this matter.

8.5.2 Section 49 a of the Names Act

On the 1st of March 2012, section 49 a of the Swedish Names Act came into force. Its introduction signals the Swedish legislator's attempt to complement the Swedish authorities' restrictive application of foreign law, especially as regards citizens with dual citizenship.

Pursuant to section 49 of the Names Act, a person who has acquired a name in another State than Sweden within the EEA or Switzerland through birth, a change of civil status or because of another family related event, has a right to acquire that name in Sweden by giving notice to the Swedish Tax Agency, if he or she at the time of acquisition was a citizen of –, was habitually resident in –, or had another “special connection”³²⁰ to that State.

Pursuant to subsection 2 of section 49 a of the Names Act, a forename cannot be acquired in accordance with section 49 a if it could cause offence or embarrassment to the bearer or if the name for some other reason is manifestly unsuitable as a forename.³²¹

Where a child under the age of 18 bears the name of the parent who does not have custody, that child may only change his or her surname pursuant to section 49 a of the Names Act if

³¹⁸ Prop 1982/83:38 p 11.

³¹⁹ *Ibid* p 9.

³²⁰ Freely translated from the Swedish term “*särskild anknytning*”.

³²¹ This mirrors the limitations in substantive law pursuant to section 13 of the Names Act.

the parent consents thereto or if a court has found the change of name to be in the child's best interest.³²²

At the outset, the introduction of section 49 a of the Names Act seems to have altered the situation so that Swedish citizens with a connection to another State, such as an additional citizenship, may now have their foreign-established names recognized in Sweden. The "right to acquire" a name in Sweden is, nonetheless, subjected to several limitations, such as that the acquisition must have occurred because of a certain change of civil status. It is also worth noting that recognition of a name seems to be subjected to the same limitations that are used in practice for foreign nationals habitually resident in Sweden who wish to have foreign law applied to their name acquisitions.³²³ As a result, administrative name acquisitions, such as a name acquired because of a gender change, made in another State than Sweden cannot be recognized in Sweden. Foreign law cannot either be applied to such name acquisitions. These limitations and their compatibility with EU law will be further addressed in section 10 of this thesis. The exact effect of the reform must, however, be said to be relatively uncertain until case law has developed.

9 A comparative outlook

In order to gain a broader perspective on the expected impact of the changes that have been made to the Swedish Names Act, it is worth taking a closer look at how international name matters are dealt with in the laws of other countries. Finnish law and Swiss law will be used as examples in this section in order to see how the applicable law is determined in transnational name matters as well as to compare to what extent foreign-established names are recognized in the respective countries. The purpose of this section is not to provide the reader with any more comprehensive legal comparison between the legal systems, but rather to provide reflections on Swedish naming law in the light of other legal systems' solutions.

³²² Subsection 3 of section 49 a of the Names Act.

³²³ The application of foreign law by Swedish authorities to nationals of other States, with the exception of Danish, Norwegian and Finnish citizens, is limited to family related- and automatic name acquisitions. See section 8.3 of this thesis.

9.1 Finnish law

Finland is the only Nordic country that strives to regulate the private international law aspects of names to a full extent.³²⁴ The private international law aspects of surnames and forenames are regulated in Chapters 6 and 6 a of the Finnish Names Act (*Släktnamnslag 9.8.1985/694*).³²⁵

9.1.1 Applicable law

When determining the applicable law to name matters, Finnish law distinguishes between family related and administrative acquisitions, much like Swedish law.³²⁶ Family related acquisitions of surnames are regulated in section 26 of the Finnish Names Act of 1985. In contrast to Swedish law, Finnish law employs a person's habitual residence as a connecting factor when determining the applicable law in matters regarding the acquisition of surnames.³²⁷ If the person was habitually resident in Finland when the reason for the acquisition occurred or at the time when an application for acquisition is filed, Finnish law is applied.³²⁸ An exception is provided for Icelandic citizens habitually resident in Finland who may, pursuant to subsection 1 of section 26 of the Finnish Names Act, always choose to have Icelandic rules on names govern their family related acquisitions.

Pursuant to section 28 of the Finnish Names Act, administrative acquisitions, such as questions regarding the forfeiture of surnames, are governed by the *lex fori*-principle, i.e. Finnish law. This is also the case for forenames pursuant to section 32 e of the Finnish Names Act, if the person is habitually resident in Finland or if he or she is a Finnish citizen.

If a person is not habitually resident in Finland at the time of the acquisition of a name or the application, but Finnish authorities are handling the case, the applicable law is determined by the law of the country where the person is habitually resident.³²⁹ Upon request, however, a Finnish citizen habitually resident in a foreign country other than Sweden, Norway or Denmark, *may* have Finnish law applied to the acquisition of a name.³³⁰ In contrast to the case

³²⁴ Ds 2011:39, *Internationella namnfrågor*, p 39.

³²⁵ The Finnish Names Act and its preparatory works are available in both Swedish and Finnish. The author of this thesis has used the Swedish versions.

³²⁶ Ds 2011:39, *Internationella namnfrågor*, p 40.

³²⁷ Section 26 of the Finnish Names Act.

³²⁸ Subsection 1 of section 26 of the Finnish Names Act.

³²⁹ Ds 2011:39, *Internationella namnfrågor*, p 40-41.

³³⁰ Subsection 3 of section 26 of the Finnish Names Act.

of Swedish citizens habitually resident in another State than Sweden, Finnish citizens habitually resident in another State than Finland may choose between the application of foreign law or Finnish law to their name matters. It however follows from section 32 of the Finnish Names Act that foreign law may not be applied to family related acquisitions if its application would be contrary to Finnish public policy.

9.1.2 Recognition of a name

The recognition of a foreign-established surname is regulated in sections 29-31 of the Finnish Names Act. The recognition of a foreign-established forename is regulated separately in section 32 f of the Finnish Names Act. According to section 30 of the Finnish Names Act, a foreign authority's decision, whether an administrative authority or a court³³¹, regarding a change– or acquisition of a surname is recognized in Finland when delivered by an authority of the State where the concerned person at the time of the decision was habitually resident. A name may, furthermore, be recognized in Finland if the decision is recognized pursuant to the laws where the concerned person is habitually resident.³³² Names that have been determined in the concerned person's State of citizenship are also recognized in Finland.³³³

It is, moreover, possible to have a name recognized in Finland *without a decision delivered by foreign authorities*, if the name could have been acquired pursuant to the laws where the person was habitually resident at the time when the person started using the name.³³⁴ The preparatory works to the Finnish Names Act refer to English common law as an example of a situation where it is not a question of law in a strict sense what name a person bears, but a question of whether that person has actually made use of the name.³³⁵

A name acquired outside of Finland may be refused recognition in Finland on any of the grounds listed in sections 31 and 32 f of the Finnish Names Act. A name's recognition may be refused if : (1) a proceeding on the matter is pending in Finland (*litis pendens*), (2) the matter has already been decided on the merits of the case in Finland (*res judicata*); or (3) the matter has already been decided on the merits of the case in a State whose name decisions may be recognized in Finland, or, lastly (4) the decision is contrary to Finnish public policy (*ordre*

³³¹ Regeringens Proposition (RP) (*Government Bill of Finland*) 236/84 p 41.

³³² Section 30 of the Finnish Names Act.

³³³ *Ibid.*

³³⁴ Section 29 of the Finnish Names Act.

³³⁵ RP 236/84 p 16 and 40. Freely translated from the Swedish term “*tagit det i bruk*”.

public). Only decisions granting names are recognized in Finland. A declined application for a name may, however, have an influence in a potential judicial review in Finland.³³⁶

9.2 Swiss law

As the newly enacted section 49 a of the Swedish Names Act, refers not only to names given in EEA countries, but also Switzerland, it is relevant to look at how the matter has been dealt with in Swiss law. Swiss law appears interesting also since it provides an example of where the law operates in a State that accommodates a diversity of communities which is apparent from the different languages and regions of which the country is composed.³³⁷ Cultural diversity is an important element in the Swiss national identity and a guiding principle in the Swiss identity has become “unity but not uniformity”.³³⁸ In Switzerland, private international law aspects of name matters are regulated in the State’s federal code of private international law: Bundesgesetz über das Internationale Privatrecht of 18 December 1987 (the IPRG³³⁹).

9.2.1 Applicable law

Pursuant to Article 37 subsection 1 of the IPRG, the name of a person domiciled³⁴⁰ in Switzerland is governed by Swiss law. The name of a person domiciled outside of Switzerland is governed by the law referred to by the rules of private international law of the State where such person is domiciled.³⁴¹ A person may, however, apply to have his or her name governed by his or her national law³⁴².

³³⁶ RP 236/84 p 41.

³³⁷ Büchler, *Islamic Law in Europe? Legal Pluralism and its Limits in European Family Laws*, p 22.

³³⁸ See the Swiss Federal Department of Foreign Affairs’ website for a brief overview:

http://www.swissworld.org/en/culture/swissness/what_is_swissness/

³³⁹ Switzerland has four official languages but the author of this thesis has used the German versions of the law and commentaries since this is the language she masters the best.

³⁴⁰ The author of this thesis has translated “*Wohnsitz*” to “domicile” within the context of the IPRG. “*Gewöhnlichen Aufenthalt*” is the expression which is rather used for the term “habitual residence”. Article 20 (a) of the IPRG, defines “*Wohnsitz*” as where a person resides with the intent of establishing permanent residence. In EU instruments, such as in Article 4(1)(a) in Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (“Rome I”) as well as in Article 2(1) of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“Brussels I”), the German term “*Wohnsitz*” has been translated to “domicile”.

³⁴¹ Subsection 1 of Article 37 of the IPRG.

³⁴² Translated from “*Heimatrecht*”.

When Swiss law is contrasted to Swedish law, the apparent difference is that Swiss choice-of-law rules operate irrespective of citizenship when determining the applicable law.³⁴³ The IPRG sees the name as a component of an individual's personality and therefore bases its choice-of-law rules on an independent connecting factor.³⁴⁴ The domicile of the concerned person has thus become the determining factor in name matters.

The law of a person's nationality however plays a certain role through Article 37 of the IPRG. Pursuant to Article 37 of the IPRG, party autonomy is conferred upon the concerned person enabling the person to choose the law of the State of nationality as the applicable law to the name matter.

9.2.2 Recognition of a name

A change of name acquired in a country other than Switzerland may be recognized in Switzerland pursuant to Article 39 of the IPRG. According to Article 39 of the IPRG a name may be recognized if this change of name is regarded as valid in the person's State of domicile or nationality³⁴⁵. The purpose of Article 39 of the IPRG is to provide consistency and continuity in the registration of names.³⁴⁶

In contrast to other provisions regarding recognition in the IPRG³⁴⁷, Article 39 of the IPRG does not refer to a decision "rendered" in another country. It refers to a change of name which is "valid"³⁴⁸. At the outset, it however appears that, in contrast to Finnish law, it is not possible to have a name recognized in Switzerland *without a decision delivered by a foreign competent authority*. This view is however contradicted to a certain degree in commentaries to the law.³⁴⁹ According to these commentaries, in order to obtain the aim of continuity, Article 39 of the IPRG must be interpreted as putting emphasis on whether the foreign

³⁴³ It is interesting to note that in the predecessor to the IPRG, the Bundesgesetz (25.6.1891) betreffend die zivilrechtlichen Verhältnisse der Niedergelassenen und Aufenthalter (NAG), a name was perceived as a component of marital status and not as a component of an individual's personality as it is today. It is also interesting to note that pursuant to Article 8 of the NAG, a person's nationality was used as a connecting factor to determine the applicable law. See Hansell, *Basler Kommentar: Internationales Privatrecht*, 2. Auflage, p 272.

³⁴⁴ Hansell, *Basler Kommentar: Internationales Privatrecht*, 2. Auflage, p 272.

³⁴⁵ Translated from the German term "Heimatstaat".

³⁴⁶ Hansell, *Basler Kommentar: Internationales Privatrecht*, 2. Auflage, p 283.

³⁴⁷ See for example Articles 42, 50 and 58 of the IPRG.

³⁴⁸ Article 39 of the IPRG states the following: "Eine im Ausland Namensänderung wird in der Schweiz anerkannt, wenn sie im Wohnsitz- oder im Heimatstaat des Gesuchstellers gültig ist."

³⁴⁹ Hansell, *Basler Kommentar: Internationales Privatrecht*, 2. Auflage, p 284.

authorities *actually would have recognized* the name.³⁵⁰ In contrast to the current position in Swedish law, a *right* to acquire the name in the other State might thus be sufficient in order to have the name recognized in Switzerland.

10 Is Swedish law compatible with EU law?

The European Commission's reasoned opinion about Sweden is based on a case concerning a couple with a child, all habitually resident in Sweden.³⁵¹ The similarities to the facts in the case of *Garcia Avello* are striking: Susana Benedet Perea, a Spanish national, and Christian Andersson, a Swedish citizen, are the parents of Roque, who possessed dual Swedish-Spanish citizenship. The parents gave notice to the Swedish Tax Agency that their son should be registered under the name "Roque Andersson Benedet" pursuant to Spanish naming customs. As Roque possessed dual Swedish-Spanish citizenship, the Swedish Tax Agency regarded him as a Swedish citizen and applied Swedish law to the case. The Tax Agency, thus, referred to the prohibition in Swedish law to bear two surnames and rejected³⁵² the parent's notice of the name. The Tax Agency registered the couple's son simply as "Roque Andersson". The parents appealed to the County Administrative Court³⁵³ and made a reference to the ECJ's ruling in *Garcia Avello*. The County Administrative Court, however, rejected the appeal and concluded that Swedish law is fully compatible with EU law since the parents had the possibility of applying by means of an application accompanied with a fee, to the Patent and Registration Office pursuant to section 14 of the Names Act. Neither the Swedish Administrative Court of Appeal nor the Supreme Administrative Court³⁵⁴ permitted the appeal to be reviewed. The European Commission therefore launched its reasoned opinion, stating that allowing a child to have two different surnames in its different States of citizenship constitutes discrimination. An opportunity to make up for this through an application to the Swedish Patent and Registration Office does not relieve this fact in the Commission's opinion. The fact that Roque could be forced to have two different names in

³⁵⁰ Hansell, *Basler Kommentar: Internationales Privatrecht*, 2. Auflage, p 284.

³⁵¹ Ds 2011:39, *Internationella namnfrågor*, p 53.

³⁵² Translated from the Swedish term "avslog".

³⁵³ Translated from "Länsrätt". Nowadays the term "Förvaltningsrätt" is used.

³⁵⁴ Translated from "Regeringsrätt", but note that it is nowadays obsolete and replaced by "Högsta Förvaltningsdomstolen" (the Supreme Administrative Court).

different Member States also put him in a worse situation than children with only a Swedish or Spanish citizenship. In the Commission opinion, this treatment may amount to an obstacle to the free movement of persons within the Union.

As was underlined earlier in this thesis, the Swedish legislator attempted to heal this situation by the enactment of section 49 a into the Swedish Names Act. We have, however, seen that this provision, in contrast to Finnish law and Swiss law, does not include comprehensive choice-of-law rules regarding names and that it refers to the nationality of a person in order to determine the right to acquire a name in Sweden. The provision can, thus, be criticized for not paying due regard to the legal issues at stake in international name matters. The following section of this thesis will therefore examine whether it is possible to leave the private international law rules rather intact, as done by Sweden, in name matters without violating EU law, and in particular Articles 21 and 18 TFEU. The purpose of this section is thus to identify the challenges that remain after the enactment of section 49 a into the Swedish Names Act, rather than to suggest explicit improvements.

10.1 An obstacle to the freedom of movement?

10.1.1 A recognition?

In the case of *Grunkin and Paul* the ECJ held that it is contrary to Article 21 TFEU and the right of EU citizens to move and reside freely within the Union to *refuse to recognize* a name established in another Member State. Similarly, the ECJ also held in *Sayn-Wittgenstein* that the *refusal to recognize* all elements of a surname may be an obstacle to the freedom of movement of persons if the refusal is not justified.

The solution adapted in section 49 a of the Swedish Names Act, does not, however, explicitly state that a name “shall be recognized”. Instead, section 49 a states that a person who has acquired a name in an EEA state or Switzerland, “has a right to acquire” that name in Sweden by giving notice of the acquisition to the Swedish Tax Agency. When contrasting the term “right to acquire” to Finnish law and Swiss law, which both state to that a change of name “shall be recognized”, the Swedish formulation seems rather ambiguous. The more

straightforward formulation “shall be recognized” is also what was suggested by Hellner as the most suitable solution for Swedish law.³⁵⁵

In the course of the legislative process, the Legislative Council held that a person’s “right to acquire” should have been expressed as a right to “bear” a name that has been acquired in another State than Sweden.³⁵⁶ The expression “may bear” is also found in other provisions in the Swedish Names Act, such as in section 24 pursuant to which a spouse who has acquired the other spouse’s surname “may bear” an earlier surname as a middle name. According to preparatory works, the formulation “may bear” would have reflected the essence of the right enshrined in section 49 a, but it was not adopted on the ground that the same formulation was used elsewhere in the Names Act. One can therefore not conclude that the right in section 49 a should be equated to the right in provisions such as section 24 of the Names Act.

According to the preparatory works the “right to acquire a name” pursuant to section 49 a of the Names Act, is held to amount to a recognition “in principle”³⁵⁷. Preparatory works emphasize that section 49 a is meant to be complementary to other material rules in the Names Act, when these latter provisions do not allow a person to acquire a name pursuant to another State’s naming customs.³⁵⁸ The purpose of section 49 a was underlined to be to provide for an alternative opportunity when foreign law cannot be applied by Swedish authorities, especially in cases of when foreign naming customs relate to a double surname.³⁵⁹ This statement clearly underlines the provision’s relationship to the reasoned opinion of the Commission and its purpose is clearly to attempt to cure the specific situations that the Commission has expressed concerns about, without inserting a provision allowing for foreign law to be applied.

Preparatory works also clearly indicate that the formulation “has a right to acquire” should be interpreted to mean that the Swedish Tax Agency must always “take a stand on” whether the

³⁵⁵ In 2008, the Swedish Ministry of Justice ordered a separate study of the private international law aspects of the Names Act. This examination was conducted by Michael Hellner who submitted his proposals in October 2010. Hellner suggested that an entire new law, additional to the Swedish Names Act, should have been introduced in order to regulate the private international law aspects of name matters. See Ds 2011:39, *Internationella namnfrågor*, p 10 and 16.

³⁵⁶ Prop. 2011/12:12 p 12. The Legislative Council (*Lagrådet*) proposed that the regulation should have been formulated as “a right to bear a name” (in Swedish: “*rätt att bära namnet*”) and not as an acquisition of a name.

³⁵⁷ Prop. 2011/12:12 p 12. In Swedish it was stated the following: “*att det utländska namnet i princip erkänns*”.

³⁵⁸ Prop 2011/12:12 p 16.

³⁵⁹ *Ibid.*

foreign acquisition of a name can be recognized in Sweden.³⁶⁰ This statement seems to mean that a review on the merits must be carried out by the Swedish Tax Agency. This conclusion seems odd since, as was mentioned earlier, the Tax Agency did not carry out any reviews on the merits before the enactment of section 49 a as regards the recognition of names of foreign nationals habitually resident in Sweden. If the expression “right to acquire” a name includes a review on the merits, can it then really be a “recognition” in the sense intended by the ECJ in its preliminary rulings? Although the recognition of names distinguish themselves from foreign judgments, whenever such judgments are recognized in private international law, a rule usually states that “a judgment given in a Member State shall be recognized in the other Member States *without any special procedure being required* [author’s emphasis]”³⁶¹. Foreign judgments are, hence, recognized automatically pursuant to such rules.

The expression “right to acquire” is, however, a solution in order to enable Swedish authorities to limit the recognition of foreign names to certain categories of names. Pursuant to section 49 a of the Names Act, a person’s acquisition of a name in another State than Sweden, must meet certain requirements before the person has a right to acquire the same name in Sweden. The acquisition of the name must: (1) already have taken place in another State than Sweden; (2) in which the applicant was either a citizen of at the time of acquisition, or was habitually resident in or had another special connection to; and, (3) the acquisition of the name must have taken place due to a change of civil status or other family related situation. A name acquisition may, furthermore, not be recognized if it may cause offence, or embarrassment for the one who bears it or if it is manifestly unsuitable as a forename.³⁶² Where a child under the age of 18 bears the name of the parent who does not have custody, that child may change his or her surname pursuant to section 49 only if the parent consents thereto or if a court has found the change of name to be in the child’s best interest. If the acquisition of a name does not fulfill these mentioned pre-requisites, the person does not “have a right to acquire” that name in Sweden, i.e. the concerned person’s foreign-established name is not “recognized” in Sweden. The ECJ, nonetheless, stated that a recognition of a name established in another Member State, may only be refused if such a refusal is based on *objective considerations* and is *proportionate to the legitimate aim pursued*. Whether the pre-

³⁶⁰ Prop 2011/12:12 p 12.

³⁶¹ See for example Article 33(1) of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“Brussels I”).

³⁶² Subsection 2 of section 49 a of the Names Act.

requisites mentioned are based on objective considerations and are proportionate to the legitimate aims pursued will be analyzed below.

10.1.2 A restrictive measure?

Pursuant to the ECJ's case law, a measure related to names that *restricts* the free movement of Union citizens, without *objective and proportionate justifications*, is prohibited. Regarding the question whether a measure constitutes a restrictive measure or not, the ECJ has developed a "serious inconvenience"-test. In the case of *Runiewicz-Wardyn* the ECJ adopted a "hands-off-approach" and stated that the test should be carried out by the national courts, rather than the ECJ, to determine whether the practical impacts can constitute a restriction.

The ECJ hinted in *Grunkin and Paul* that a Member State's public policy concerns might justify an obstacle to the freedom of movement of persons. This standpoint was also later confirmed in the case of *Sayn-Wittgenstein*. It, moreover, seems as if administrative reasons also may justify an obstacle to the freedom of movement after the ruling in *Runiewicz-Wardyn*.

It is questionable whether Swedish law, after the 2012 amendments in the Names Act, recognizes names established in other EEA countries and Switzerland³⁶³ to the extent that the ECJ had in mind. If "a right to acquire" a name would constitute a "recognition" in the terms that the ECJ expressed in its rulings, such a recognition is nonetheless limited to a number of pre-requisites. One must therefore establish whether these restrictions: (1) may constitute a restriction that may amount to a "serious inconvenience", and if yes, whether it is (2) based on justifiable objective considerations and (3) is proportionate to the aim pursued.

Whether or not the restrictions in place in section 49 a of the Names Act constitute a restriction that may amount to a "serious inconvenience", depends on the specific circumstances of each case. If a citizen of any of the Member States of the EU is denied recognition of a name in Sweden pursuant to section 49 a, he or she is forced apply to the

³⁶³ The appropriateness of this limitation is highly questionable since it is very disadvantageous for citizens of other countries. In the author's opinion the limitation will most likely result in inconsistency. Swiss law and Finnish law does not impose such a restriction. The standpoint that such a limitation should not be used was also taken by representatives from the Swedish Social Democratic party (*Socialdemokraterna*), the Environmental Party (*Miljöpartiet*) as well as the Leftist Party (*Vänsterpartiet*), who reserved themselves against the proposal given by the Committee of Civil Affairs. See Civilutskottets betänkande 2011/12:CU7 Reservation 1. A comprehensive discussion of how nationals who are not citizens of an EEA country or Switzerland are treated, is, nonetheless, outside of the scope of this thesis.

Swedish Patent and Registration Office and also have to pay a fee in order to have the application reviewed.³⁶⁴ For Swedish citizens who have connections to other States, such as an additional citizenship or if they are habitually resident in another EEA State or Switzerland (with the exception of Norway, Denmark and Finland), their acquisitions of names are restricted to the rules set out in the Names Act since foreign law is not applied to their name acquisitions by Swedish authorities. If Swedish citizens would wish to acquire a name based on an administrative acquisition, they will be treated according to the same procedure used by the Swedish authorities before the enactment of section 49 a of the Names Act. Due to this reason, concerns were raised by the Commission in the first place. This was also the underlying reason why a change was introduced into the Names Act. Thus, if an applicant is denied recognition pursuant to the new rule in section 49 a of the Names Act, the circumstances in the specific case are likely to constitute a “serious inconvenience” and effectively also, a restriction to the free movement of persons pursuant to Article 21 TFEU. It must therefore be determined whether the limitations in section 49 a are based on objective considerations and if the measures employed are proportionate in relation to the aim pursued.

10.1.3 Justified restrictions?

10.1.3.1 Connecting factors

A person will only be attributed a right to acquire a name pursuant to section 49 a if the person was a national of –, resident in –, or had another special connection³⁶⁵ to the country where the name was acquired. The ECJ emphasized in its rulings that connecting factors *as such* are not contrary to EU law and the right enshrined in Article 21 TFEU. The connecting factors as those stated in section 49 a are also traditionally found in private international law rules in Swedish law as well as in EU regulations regarding the recognition and enforcement of foreign judgments and decisions.

“Habitual residence”, within the context of section 49 a of the Names Act, is to be understood as it usually is in Swedish law, namely taking into account whether the stay can be considered permanent in the light of duration of the stay and other circumstances.³⁶⁶ Names acquired in States to which the concerned person only had a fleeting connection to, will thus not be recognized.

³⁶⁴ The procedural aspects of name matters are currently examined by the Committee of inquiry of the Swedish Names Act. See Dir (*The Swedish Government’s terms of reference*) 2009:129. *En översyn av namnlagen*, p 7-8.

³⁶⁵ Freely translated from the Swedish term “*särskild anknytning*”.

³⁶⁶ Prop 2011/12:12 p 18.

Convincing reasons regarding name stability in general, speak in favor of a requirement according to which a name cannot be acquired in a State to which the person had only a fleeting connection. The use of connecting factors to the country where a person has acquired a name is additionally used for some categories of persons in Swedish law already. The Swedish Tax Agency, for example, recognizes names that nationals of other States than Sweden have acquired in the applicant's country of citizenship. Regarding Swedish citizens who have acquired a name in Norway, Denmark or Finland, their name is recognized if they were habitually resident in any of those three States at the time of the acquisition. There are compelling objective reasons, such as name stability in general, for limiting the recognition in this respect to countries which a person has a close connection. It is, furthermore, difficult to imagine that less restrictive measures could be applied in this respect.

10.1.3.2 An acquisition must have taken place

Another pre-requisite found in section 49 a of the Names Act is that an acquisition of a name must have taken place in another State than Sweden.³⁶⁷ The name matter must also have been decided in accordance with the procedures used in that other State.³⁶⁸ A *right* to acquire a name pursuant to foreign law is, therefore, not sufficient in order to acquire a name pursuant to section 49 a of the Swedish Names Act – the applicant must already have acquired the name through a formal procedure abroad.³⁶⁹ The exact procedure required, is not elaborated upon in preparatory works. This can be problematic since naming procedures and decisions vary in different States.³⁷⁰ In some States a “decision” is not even needed for a person to acquire a name – it is sufficient that a person starts using a specific name to establish it as a name acquisition.³⁷¹ It is also uncertain whether the decision of an acquisition of a name, which is to be recognized in Sweden, must have reached the point where it has become a legally binding decision. There are, for example, flexible time limits in English law and it is difficult to determine when a decision or a judgment has acquired the status of a legally binding decision.³⁷²

³⁶⁷ Prop 2011/12:12 p 18.

³⁶⁸ *Ibid* p 17.

³⁶⁹ *Ibid*.

³⁷⁰ Ds 2011:39, *Internationella namnfrågor*, p 111-112.

³⁷¹ *Ibid*.

³⁷² *Ibid*.

The preparatory works to section 49 a of the Names Act are silent on the objective considerations underpinning the standpoint that a name must have been acquired in another State. It is therefore difficult to establish whether it can be justified as a restriction to the freedom of movement of persons enshrined in Article 21 TFEU. A few observations may nonetheless be made. The fact that an acquisition must have taken place abroad may cause inconvenience to individuals, as a foreign name acquisition may take time to be determined and it may also cause administrative difficulties. Individuals who have a strong bond to another Member State may, for example, have been habitually resident in Sweden for a long time and be more familiar with Swedish administrative procedures rather than foreign procedures. Acquiring a name outside of Sweden could also be costly for the individual.

The requirement that a name must have been acquired abroad before a foreign name can be recognized is also found in Swiss law as well as in Finnish law. These rules are, however, complemented by rules allowing a person to directly opt for the application of foreign law to their name acquisition *in* Switzerland or Finland. Pursuant to the Swedish Names Act this is not possible if the applicant is a Swedish citizen. Although it is difficult to determine the proportionality in this regard since the objective considerations have not been underlined in preparatory works, less restrictive measures, such as allowing Swedish authorities to apply foreign law, may be used. It must therefore be concluded that this restriction does not qualify as a justified restriction to the freedom of movement in EU law.

10.1.3.3 Family related acquisitions

Pursuant to section 49 a of the Names Act, the acquisition of a name must have been acquired through birth, a change of civil status³⁷³ or another family related event. Administrative acquisitions of names, such as a change to a newly formed name or a change acquired after a change of gender, cannot be acquired in Sweden pursuant to section 49 a of the Names Act.³⁷⁴

The categorization of names in Swedish law into “family related”, “administrative” and “automatic” acquisitions clearly indicates the close link to family law. It is also, arguably, a symbol of how names are perceived as dependent on a person’s civil status rather than an inherent personal right.

³⁷³ In Swedish law, the term “civil status” mainly refers to marriage and divorce.

³⁷⁴ Prop 2011/12:12 p 17.

The recognition of names, pursuant to section 49 a of the Names Act, was limited to names acquired through family related events since the concerned person “already has a connection to those kind of names”.³⁷⁵ This, according to preparatory works, would ensure that strong reasons caused the name acquisition in the first place and there were clear and well-established rules regarding the acquisition.³⁷⁶

The acquisition of a name based on non-family related events were perceived as too “insecure” to establish a right to acquire a name pursuant to section 49 a of the Names Act.³⁷⁷ The preparatory works expressed a worry that if section 49 a would have included administrative name acquisitions, Swedish citizens who had been denied a change of name pursuant to Swedish law would travel abroad to acquire a name and then have it recognized in Sweden.³⁷⁸ It was also noted that foreign authorities would not be able to, for example, regard registered trademarks in Sweden pursuant to section 13 of the Names Act, when a name is acquired abroad.³⁷⁹

It is important to note that the current order introduced by section 49 a of the Names Act could result in an arbitrary and artificial split between names that are– and are not recognizable in Sweden. This is due to the fact that far from all EEA countries and Switzerland divide their name acquisitions into “family related” and “administrative” acquisitions. This problem can, for example, be illustrated by the example if two Swedish citizens habitually resident in another EEA State or in Switzerland, acquires a common surname without marriage.³⁸⁰ When returning to Sweden they would be refused recognition of the surname based on the ground that it was not a family related acquisition. Hellner also suggested explicitly that an order with such a distinction between family related and administrative name acquisitions should be abandoned in the Swedish Names Act.³⁸¹

³⁷⁵ Prop 2011/12:12 p 12.

³⁷⁶ *Ibid.*

³⁷⁷ *Ibid.*

³⁷⁸ *Ibid.*

³⁷⁹ *Ibid.*

³⁸⁰ Similar examples were highlighted by Uppsala University in their reply to a referral for consideration of the legislative changes. See remissyttrande 2011-05-02 JURFAK 2011/32.

Available at: <http://www.jur.uu.se/LinkClick.aspx?fileticket=ZdWAO1x3f58%3D&tabid=5420&language=sv-SE>.

³⁸¹ Ds 2011:39, *Internationella namnfrågor*, p 78.

Even though objectives underpinning the restriction not to recognize all kinds of names may qualify as justifiable objective considerations, such as the objective of name stability in general, it is unlikely that the measure is proportionate as less restrictive measures are available. The Names Act does not include “traditional” grounds on which recognition of a foreign name may be refused, for example on grounds of *ordre public*. A less restrictive measure, such as introducing grounds of refusal on for example the basis that a trademark may already have been registered in Sweden, may be used. The restriction to family related acquisitions must therefore be said to be disproportionate to the aim pursued and, thus, in violation of Article 21 TFEU.

10.1.3.4 Offensive names

In addition to the pre-requisites examined above, forenames that may possibly cause offence or embarrassment for the one who bears it, or manifestly unsuitable forenames, may not be recognized pursuant to subsection 2 of section 49 a of the Names Act. A similar rule is found in section 12 points 5-6 as well as in section 34 of the Names Act. The assessment in section 49 a should, nonetheless, not be the same as in wholly Swedish matters and it must be regarded in its international context.³⁸²

Although objective reasons may exist in this regard, a traditional *ordre public*-provision would most likely be sufficient to refuse names that may cause offence, embarrassment or if they are manifestly unsuitable. Such is the case in Finnish law and Swiss law. Hellner also emphasized that the Swedish Tax Agency as a general rule did not look at the exceptions in section 12 points 5-6 when a non-Swedish citizen’s foreign name acquisition is recognized in Sweden.³⁸³ It is therefore highly questionable whether such a restriction is proportionate to the aim pursued and in compliance with EU law.

10.1.3.5 Children under the age of 18 years

Finally, pursuant to subsection 3 of section 49 a of the Names Act, a child under the age of 18 who bears the surname of a parent who is not the child’s custodian, may only change his or her surname pursuant to section 49 a if the parent consents thereto or if a court has found that that the change is in the child’s best interest. This rule echoes the rule applicable in internal Swedish cases in section 6 of the Names Act. The rule in section 6 of the Names Act is based

³⁸² Prop 2011/12:12 p 19.

³⁸³ Ds 2011:39, *Internationella namnfrågor*, p 92.

on the objective that it is vital to establish a certain degree of name stability so that the cohesion of families can remain.³⁸⁴ The reason for also subjecting transnational name matters to the same limitation was based on the assumption that just because a parent has given his or her consent to a name acquisition abroad, it does not mean that this consent should be extended to include such an acquisition in Sweden.³⁸⁵ This reasoning, nonetheless, seems flawed since it would be difficult to understand why a parent would want his or her child to bear different names in different States. It would, most likely, be difficult to argue that the limitation is proportionate to the aim pursued since a parent's wish concerning the names of a child may be fulfilled in other, less restrictive ways, such as allowing for greater party autonomy of the applicable law in name matters.

10.1.3.6 Nordic citizens

In preparatory works to section 49 a of the Names Act, it is established that the section is not applicable to Swedish citizens who are habitually resident in Denmark, Norway or Finland.³⁸⁶ This exception is due to the fact the names acquired in these countries are fully recognizable in Sweden because of the agreement between the States on these matters.³⁸⁷ The existence of this exception makes it difficult to understand why Swedish law subjects the recognition of names established in other EEA countries or Switzerland to the above-described limitations.

10.2 Discrimination on grounds of nationality?

The prohibition against discrimination based on grounds of nationality enshrined in Article 18 TFEU was raised in the context of dual citizenship in names matters in the ECJ's case law. It is therefore necessary to determine whether the interests of Swedish citizens with an additional nationality are sufficiently regarded in the Names Act.

10.2.1 Are persons with dual nationality treated differently?

Similarly to Belgian private international law rules that were contested in the case of *Garcia Avello*, Swedish nationals with an additional citizenship were as a general rule treated in the same way as persons who only held a Swedish citizenship before the enactment of section 49 a into the Names Act. This standpoint was based on the sole ground that Swedish nationals

³⁸⁴ Prop 1981/82:156 p 29.

³⁸⁵ Prop 2011/12:12 p 19.

³⁸⁶ *Ibid* p 11 and 17, and also see section 50 of the Names Act.

³⁸⁷ Prop 1982/83:38 p 9 cont.

with an additional citizenship were exclusively regarded as Swedish nationals. Swedish law was, thus, applied to their name matters and their name acquisitions were therefore subjected to the limitations set out in the substantive rules of the Names Act. Consequently, they could, for example, not acquire a double surname without applying for an exception to the Swedish Patent and Registration Office.

After the enactment of section 49 a in the Names Act, persons with dual citizenship have the possibility to acquire a name if the pre-requisites in section 49 a are fulfilled. Swedish law is, however, still applied to persons with dual citizenship. The standpoint that they are regarded as exclusively Swedish citizens does not seem to have been altered. Section 49 a of the Names Act is, furthermore, not only applicable to persons holding dual citizenship, but it is also applicable to persons with only a Swedish citizenship who have connections to an EEA country or Switzerland. The enactment of 49 a has therefore not introduced a standalone right for only persons possessing dual citizenship. It therefore appears at the outset as if persons with dual citizenship are still treated in the same way as persons only holding a Swedish citizenship.

In the case of *Garcia Avello*, the ECJ held that different situations must not be treated in the same way. Such treatment was held to be justifiable only if it was based on objective considerations independent of the nationality of the persons concerned and if the treatment was proportionate to the objective being legitimately pursued.³⁸⁸ Are persons with dual citizenship in a different situation than persons with only Swedish nationality?³⁸⁹ In *Garcia Avello* the ECJ established that persons holding dual citizenship were in fact in a different situation than persons only holding Belgian nationality. This distinction seems to have been concluded on the basis that persons with dual nationality faced real and potential difficulties due to their different surnames caused by the different laws to which they were attached by nationality.³⁹⁰ The ECJ held that dual citizens “may plead difficulties specific to their situation *which distinguish them* [the author’s emphasis] from persons holding only Belgian nationality”³⁹¹. One must therefore examine whether persons holding a Swedish as well as a

³⁸⁸ C-353/06, *Stefan Grunkin and Dorothee Regina Paul v Standesamt Niebuß*, Judgment of the Court 14 October 2008, paragraph 31.

³⁸⁹ *Ibid* paragraph 34.

³⁹⁰ *Ibid* paragraphs 35-37.

³⁹¹ *Ibid* paragraph 37.

foreign citizenship, will face such difficulties as to distinguish them from persons holding only a Swedish citizenship after the enactment of section 49 a in the Names Act.

Even though Swedish law is still applied to persons with dual citizenship, the enactment of section 49 a in the Names Act has opened up a possibility for them to circumvent the strict rules in the Names Act, such as the prohibition against double surnames enshrined in section 14 subsection 2. This should result in that a person is not as likely to have different names in different States, except in cases which are excluded from the ambit of section 49 a of the Names Act, such as administrative name acquisitions. The difficulties that persons with dual citizenship are likely to encounter have therefore been diminished. Consequently, persons with dual citizenship may not be as likely to face more difficulties than Swedish citizens when acquiring a name since the latter category of persons are subjected to the same limitations when they have acquired a name abroad. What, nonetheless, distinguishes persons with dual nationality is that they could have stronger bonds to another State. They may be more likely to wish to acquire a name pursuant to foreign naming customs and they may nevertheless encounter more difficulties than persons with only a Swedish citizenship. Swedish law is therefore only compatible with Article 18 TFEU if the limitations may be justified and are proportionate in a way that was discussed in section 10.1 of this thesis.

The enactment of section 49 a has, furthermore, not altered the fact that Swedish citizens with an additional nationality may not have foreign law applied to their name acquisition in the manner foreign nationals may pursuant to section 51 of the Names Act. This solution may have struck a fair balance since EU law most likely does not demand that persons with dual nationality shall be treated in the same way as foreign nationals.³⁹² If persons with dual citizenship would enjoy such an advantageous treatment, it is not unthinkable that this in itself would amount to discrimination since persons with a Swedish and a foreign citizenship may be regarded as being in a different position than persons possessing only the nationality of a State other than Sweden.

³⁹² On the contrary, Hellner argued that the principle of non-discrimination in EU law demands that an overriding public interest must be present if we want to treat persons with dual citizenship, where one of them is a Swedish citizenship, differently than persons who are only nationals of another State than Sweden. See Ds 2011:39, *Internationella namnfrågor*, p 77 cont.

10.2.2 Choice-of-law rules

The question regarding whether persons with dual citizenship should be able to have foreign law applied to their name acquisitions can also be perceived from another point of view. The ECJ stated in *Garcia Avello* that the rights conferred by Articles 18 and 21 TFEU³⁹³, must be construed as precluding Member States from refusing to grant an application for a change of surname *to which the applicants are entitled* to according to the law and traditions of the other State of nationality.³⁹⁴ This statement undeniably suggests that a *right* to acquire a name pursuant to another Member States' laws and traditions is sufficient to grant the concerned applicant a right to acquire that name in Sweden. In private international law terms this means that persons holding dual citizenship, where one of the citizenships is Swedish, should be able to have foreign law directly applied by Swedish authorities to their name acquisition. It is, however, not clear whether the ECJ's statement in *Garcia Avello* would also demand that Swedish law must grant greater party autonomy to persons with dual citizenship to enable them to choose their applicable law.³⁹⁵ As Swedish law stands today, persons with dual nationality do not have this possibility since they must acquire a name abroad before they have a right to acquire the same name in Sweden. Swedish law may therefore not be in compliance with Article 18 of the TFEU. One should nonetheless be careful when interpreting the ECJ's statement that Member States may not refuse to grant an application for a change of surname *to which the applicants are entitled* to according to the law and traditions of the other State of nationality. The ECJ has not, in any of the cases discussed in this thesis, uttered anything specific about *how* Member States should combat discrepancies of names. The ECJ can, thus, not be said to have taken a standpoint on whether it is better to do this through more liberal recognition rules, flexible substantive rules or choice-of-law-rules.³⁹⁶

³⁹³ At the time 12 EC and 17 EC.

³⁹⁴ C-353/06, *Stefan Grunkin and Dorothee Regina Paul v Standesamt Niebüll*, Judgment of the Court 14 October 2008, paragraph 45.

³⁹⁵ Ds 2011:39, *Internationella namnfrågor*, p 29.

³⁹⁶ Bogdan has, however, expressed the view that there is enough room for consideration of foreign aspects in the substantive rules in the Swedish Names Act. See Bogdan, *EG-fördragets direkta inverkan på medlemsstaternas internationella namnrätt: några funderingar kring EG-domstolens Avello-dom*, SvJT 2003 p 1061.

11 Conclusions and final remarks

In conclusion, this thesis has, firstly, examined the ECJ's leading jurisprudence in name matters. It has discussed the possible interpretation of the ECJ's preliminary rulings and their consequences for Member States' private international law rules. It has illustrated that the ECJ's interpretation of fundamental EU rights in name matters has come a long way from the inconvenience caused from Kafka-like circumstances in *Konstantinidis*, where in essence the applicant's name was completely altered by German authorities, to the situation where diacritical marks would not be registered in the case of *Runiewicz-Wardyn*. This thesis has also highlighted how the methodology of the ECJ in name matters has shifted from a focus on discriminatory treatment of EU citizens in the case of *Garcia Avello*, to the right of persons to move and reside freely within the Union in the cases of *Grunkin and Paul*, *Sayn-Wittgenstein* and *Runiewicz-Wardyn*. The analysis of the ECJ's jurisprudence has also demonstrated that it has become fairly easy for Member States to infringe constitutional EU rights if they have restrictive private international law rules in place in name matters. Constitutional EU rights have been given an extensive interpretation by the ECJ and it has, therefore, become very important for Member States to justify their restrictive measures. The exact definition of "EU citizenship" and the rights derived from it related to name matters is, nonetheless, still an ongoing and evolving discourse, apparent from the European Commission's legislative plans.

This thesis has, moreover, described and analyzed the recent changes made to the Swedish Names Act that came into force on the 1st of March 2012. It has concluded that Swedish citizens with connections to other Member States, such as an additional citizenship, may be hindered and disadvantaged if they would wish to acquire a name pursuant to another State's naming customs. When the changes made to the Names Act are contrasted to the solutions found in Finnish law and Swiss law, it is evident that the applicable Swedish private international law rules are much more restrictive. Consequently, the private international law rules regarding name matters found in both Finnish law and Swiss law are more beneficial and tolerant towards their own nationals who have connections to other States.

Finally, this thesis has discussed whether the changes introduced in 2012 into Swedish law suffice to comply with EU law. It may be argued that the manner in which the ECJ established its competence in the case law examined in this thesis, is highly questionable. Whether or not one regards the ECJ as a knight on a white horse, swinging a sword to protect fundamental treaty rights as well as human rights, the ECJ's jurisprudence is, nonetheless, binding on Sweden as a Member State of the EU. Regarding this fact, the solution now in place in section 49 a of the Swedish Names Act must be said to have provided us with only symptomatic relief. It will, to a certain and limited extent, solve the symptoms of limping names, but it will not cure the actual disease – that EU law demands, with few exceptions, that Swedish citizens with connections to other Member States should be able to acquire names in accordance with those Member States' naming customs. Whether the minimalistic enactment is a symbol of reluctance in relation to EU law or a wish to maintain coherence in Swedish name law, remains unknown. Whatever the reason, a more thorough regulation of the private international law aspects of name matters is needed in Sweden to comply with EU law in the author's opinion.

In the nearest future, we will with great interest await the Commission's response, the possible solutions offered by the Swedish committee inquiring the Swedish Names Act on a whole, as well as the developments regarding the recognition of the effects of civil status at EU level. Within the Union or other European countries, there exists no clear-cut line between a State's own nationals and other States' nationals. It is highly likely that a person may be connected to more than one European State and have a closer connection to his or her State of habitual residence rather than to the State which issued his or her passport. The perception of names is additionally developing towards regarding them as an inherent personal right and names do therefore not necessarily have to be strictly subjected to the laws of only one nation. It is to be hoped that the European Union *and* its Member States will enact laws in name matters that are flexible enough to take these realities into account. Sweden should strive to contribute to a Europe where uniqueness and diversity is appreciated, also in name matters. Preferably, a guiding principle for Sweden will be to include all European citizens and in this manner meet the concerns of an ever-increasing generation who finds their emotional and national identity as well as their sense of belonging, split between different States.

Bibliography

Official legislative documents

Sweden

Government Bills of Sweden

Prop 1981/82:156. Regeringens proposition om namnlag.

Prop 1982/83:38. Regeringens proposition om internationella namnregler.

Prop 1984/85:124. Regeringens proposition om internationella faderskapsfrågor m.m.

Prop 1989/90:87. Regeringens proposition om vissa internationella frågor rörande makars förmögenhetsförhållanden.

Prop 2011/12:12. Regeringens proposition om rätt till namn som förvärvats i en annan stat inom EES.

Ministry publication series

Ds 2011: 39. Internationella namnfrågor.

Swedish Government Official Reports Series

SOU 1979:25. Nya namnregler. Betänkande av namnlagsutredningen. Stockholm 1979.

SOU 1987:18. Internationella familjerättsfrågor. Slutbetänkande av familjelagssakkunniga. Stockholm 1987.

The Swedish Government's terms of reference

Dir. 2009:129. En översyn av namnlagen.

The Committee of Civil Affairs' Report

Civilutskottets betänkande 2011/12:CU7. Rätt till namn som förvärvats i en annan stat inom EES.

Finland

Government Bill of Finland

RP 236/84. Regeringens proposition till Riksdagen med förslag till lagstiftning om släktnamn.

Material from the Swedish Government Offices

The European Commission's reasoned opinion about Sweden concerning Swedish authorities' application of the law when a person with dual citizenship wishes to acquire two surnames (*Europeiska Kommissionens överträdelseärende mot Sverige om svenska myndigheters rättstillämpning vid anmälan om dubbelt efternamn för en person med dubbelt medborgarskap*). The Swedish Ministry of Justice's case number: Ju2007/9279/L2. The European Commission's case number: COM 2006/4454.

Documents from the European Commission

COM(2003) 401 final, Communication from the Council and the European Parliament – Area of freedom, security and justice: assessment of the Tampere programme and future orientations, Brussels 2.6.2004.

COM(2010) 747 final, Green Paper – Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records, Brussels 12.12.2010.

Literature

Books

Bogdan, Michael, *Concise Introduction to EU Private International Law*, 2nd edition, Europa Law Publishing, Groningen, 2012.

Bogdan, Michael, *Svensk internationell privat- och processrätt*, 7e upplagan, Norstedts Juridik AB, Stockholm, 2008.

Büchler, Andrea, *Islamic Law in Europe? Legal Pluralism and its Limits in European Family Laws*, Ashgate Publishing Company, Burlington, 2011.

Craig, Paul & Búrca, Grainne, *EU law: Text, Cases and Materials*, 5th ed., Oxford University Press, Oxford, 2011.

Ericsson, Britt-Marie, *Namnlagen. Namnskick och namnrätt med lagkommentar*, Liber Förlag, Stockholm, 1983.

Hansell, Heinrich, Vogt, Nedim Peter, Schnyder, Anton K. & Berti, Stephen V., *Basler Kommentar: Internationales Privatrecht*, 2. Auflage, Helbing Lichtenhahn Verlag, Basel, 2007.

Höglund, Olle, *Namnlagen, En kommentar*, Andra upplagan, Norstedts Juridik AB, Stockholm, 1998.

Periodicals

Abrahamsson, Olle, *Skall man få heta vad som helst? En namnlagsutredares dilemma*, *Studia Anthroponymica Scandinavica: Tidskrift för nordisk personnamnsforskning*, 2011, p 147-163.

Besselink, Leonard F.M., Case C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien, Judgment of the Court (Second Chamber) of 22 December 2010*, *Common Market Law Review*, Vol. 49 2012, p 671-694.

Bogdan, Michael, *EG-fördragets direkta inverkan på medlemsstaternas internationella namnrätt: några funderingar kring EG-domstolens Avello-dom*, *SvJT* 2003, p 1057-1068.

Bogdan, Michael, *Några anteckningar till svensk internationell namnrätt*, *Tidskrift för Sveriges Advokatsamfund*, 1977 p 43-54.

Hellner, Michael, *Sverige, EU och den internationella privaträtten*, *SvJT* 2011, p 388-411.

Jacobi, Hadas Alexandra, *A Fürstin by any other name? European citizenship and the limits of individual rights in the ECJ*, *Columbia Journal of European Law*, Vol. 17 2011, p 643-671.

Jacobs, Francis G., *Citizenship of the European Union – A legal analysis*, *European Law Journal*, Vol. 13 2007, p 591-610.

Kruger, Thalia & Beaumont, Paul, *Dual Nationality = Double Trouble?*, *Journal of Private International Law*, Vol. 7 2011, p 601-626.

Lawson, Rick, *Christos Konstantinidis v Stadt Altensteig- Standesamt and Landratsamt Calw.-Ordnungsamt.*, *Judgment of the Court (Sixth Chamber) 30 March 1993*, *Common Market Law Review*, Vol. 31 1994, p 395-412.

Lehmann, Mattias, *What's in a name? Grunkin-Paul and beyond*, *Yearbook of Private International Law*, Vol. 10 2008, p 135-164.

Maas, Willem, *Unrespected, Unequal, Hollow? Contingent Citizenship and Reversible Rights in the European Union*, *Columbia Journal of European Law*, Vol. 15 2009, p 265-280.

Muir Watt, Horatia, *European Federalism and the "New Unilateralism"*, *Tulane Law Review*, Vol. 82 2007, p 1983-1998.

Van Eijken, Hanneke, *C-391/09 Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilnius miesto savivaldybes administracija and Others*, *Common Market Law Review*, Vol. 49 2012, p 809-826.

Verlinden, Johan, *European Court of Justice, Judgment of October 2. 2003, Case 148/02, Carlos Garvia Avello v. État Belge (The State of Belgium)*, *Columbia Journal of European law*, Vol. 11 2004, p 705-716.

Case law

Case law from Swedish courts

RÅ 1985 2:8.

RÅ 2005 ref. 30.

Case law from the Court of Justice of the European Union

C-180/83, *Hans Moser v Land Baden-Württemberg*, Judgment of the Court 28 June 1984.

C-168/91, *Christos Konstantinidis v Stadt Altensteig- Standesamt and Landratsamt Calw-Ordnungsamt.*, Judgment of the Court 30 March 1993.

C-148/02, *Carlos Garcia Avello v État Belge*, Judgment of the Court 2 October 2003.

C-353/06, *Stefan Grunkin and Dorothee Regina Paul v Standesamt Niebüll*, Judgment of the Court 14 October 2008.

C-208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, Judgment of the Court 22 December 2010.

C-434/09, *Shirley McCarthy v Secretary of State for the Home Department*, Judgment of the Court on 5 May 2011.

C-391/09, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others*, Judgment of the Court 12 May 2011.

Case law from the European Court of Human Rights

Case No. 16213/90, *Burghartz v Switzerland*, Judgment on 22 February 1994.

Case No. 28957/95, *Christine Goodwin v United Kingdom*, Judgment on 11 July 2002.

Case No. 664/06, *Losonci Rose and Rose v Switzerland*, Judgment on 9 November 2010.

Electronic sources

An English translation of the Belgian Code of Private International law of 2004 (*Loi du 16 juillet 2004 portant le Code de droit international privé*). Available at:
<http://www.ipr.be/data/B.WbIPR%5bEN%5d.pdf>

Eurostat's website "Statistics Explained": Migration and migrant population statistics.

Available at:

http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Migration_and_migrant_population_statistics

Final Report for the European Commission, DG JLS- Directorate-General for Justice, Freedom and Security, on the project No JLS/2006/C4/004 conducted by von Freyhold, Vial & Partner Consultants- Wissenschaftliche Berater und Gutachter. Available at:
http://ec.europa.eu/civiljustice/publications/docs/study_ms_legislation_country_reports_en.pdf

Glossary for the Courts of Sweden, Internationella Kansliet och informationsavdelningen Domstolsverket. July 2010- revised April 2012. Available at:
http://www.domstol.se/Publikationer/Ordlista/svensk-engelsk_ordlista.pdf

Poland and Lithuania: Bad blood. Polish-Lithuanian ties are ancient but increasingly acrimonious. Article in The Economist on March 10 2012. Available at:
<http://www.economist.com/node/21549987>

Poland and Lithuania: Dialogue of the deaf between Vilnius and Warsaw. Article in The Economist on February 10 2012. Available at:
<http://www.economist.com/blogs/easternapproaches/2012/02/poland-and-lithuania>

The European Convention on Nationality, The Council of Europe, Strasbourg, 6.XI.1997. Available at:
<http://conventions.coe.int/Treaty/en/Treaties/Html/166.htm>

The status of the number of parties as well as signatories and ratifications of the United Nations Convention on the rights of the Child. Available at:
http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

The Swiss Bank Credit Suisse's currency converter. Available at:
<http://www.oanda.com/convert/classic?user=creditsuisse>

The Swiss Federal Department of Foreign Affairs' website. Available at:
http://www.swissworld.org/en/culture/swissness/what_is_swissness/

Translation of letter to the European Commission from the Swedish Ministry of Justice. 9 May 2011. Ju201/133/L2. The Swedish Government's views on the Green Paper promoting free movement of public documents and recognition of civil status records (COM(2010) 747 final). Available at:
http://ec.europa.eu/justice/newsroom/civil/opinion/files/110510/public_authorities/sweden_mijnjust_en.pdf

Translation of letter to the European Commission from the Swedish Parliament. April 2011. Statement of the Committee on Civil Affairs. 2010/11:CU21. Free movement of documents. Available at:
http://ec.europa.eu/justice/newsroom/civil/opinion/files/110510/public_authorities/sweden_parliament_en.pdf

Uppsala University's reply to a referral for consideration of the memoranda "*Rätt att bära namn som förvärvats i en annan stat inom EES*". (Ju2011/2645/L2) 2.5.2011 JURFAK 2011/32. Available at:
<http://www.jur.uu.se/LinkClick.aspx?fileticket=ZdWAO1x3f58%3D&tabid=5420&language=sv-SE>

William Shakespeare's play "Romeo and Juliet". Available at:
http://www.literaturepage.com/read/shakespeare_romeoandjuliet.html