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THE CROSS-BORDER CONTINUITY OF PERSONAL IDENTITY IN THE EUROPEAN UNION

1. The social impact of the free movement of persons in the EU.

The free movement of persons is one of the fundamental rights in the European Union. Although it was originally established in order to foster cooperation in economic terms, its nature has since been changing towards a more socially-oriented one. A very well-known example of this evolution is provided by the case-law of the Court of Justice of the European Union (CJEU) on the rights to move and to reside freely within the territory of a Member State (MS) granted to non-EU national parents of EU-citizen children. The original economic purposes have not prevented the CJEU from ensuring the effectiveness of the rights enshrined in the EU Treaties. The reasons why individuals decide to move and establish themselves in another MS are not to be taken into account. The «access» to the circulation, which has been significantly simplified, is nevertheless only the first step towards the effective exercise of the right to free movement of persons. Such effectiveness must be also safeguarded after the establishment of the individual within another MS. It means that the person is not to be regarded (only) as an economic factor, but first of all as a human being with a «baggage» of individual rights and interests. This «baggage» should travel with the individual as the free movement cannot deprive citizens of their fundamental rights. This aim is laid down in Article 67, para. 1, of the Treaty on the Functioning of the European Union (TFEU), which states that «The Union shall constitute an area of freedom, security and justice with respect for fundamental rights», as well as in Article 45 of the Charter of Fundamental Rights of the European Union (CFR), which sets out the fundamental role played by the EU citizenship. Hence, the free movement cannot undermine the rights that the citizens have acquired in another MS.

One of them is the right to personal identity. Can we accept the fact that a MS, wherein the citizen resides exercising his/her EU right of free movement, fails to recognise, or changes his/her means of personal identification? It is not a merely theoretical issue, since numerous disputes have

already arisen, and it is based on three grounds in particular. First of all, the EU has no competence as for matters related to civil *status* and family law. Therefore, it cannot adopt harmonised or unified rules regulating the attribution, modification and loss of personal identification means. Moreover, there have not been adopted any measures providing for civil judicial cooperation under Article 81 of the TFEU or for administrative cooperation under Article 74 of the TFEU. Consequently (and this is the third concern), such matters remain within the exclusive competence of the MSs, resulting in legitimate differences, on a national basis, concerning personal *status* and family relationships, both in substantive law and in private international law (PIL).

Against this legal background, each MS could be entitled to refuse to recognise the documents of a person exercising the right to free movement, being such documents foreign public acts, and to apply its own conflict of laws rules in order to determine the law applicable to the means of personal identification. Even a court judgment, stating definitively the personal and/or the family name as identification means, could fail to be automatically recognised in other MSs, despite the principle of mutual recognition of decisions in the area of freedom, security and justice. Although the praxis does not show such a continuous hostile attitude, the above cases may occur in particular circumstances.

Another difficulty is related to the fact that the means of personal identification can change over time. For example, it is a consequence of civil *status* changes, according to the applicable law (to the personal consequences of the new *status*). The above legal fragmentation as far as family law is concerned leads to various possible outcomes. Firstly, even if the *status* changes do not affect the means of personal identification in the MS of origin, the new State of domicile or residence might apply a different law to the personal effects of the *status*, and thus change the person's name. Secondly, the opposite scenario is equally likely to occur. Finally, two different laws on the personal consequences of the new *status* might be applied, resulting in two different names given to the same person.

Although many cases have already been decided by the CJEU and the European Court of Human Rights (ECtHR), such legal fragmentation suggests that the social claim to cross-border continuity of personal identification is still an unsolved issue. Therefore, this paper aims at investigating the possible useful legal instruments to be introduced in order to fulfil the legitimate expectations and the rights of European citizens when moving across borders, analysing the free movement of persons from a social point of view.

2. A human right: the case-law of the European Court of Human Rights.

It is first of all necessary to investigate if a right to cross-border continuity of a person's name is to be recognised. A relevant source of law is of course provided by the ECtHR case-law.

In the well-known *Burghartz* case, the ECtHR referred to the non-discrimination principle under Article 14 of the European Convention on Human Rights (ECHR), taken together with the right to private and family life under Article 8 of the ECHR, in order to define the person's right to a name: «As a means of personal identification and of linking to a family, a person's name none the less concerns his or her private and family life. The fact that society and the State have an interest in regulating the use of names does not exclude this, since these public-law aspects are compatible with private life conceived of as including, to a certain degree, the right to establish and develop relationships with other human beings, in professional or business contexts as in others» (para. 24). A person's name is an integral part of his/her private life, as it is a tool for his/her identification in the society and in the professional environment.

The same statement has been repeated in other similar cases. In the *Stjerna* case, the ECtHR has taken a major step forward by stating that the right to personal identity is an integral part of the right to

private life (Article 8 of the ECHR), and that no reference to the principle of non-discrimination is required. The same conclusion has been reached in connection with a person's forename in the *Golemanova* case. Furthermore, in some disputes on the refusal of recognition of a *status*, the ECtHR pointed out the strong connection between the modification of the personal *status* and the consequent change of the individual's name. A noteworthy decision is the one concerning the *Negrepontis-Giannisis* case, in which the ECtHR confirmed that the family ties created by adoption is part of the family life, and that the right to the name given after the *status* change is to be included in the private life of such person. The issues regarding the personal *status* and the effects of a *status* change are intertwined, but independent, and can be considered in the light of different rights. As subsequent judgments do not provide further or diverging reasons, this case-law is well-established: the right to private life includes the respect of each person's identity, with particular regard to the means of personal identification.

A partially different issue is the one regarding the cross-border continuity, i.e. the right to retain the same name, as a tool for personal identification, in each MS. Once again, *Burghartz* set an important precedent, since the claim's nature was transnational. The family name was in fact conferred according to German law, and the claimant sought its recognition in Switzerland. Two more court decisions are of even greater importance, since were made exclusively on the legal basis of Article 8 of the ECtHR. In the *Henry Kismoun* case, the claimant was registered under two different identities in France and in Algeria. Therefore, he applied in France for the recognition of his forename and surname, as registered in Algeria, since he had been using them for the most part of his life and thus felt them as a part of his personality. According to the ECtHR, a right to one's name is functional to personal identification in the private sphere. Consequently, the State has a positive obligation to balance the persons's fundamental interest to having a single identification and the public interest as for the recognition of such person. The States are given a wide margin of appreciation in this subject matter, since public interest is at stake, too. However, by not taking into account the person's right to a single name, the State has used its margin of appreciation incorrectly. Under the same principles, an opposite outcome was reached in *Harroudj*: France has not violated the right to private life by denying to transform a *kafala* in an adoption. The reasoning put forward by the ECtHR has given appropriate weight to the continuity of the name as an element strictly connected to the personal *status*; since the *kafala* does not modify the means of personal identification of the *markfoul*, and the latter are immediately recognised in France, granting this way their cross-border continuity.

As a preliminary conclusion, we can state that the ECtHR has reinforced the right to a single name, whose continuity must be safeguarded by the States. This result must be achieved through all the reasonable legal means, including, where necessary, the non-application of the national PIL rules, concerning both the conflict of laws and the rules on recognition of foreign (judicial or administrative) decisions.

3. A functional right: the case-law of the Court of Justice of the European Union.

This case-law must be regarded as a matter of the utmost importance in the EU.

First of all, Article 7 of the CFR safeguards the right to respect for private and family life in almost the same terms as Article 8 ECHR. Article 52, para. 3 of the CFR establishes that the level of protection accorded in the ECHR is to be considered the minimum standard in the EU, when the rights that are granted correspond. Since the CFR is addressed to the MSs only when they are implementing EU law (Article 51), the respect for private and family life under Article 7 must be guaranteed when EU citizens exercise their EU mobility rights. In this legal framework, the MS could offer even a higher level of protection, provided that it does not compromise «the primacy, unity and

effectiveness of EU law» (*Melloni* case). Therefore, the above ECtHR case-law sets out the minimum EU standard level, as for the right to name continuity, in the implementation and the enactment of EU law on the free movement by institutions and MSs.

Secondly, the area of freedom, security and justice is based on the protection of fundamental rights, and «places the individual at the heart of its activities, by establishing the citizenship of the Union» (preamble of the CFR). Consequently, an effective free movement of the citizen must be ensured in the frame of his/her fundamental rights.

Lastly, the vertical direct effect of the right to a name's cross-border continuity as included in the right to private life cannot be questioned. By appealing to the positive obligation of the MSs to recognise the means of personal identification, an individual is invoking his/her fundamental rights. If this is true in the ECHR system, in which the victim can also be a citizen of a third State, it should be even more so in the EU, within which also the principles of sincere cooperation and mutual trust between MSs apply. However, the CJEU's approach differs from the ECtHR's reasoning. The judgments are well-known, and this paper wishes only to recall some conclusions.

First of all, in the CJEU case-law the relevant human rights are not mentioned at all. The reasoning instead focuses on the free movement, which can be hindered if a person having multiple identities is supposed to demonstrate his/her identity every time he/she crosses a border. The only exception is made by the recent *von Wolffersdorff* judgment, in which however the right to private life is not dealt with as an autonomous fundamental right to be safeguarded, but as a possible aim that legitimates the refusal of the recognition of the name acquired abroad (since a different name was registered in Germany).

Secondly, the EU free movement is not an absolute right, since it can be restrained by proportionate reasons on the grounds of public policy. Although this limit must be strictly interpreted, its exact content cannot be precisely defined. Under the above CJEU case-law, the defence of the constitutional identity and the republican order of a MS (*Sayn-Wittgenstein* and *von Wolffersdorff* cases, in which some limits to the exception have been defined), as well as the protection of the national language (*Runevič-Vardyn and Wardyn* case) can be assumed to be principles of public policy.

Thirdly, the CJEU has not set out – as it is not its function in the procedure for preliminary ruling - which is the appropriate connecting factor for the attribution of the means of personal identification of the individual. In *García Avello* and in *Grunkin and Paul*, the Court has not discussed the suitability of the citizenship and of the habitual residence criteria. Eventually, in *von Wolffersdorff*, the CJEU does not raise doubts about the application of English law to the name change. Therefore, national legislators are free to determine the most appropriate connecting factors under their appreciation and national traditions, both when the personal identity is formed for the first time and when (or if) it is changed following a personal *status* modification. Primary EU law, i.e. the freedom to move and to reside in every MS, as interpreted by the CJEU, does not give any preference as to the law applicable to the attribution of the means of personal identification of the EU citizen.

4. Consistency in the outcomes of the European Courts case-law.

The two European Courts have come to similar conclusions, thanks to which it is not necessary to tackle the very delicate issue of striking a balance between a human right safeguarded by the ECHR and a fundamental freedom granted by the EU. However, the reasoning behind the two outcomes is different. According to the ECtHR, on the one hand, the cross-border continuity of the means of personal identification lays down a positive obligation on the State, and is aimed at protecting the right to private life. The CJEU, on the other hand, characterizes the failure of recognition as an obstacle to

freedom of movement of EU citizens, which can be only justified by proportionate legitimate aims covering general interests. Basically, the human right to private life and the fundamental freedom of movement do not conflict as to the results to be attained, when the individual concerned claims the continuity of his/her means of personal identification.

Nevertheless, the admitted exceptions seem analogous, too. The protection of both the republican order and the national language, accepted by the CJEU, is very close to the justification for the State's interference with the individual's private life according to the ECtHR case-law. The safeguard of the democratic principles in the society, expressly provided for in Article 8 ECHR, and the protection of a national language can limit the exercise of a human right, to the extent that the margin of appreciation has been used reasonably and without any discrimination, and that there is a consistent European common ground.

Another implicit common conclusion of the two European Courts regards the certification of the means of personal identification. This is clear from the ECtHR's *Golemanova* case. In the Court's opinion citizens' freedom to determine their own means of personal identification is not an absolute one; accordingly, the protection of public and collective interests is legitimate and might prevail. Furthermore, the CJEU has by now tackled cases on the recognition of personal identity attested in a public (foreign) document. Against this background, a serious reflection on the impact of the European case-law is possible insofar as it is restricted to the continuity of means of personal identity certified in a public document. We might provisionally state that the most suitable way of satisfying the individual's expectation is by granting such person both the certification and the legal effect of its content(s).

The European Courts do not expand on the legal theories that can lay the foundation for or justify the achieved results. Even though the case-law lays down the continuity aim, it does not provide for a specific path to follow in order to reach it. Furthermore, in the relevant judgments there is no indication of the most appropriate connecting factor between the habitual residence and the person's citizenship, nor any citizenship selection criteria in case of multiple nationalities. Finally, in *von Wolffersdorff*, no suggestions have been offered as for the rules on the personal effect of adoption and the naturalisation after marriage. This means that national judges are requested to grant priority to the EU principles of freedom to move and reside, as well as to the ECHR's right of private life, over national conflict of laws rules, preventing them from reaching the aim in the specific dispute. In the first case, the appropriate tool is the non-application of national PIL rule(s) in accordance with the CJEU well-known case-law; in the second one, each MS has to find its own solution, depending on the relationships between the national law and international conventions, as it has been stated in the *Åkerberg Fransson* decision.

However, this case-law cannot be considered completely neutral, since it affects national PIL. In *García Avello*, the Court accepted that the parties can choose one of the laws of (multiple) citizenship as applicable to the formation of the family name, despite the *lex fori* being the most effective one. Consequently, the rules on the prevalence of *lex fori* citizenship, or failing that, of the most effective nationality, commonly used by the MSs, cannot be applied if the parties have expressed their preference for one of them. Furthermore, in *Grunkin and Paul*, the same possibility to choose is accorded if the person concerned resides habitually in a MS different from the State of citizenship, using the habitual residence as a connecting factor. Finally, in *von Wolffersdorff,* the Court takes the view that also the adult can choose to form his/her name under one of the laws of his/her (multiple) citizenship. Despite its apparent neutrality, this case-law might affect the national PIL, at least because it states the duty to accept the free will of the person(s) concerned in cases strictly linked with more than one MSs.

The last consistency of the case-law of the European Courts is about the content of the claims. In many cases the personal or family *status* was not discussed at all, and the dispute was exclusively

based on the means of personal identification. These precedents confirm that the two branches, i.e. private and family life, can be separated both in theory and in practice; a claim can arise on the latter, despite there being any dispute over the former. Therefore, the two issues can also be treated separately, notwithstanding their strong connection.

5. The principle of mutual recognition: is it an appropriate method of safeguarding the cross-border continuity of the personal identity?

The consistency of the case-law of the two Courts raises the issue of whether the EU principle of mutual recognition is suitable as a general method in the cross-border cases. After all, if the means of personal identification are automatically recognised in all MSs, the protection of private life can be safeguarded, too. In the opinion of the present author, however, the mutual recognition cannot be currently regarded as a general method in this subject matter. In point of fact, it is an aim for MSs when they fail to ensure the continuity through their national regulatory instruments.

In some circumstances the principle of mutual recognition cannot be applied because of the material impossibility of recognizing the person concerned. This may happen, for instance, with women taking their husband's surname after marriage under some national laws on the personal effects of the marriage. In these cases, in which a principle of mutual recognition could be extremely useful, difficulties related to the material recognition of the wife can arise. However, any automatism is impossible for factual reasons, and not because the State is unwilling to accept the means of personal identification put forward by the domestic rules of another State. Therefore, the first step consists in the person's identification through other means, such as the forename, the place and the date of birth. Recognition can be granted, following such identification, though it is not an automatic application.

Moreover, MSs seem not to accept a general principle of mutual recognition of names. We only need to consider the arguments given by Germany in *von Wolffersdorff*, insisting on the exceptions to the mutual recognition, with particular regard to public policy, as well as on the fictitious links with another MS.

Finally, the mutual recognition is not suitable to resolve positive and negative conflicts; examples thereof are both the *von Wolffersdorff* and *Henry Kismoun* judgments. The positive conflicts might still arise since it fails to state any rule of preference to be applied in case of multiple certifications; while the negative ones, for a lack of a rule on the choice of law, or at least on the determination of a competent State as for name attribution or modification.

Therefore, the mutual recognition should be rather used as an exception, to be applied only and insofar as the national rules cannot reach the goal. MSs are free to establish an internal procedure in order to control the authenticity and the correctness of the foreign public certification, and they can refuse to recognise it in a limited number of cases. If a refusal occurs outside these hypotheses, the mutual recognition can supply (and the rights under Article 8 of the ECHR could be granted). This method is a secondary tool in case of national failures, rather than exclusive means to ensure continuity of the person's single name. A different general solution should be sought, in order to prevent litigation and to safeguard immediately the rights of free movement and private life of the individual.

6. Some tentative solutions in the EU: the acceptance of public documents.

The EU could seem a perfect institution where innovative instruments can be enforced and experimented, including those in connection with such a delicate matter. The EU is indeed grounded on peculiar principles, which are rather unknown in other international organisations, i.e. the

fundamental role of the free movement of persons, the promotion and the enhancement of the mutual trust between MSs, as well as the mutual recognition in an area of freedom, security and justice. These characteristics could lead to further strengthen the centralisation of PIL rules through the EU harmonisation or uniformation.

This statement could not however be more than an expectation for the future, since it has been contradicted in practice by the most recent EU result concerning the subject matter. We are referring to the regulation n. 2016/1191 on the acceptance of public documents issued by authorities of the other MSs. The proposal followed the Green Paper of December 2010 on the reduction of bureaucracy for EU citizens, but it only put forward one issue, which is most probably the less contested one in view of the instrument of administrative cooperation already experimented in international relationships. The Green Paper tackled both the issues of acceptance of public documents and recognition of legal *status*, yet only the former one has been included in the 2013 Commission's proposal. Article 2, para. 4 of the regulation specifies indeed that it is not applicable to the legal effect of the content of the public documents. Therefore, the authenticity of the foreign act is presumed, thanks to the use of EU multilingual standard forms, unless serious doubts arise to the public officer receiving the act (Article 14). This simplified system is optional, since other procedures for the acceptance of public documents can be used (Article 1, para. 1). It represents an important step forward in the administrative cooperation between MSs as it simplifies the circulation of public documents by abolishing intermediate procedures. This system will therefore be very functional and will immediately bring the circulation of public documents into effect. However, it is not a revolutionary achievement as it is a quite natural step on the path to international administrative cooperation, a path which was already partly covered by the MSs themselves through a large number of well-working international conventions. This achievement can be considered quite natural in a strongly integrated system. The regulation simplifies the administrative cooperation, but cannot settle the concerns regarding the formation and cross-border continuity of the means of personal identification.

7. Possible solutions in the near future starting from the EU 2010 Green Paper.

In the opinion of the present author, it is rather interesting to restart the debate from the 2010 Green Paper. The current situation cannot be accepted any more. Although refusals of recognition of the means of personal identification do not occur on a daily basis, it cannot be simply forgotten that some individuals are compelled to change their identities while crossing a border, in a legal system grounded on the rule of law and the respect of human rights. The issue is not a merely technical or administrative one as it has a negative impact on the human rights and on the free mobility of the persons. National PIL rules are not always suitable, and their functioning have been indirectly undermined by the above CJEU and ECtHR case-law. A double-EU citizen new-born baby can be identified according to the rules of each nation, or to those of the State of residence and domicile, if so permitted by the MS; when he/she will be an adult, each citizenship has the same value and will link the person with the two (or more) countries without there being any possibility to distinguish between them, or to enforce one connection only (CJEU's case *Hadadi*). The individual might be free to choose, but at the same time another MS could jeopardize the respect of such choice. This situation creates legal uncertainty, which hinders the free movement of the person concerned. The EU cannot restrict itself to uniforming the economical aspects of the individual's life and then to simply establishing the *lacunae* in the material scope of its acts (proposed and approved by the EU itself), leaving this way the MSs with the duty to somehow coordinate each other according to a «principle of mutual recognition». The debate raised by the Green Paper on the cross-border effects of foreign public documents seemed

to be the inevitable consequence of an intolerable legal uncertainty. Although some answers to the Green Paper betrayed uneasiness in dealing with the issue, the bitterest objections have been raised to the recognition of the personal *status* stemming from the cross-border effects of public documents. Less troublesome seemed to be the cooperation between MSs on the means of personal identification. Therefore, the current system can be reviewed, so as to strengthen the cooperation between MSs aimed at implementing the rule of law and the protection of human rights.

Some methods can be suggested. Some MSs accept the «exception of mutual recognition» every time their conflict-of-law rules fail to grant the cross-border continuity of the means of personal identification. The PIL system has not been subject to any formal (legislative) modification, but when a solution reached exclusively through the application of rules seems in contrast with the right of private life and/or the free movement of persons, this outcome is disregarded. Furthermore, some MSs, such as Italy, admit the choice of the law applicable to the composition of the means of personal identification, despite the absence of any reform concerning the choice of law rules, when the person concerned presents evident links to more than one MS.

This can only be a provisional solution; since it is applied on a case-by-case basis, it does not grant the legal certainty required by the ECtHR and it is always subject to a margin of appreciation as evidenced by the CJEU recent cases.

A solution at the EU level can be more suitable in terms of certainty and uniformity. The 2010 Green Paper set forth three possible options.

The first one envisaged a support of the EU to the national authorities in order to assure an effective cooperation. This first step would lead to a harmonization of the conflict-of-law rules, or to an approximation of the national law on family matters. Provided that the envisaged type of EU guidance is not very clear, this method can anyway be most properly characterized as a tool for administrative cooperation. Therefore, it cannot be considered to be an optimal outcome, although it undoubtedly provides for a new system.

8. The recognition of legal situations.

The second option discussed in the Green Paper is the automatic recognition of the legal effects of civil *status*. According to its brief description, the recognition does not depend on the harmonization (and consequently on the modification) of the existing national PIL rules. MSs should only accept and recognize the effects of a legal situation created in another MS on the grounds of the mutual trust. According to the Green Paper, this method has numerous advantages, such as the simplicity and the transparency, the legal certainty, the protection of the legitimate expectations of the individual(s) concerned and the cross-border continuity of the means of personal identification. Furthermore, national laws would remain unaffected. The only required rules are the compensative ones aimed at avoiding abusive or fraudulent behaviours and the manifest contrast with public policy. This solution would be particularly suitable in the field of the cross-border continuity of names.

This method seems approximating to the so called method of recognition of legal *status* put forward by some scholars. They both have a complementary nature with respect to the conflict-of-law rules, aimed at avoiding limping situations. Although the Authors are still debating on the necessary working conditions of the method, there seem to be a general consent to one requirement in particular, i.e. the validity of the legal situation in the State of origin. Having the sovereignty and the exclusive competence, the State of origin can create such situation under its national law (including the conflict-of-law rules) and prevent the receiving State from applying its own national rules on the recognition of foreign legal situations and public documents. To summarize, the national rules of the States of origin

ensure the validity of a situation that must then be accepted in all the other countries; instead of being changed, the conflict-of-law rules are coordinated in cross-border situations. Being this condition generally accepted by the scholars, the current focus of debate among the Authors are the means of determination of the «original competence». Some suggest «metarules on the conflict of laws» aimed at the identification of the State of origin, while others suggest the objective exclusive competence or the application of the principle of proximity in both ways, i.e. ensuring the State of origin has an effective link with the individual concerned, or on the contrary, granting the recognition until it is manifestly evident that there is a lack of actual connections with the State of origin. These conditions could be further provided for by a safeguard clause on public policy. This method offers numerous advantages, especially because it admits the cross-border continuity of all the legal situations and *status* validly created abroad, including in third countries. This result might satisfy the legitimate expectations of the individuals, since the means of personal identification can freely circulate, without any recognition procedure being required, together with the persons concerned.

The 2010 Green Paper's concise description of the envisaged method does not allow to state with certainty that the automatic recognition of the legal effects of civil *status* corresponds entirely to the recognition of legal situations. In fact, no mention is made of the basic condition of the validity of the legal situation; furthermore, the 2010 Green Paper takes only account of situations created in a MS. However, the determination of the competence of one country according to the method of legal situations could be a safeguard against abusive or fraudulent behaviours under the approach put forward by the 2010 Green Paper,. If this is true, the common core of the two methods resides in their allegedly scarce impact on the conflict-of-law rules, whereas the recognition should only be coordinated (rather than completely reformed). The EU could limit its action to two branches. First of all, it should determine the competence of a (Member) State to validly create such situation through objective criteria (such as the citizenship, the domicile, the residence, or the place where the *status* has been changed, used as an alternative criteria), or through the requirement of a substantial connection with that jurisdiction. Consequently, it states the negative obligation for the MSs to accept the documents issued abroad, as well as their legal effects, without any proceeding being required, save in exceptional cases to be expressly provided for.

However, a set of reasons leads the present author to believe that this approach would rather not be followed by the EU.

The first one relates to the theoretical grounds of the civil judicial cooperation, with particular regard to the methods of coordination most commonly used in the EU acts. In fact, they are based on the classic method of coordination, or on substantial conflict-of-law rules, already enshrined in most national PIL provisions. Instead, the recognition of legal situations sets aside the conflict of laws, while only the validity of that situation must be scrutinized under the law of the State of origin.

Secondly, the EU does not seem well-inclined to consider «European» and «extra-European» situations as equivalent. The restrictive approach towards the latter is demonstrated by the inapplicability of the rules on simplified recognition and enforcement of foreign judicial decisions, although they have already been recognized or enforced in one MS. These premises make it impossible to foresee a different position relating to legal situations created in a third country and certified by a public administration in a document (and not by a judge in a decision).

Thirdly, the case-law of the two European Courts has a neutral approach as for the allocation of the competence to constitute a legal situation; there has not been any control on the origin of the means of personal identification. A good example of this sort of «indifference» is provided by the *von Wolffersdorff* and *Henry Kismoun* cases. Since this competence has not been considered as a possible

relevant element, the primary factor was the individual's will. The impossibility to ascertain the validity of that situation is a direct consequence of this approach.

Fourthly, the civil judicial cooperation is based on the role of the party autonomy in its classic conception. On the other hand, the recognition of legal situations requires an objective factor determining the State of origin. The only possible concession is an option to freely determine the competent jurisdiction in case of positive conflicts, as it could be derived also from the *von Wolffersdorff* and *Henry Kismoun* decisions.

Finally, it is not completely true that the method does not impact on national legislations. Quite on the contrary, the national rules on the recognition of foreign *status* and public documents should be disregarded, once established that the State of origin has competence to create that (certified) situation. Any other condition requested by the national legislation for the recognition cannot be applied. Therefore, the method affects the national provisions (and not the conflict-of-law rules) on the recognition of the effects of legal situations created abroad.

These elements point out the theoretical and practical distance between the common EU approach and the recognition of legal situations, due to which the future introduction in the EU of the latter seems reasonably unforeseeable. The moment is not yet ripe for the EU to approve a new system of automatic recognition of public documents and their effects, not even in the quite limited field concerning the right of personal identity. If it was to be proposed, the EU would incur the risk of fierce oppositions by the Council as the institutional representative of the MSs. Under article 81, para. 3 of the TFEU, the Council shall act unanimously when approving measures concerning family law. The full consent would be very hard to reach, and the opposition might once more result in the establishment of enhanced cooperation, whose efficiency raises doubts in this subject matter.

9. The partial uniformation of the conflict-of-law rules in order to overcome the current legal fragmentation.

The last method suggested in the 2010 Green Paper is the recognition based on the harmonization of conflict-of-law rules. Accordingly, the EU could adopt a new regulation uniforming the PIL rules on (personal *status*, but limited to the scope of the present paper) the attribution and the change of the personal identity. A primary role would be played by the private autonomy; failing a choice, an implicit preference is accorded to residential connections, which ensure strong and current links between the individual and the State.

These regulatory solutions would be in line with both the CJEU case law and the contents of the effective EU regulations on PIL. As already mentioned above, many judgments lead us to suppose that the CJEU shows preference for the private autonomy even in the civil *status* conflict-of-law rules. It seems logical that a future EU regulation accepts these suggestions. The choice should be admitted both initially, when the means of personal identity are established for the first time, and afterwards, following a change of *status*. This possibility would also grant the freedom of personal identity, since the elements of the name(s) would be determined under a law chosen by the person concerned, in accordance with his/her personal – but extremely relevant – feelings of connection or belonging to a State.

Failing any choice, the Green Paper makes explicit its preference for the habitual residence as an objective connecting factor. This rule would be consonant with the other EU regulations on family matters, such as the regulation n. 2201/2003 on jurisdiction or the regulation n. 1259/2010, on the enhanced cooperation in the area of the law applicable to divorce and legal separation. Furthermore, many scholars have pointed out that such connecting factor promotes the free movement of persons,

since it enables the individual's integration in the place where he/she lives. However, in the opinion of the present author, this advantage is less important in our field. In fact, the cross-border continuity can be better safeguarded if the legal situations (and their effects) are not modified following the change of the factual situations. The flexibility of the habitual residence as a connecting factor is not suitable, when stability must be granted. It cannot be expected that a person changes his/her means of personal identification every time he/she changes the habitual residence. Instead, a typical stable connecting factor is the citizenship. There is nevertheless one prevailing ground that makes the habitual residence a proper connecting factor in this subject matter. Indeed, most of the EU regulations adopted in the Area of Freedom, Security and Justice make use of it. It is submitted that the formal fragmentation of the PIL provisions in different regulations cannot cause inconsistencies and practically unworkable rules. The use of the same or consistent connecting factor can help the coordination between different regulations.

However, at least some stability must be granted. This can be achieved through a proper rule on the *conflit mobile*, which would clarify that the modification of the habitual residence does not affect the identity already acquired abroad, until a new change of the legal *status* occurs. The personal identity would be definitively established in a public document that can circulate within the territory of the MSs. It would be much more difficult to create abusive or fraudulent situations, since the change of the habitual residence is not a sufficient condition in order to request a modification of the law applicable to the name. Obviously, this solution is not able to bring definitely to an end every possible fraud or abuse-related activity; the uniformation of the conflict-of-law rules should be accompanied by further provisions in accordance with the CJEU case-law, which admits national means aimed at eliminating any benefit to be acquired by fraud or abuse of the law, as a barrier of last resort aimed at safeguarding public interests (which are also relevant in relation to the mentioned ECtHR case-law).

In such a legal framework, the mutual recognition could be much more easily put into practice; the MS is requested only to accept the means of personal identification that are formed according to a uniform choice-of-law rule and, definitively, to the same substantive law in all the EU States. Therefore, refusals based on public policy reasons would be extremely rare in a harmonized legal area.

This solution would affect the national conflict-of-law rules, which would be completely replaced by the uniform EU law, as it has been the case with all the other regulations in force. MS are however more used to a uniform EU regulation implementing a classical conflict-of-law approach (with some specific innovations, but anyway part of a classic scheme); furthermore, it affects only a small part of national provisions on PIL. This statement does not assure the certainty of consent by the MSs, that have very recently experienced the impossibility to unanimously establish rules on the PIL of the patrimonial effects of the marriage and the registered partnerships. In fact, family and personal *status* matters are still very delicate issues, when national values can be at stake; this is all the more true of the right to a name, which is the only possible instrument able to establish (almost) unequivocally the identity of the person concerned also for public purposes. However, the harmonisation can probably be more easily achieved in comparison with the introduction of a completely new method, such as the recognition of legal situations.

In conclusion, there is a wide range of solutions, each featuring both natural advantages and drawbacks. However, it is submitted that the EU can no longer delay the solution of this issue, as it is the natural devolopment of the implementation of uniform rules in many fields of civil and case-law laying down positive and negative obligations on the cooperation between MSs. We must not forget that the human right to private life is at stake.

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