

Ágoston MOHAY (assistant professor, Faculty of Law, University of Pécs)

Norbert TÓTH (lecturer, Faculty of International and European Studies, National University of Public Service)

## **What's in a name? Equal treatment, Union citizens and national rules on names and titles<sup>1</sup>**

(WORKING PAPER)

### INTRODUCTION

The construction of names and the use of nobility titles are not regulated by European Union law. Yet the Court of Justice of the European Union has had to deal with such issues in relation to equal treatment, Union citizenship and free movement and residence on various occasions. Memorable judgments include *Garcia-Avello*<sup>2</sup>, *Grunkin and Paul*<sup>3</sup>, *Sayn-Wittgenstein*<sup>4</sup>, and *Runevič-Vardyn and Wardyn*<sup>5</sup>, where national rules on names or titles had to be contrasted with EU law in light of the aforementioned considerations with varying outcomes. This case note undertakes to analyse the most recent judgment relevant in this regard: the case of Nabil Peter Bogendorff von Wolffersdorff – or should we address him as Peter Mark Emanuel Graf von Wolffersdorff Freiherr von Bogendorff?<sup>6</sup>

### FACTS OF THE CASE

Nabil Peter Bogendorff von Wolffersdorff, a German national, moved to the United Kingdom in 2001, making use of the right of free movement, and exercised the profession of insolvency adviser in London. He later acquired British nationality by naturalisation (2004), whilst retaining his German nationality as well. By means of a deed poll, Mr. Bogendorff von Wolffersdorff changed his name so that, under English law, he is called Peter Mark Emanuel

---

<sup>1</sup> This research was supported by the Hungarian Scientific Research Fund (OTKA) Research Project K 115646. The current version of this case note is a working paper and should not be quoted without the express prior consent of the authors.

<sup>2</sup> ECJ 2 October 2003, Case C-148/02, *Garcia Avello v Belgium*

<sup>3</sup> ECJ 14 October 2008, Case C-353/06, *Grunkin and Paul*

<sup>4</sup> ECJ 22 December 2010, Case C-208/09 *Sayn-Wittgenstein v Landeshauptmann von Wien*

<sup>5</sup> ECJ 12 May 2011, Case C-391/09 *Runevič-Vardyn and Wardyn v Vilniaus miesto savivaldybės administracija*

<sup>6</sup> ECJ 2 June 2016, Case C-438/14 *Bogendorff von Wolffersdorff v Standesamt der Stadt Karlsruhe and Zentraler Juristischer Dienst der Stadt Karlsruhe*

Graf von Wolffersdorff Freiherr von Bogendorff.<sup>7</sup> He subsequently left the UK together with his spouse and moved back to Germany, where they continue to live together with their daughter born in 2006.<sup>8</sup> In 2013, he asked the Register office of the city of Karlsruhe to enter in the register of civil status the forenames and surname he had acquired under British legislation.<sup>9</sup> The registration was refused by the office, and the applicant went to court seeking an order that the office shall amend his birth certificate with retroactive effect. In the court proceedings, the Register office claimed that the reason for the refusal of the registration of the name requested was due to it being manifestly incompatible with essential principles of German law.<sup>10</sup>

It should be noted that the family previously already had to take legal action to get the name of their daughter registered. The daughter of Mr. Bogendorff von Wolffersdorff and his wife has double German/British nationality, her birth was declared at the Consulate General of the UK in Düsseldorf, Germany. The name entered into her British birth certificate (and passport) is Larissa Xenia Gräfin von Wolffersdorff Freiin von Bogendorff. The register office of Chemnitz (where the family resided) refused to register her under her 'British name' in 2006.<sup>11</sup> The refusal was based on German law: accordingly, a person's name 'is subject to the law of the State of which that person is a national'<sup>12</sup>, and German law forbids the conferral of nobility titles. Mr. Bogendorff von Wolffersdorff applied to the Oberlandesgericht Dresden (Higher Regional Court of Dresden, Germany), seeking an order that that Register office enter his daughter's name in the register of civil status in the form appearing on the birth certificate issued by the British authorities. Following a lengthy procedure, the German court granted

---

<sup>7</sup> Case C-438/14, paragraphs 11-15. "Graf" is the German equivalent of "count". The title "Freiherr" was a nobility title used in the Holy Roman Empire, essentially the German equivalent of "baron". J. Whaley, *Germany and the Holy Roman Empire Volume II: The Peace of Westphalia to the Dissolution of the Reich, 1648-1806* (Oxford University Press 2012) p. 71.

<sup>8</sup> Case C-438/14, paragraph 16

<sup>9</sup> His claim was based on Paragraph 48 of the Einführungsgesetz zum Bürgerlichen Gesetzbuch, the German Law introducing the Civil Code of 21 September 1994 (BGBl. 1994 I, p. 2494, corrigendum BGBl. 1997, I, p. 1061)] (henceforth: EBGB). This provides that if a person's name is subject to German law, he may, by declaration to the register office, choose the name acquired during habitual residence in another Member State of the EU and entered in a register of civil status there, where this is not manifestly incompatible with essential principles of German law. 'The choice of name shall take effect retroactively from the date of entry in the register of civil status of the other Member State, unless the person expressly declares that the choice of name is to have effect only for the future. The declaration must be publicly attested or certified. (...)' (Case C-438/14, paragraphs 9 and 21.)

<sup>10</sup> Case C-438/14, paragraphs 23-24.

<sup>11</sup> Case C-438/14, paragraphs 17-18.

<sup>12</sup> EBGB, paragraph 10.

that application in 2011.<sup>13</sup> Following this ruling, the father also attempted to get the name he bears under British law registered in Germany.

Before moving forward, let us briefly look at the relevant legal regulations regarding nobility titles in Germany. The *Grundgesetz*, the Basic Law of the Federal Republic of Germany provides that the law in force prior to the first meeting of the Bundestag shall remain in force in so far as it does not run counter to the Basic Law.<sup>14</sup> This includes Article 109 of the ‘Weimar Constitution’ of Germany<sup>15</sup>, which *inter alia* provides that all Germans are equal before the law, and that public law advantages or disadvantages of birth or rank are to be abolished, furthermore, titles of nobility are valid only as part of a name and may no longer be conferred. The EGBGB, the relevant German law contains rules on the choice of a name acquired in another Member State of the EU.<sup>16</sup> This provision was created by the German law on the adaptation of the rules of private international law to Regulation 1259/2010/EU and on the amendment of other rules of private international law (entry into force: 29.01.2013)<sup>17</sup>; it was introduced following the Grunkin and Paul judgment of the Court.<sup>18</sup>

Against this national legal background, the Amstgericht (*German District Court*) of Karlsruhe noted that the scope of Paragraph 48 EGBGB was debated, in particular where the name was acquired independently of any change of personal status under family law – as was the case in the present dispute. The German court felt that the case law of the Court of Justice did not provide an answer to the questions raised in the Bogendorff von Wolffersdorff dispute – not even in *Sayn-Wittgenstein*. Thus it decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling: ‘Are Articles 18 TFEU and 21 TFEU to be interpreted as meaning that the authorities of a Member State are obliged to recognise the change of name of a national of that State if he is at the same time a national of another Member State and has acquired in that Member State, during habitual residence, by means of a change of name not associated with a change of family law status, a freely chosen name including several tokens of nobility, where it is possible that a future substantial link with that State does not exist and in the first Member State the nobility has been abolished by

---

<sup>13</sup> Case C-438/14, paragraphs 19-20.

<sup>14</sup> Paragraph 123(1) of the Grundgesetz für die Bundesrepublik Deutschland (BGBl. 1949, I, p. 1)

<sup>15</sup> Verfassung des Deutschen Reichs, 11 August 1919 (Reichsgesetzblatt 1919, p. 1383).

<sup>16</sup> EGBGB, Paragraph 48. See footnote 9 above.

<sup>17</sup> Gesetz zur Anpassung der Vorschriften des Internationalen Privatrechts an die Verordnung (EU) Nr. 1259/2010 und zur Änderung anderer Vorschriften des Internationalen Privatrechts (BGBl. 2013 I, p. 101)

<sup>18</sup> Case C-438/14, paragraph 10

constitutional law but the titles of nobility used at the time of abolition may continue to be used as part of a name?’<sup>19</sup>

#### THE JUDGMENT OF THE COURT

In its reasoning, the Court of Justice first reiterated that every citizen of a Member State is a citizen of the Union, including the applicant in the main proceeding, and that Union citizens are entitled to equal treatment under EU law and within the material scope of EU law, which certainly covers situations where EU citizens exercise the freedom to move and reside within the territory of the Member States.<sup>20</sup> The Court also recalled that, ‘as EU law stands at present, the rules governing the way in which a person’s surname and forename are entered on certificates of civil status are matters coming within the competence of the Member States, the latter must nonetheless, when exercising that competence, comply with EU law’ and, in particular, the freedom to move and reside according to the TFEU.<sup>21</sup> The Court noted that the applicant had indeed made use of his free movement right under Article 21 TFEU, and went on to examine, in the light of that provision, the refusal by the authorities of a Member State to recognise the name acquired by a national of that State in another Member State, of which he also holds the nationality.<sup>22</sup>

The Court noted the fundamental rights connotation of the issue: a person’s forename and surname are considered constituent elements of his identity and private life, the protection of which is ensured by Article 7 of the Charter of Fundamental Rights of the EU and also by Article 8 of the ECHR. The Court pointed out that the refusal by the nation authorities to recognise the name of a national of that State who exercised his right to move and reside freely in the territory of another Member State, as determined in that second Member State, is likely to hinder the exercise of the right of free movement and residence. ‘Confusion and inconvenience are liable to arise from the divergence between the two names used for the same person (...)’<sup>23</sup> It is well known from the jurisprudence of the Court that national legislation which places certain nationals of a Member State at a disadvantage merely for the reason that they have exercised their freedom to move and to reside in another Member State is a restriction on the freedoms conferred on EU citizens. The Court ascertained that due to the fact that the applicant’s name had been registered differently in two Member States, and to

---

<sup>19</sup> Case C-438/14, paragraphs 24-25

<sup>20</sup> Case C-438/14, paragraphs 28-31

<sup>21</sup> Case C-438/14, paragraph 32

<sup>22</sup> Case C-438/14, paragraph 33-34

<sup>23</sup> Case C-438/14, paragraph 37

the consequence that his name would appear different in official documents depending on which state had issued them, the applicant might need to dispel doubts as to his identity; a hindrance to the exercise of the right of free movement and residence. Similarly, his daughter having a differently registered family name could lead to difficulties as regards proving their familial ties. These difficulties constituted a restriction on the rights enshrined in Article 21 TFEU.

Yet as is apparent from the settled case law of the Court, such a restriction may be justified, provided it is based on objective considerations and is proportionate to the legitimate objective of the national provision. The Court looked at four possible justifications which were mentioned by the referring court:

Ad 1) Under German law, a change of name by an intentional act, independent of any change of personal status under family law, is not permitted. This rests mainly on the principles of the immutability and continuity of names, which must constitute a reliable and lasting identifying feature of a person. The Court of Justice, recalling *Grunkin and Paul* held that although those principles may be legitimate, they do not, in themselves, warrant a refusal by the competent authorities to recognise the surname of the person concerned as already lawfully determined and registered in another Member State.<sup>24</sup>

Ad 2) The referring court drew attention to the fact that the difference in names of the applicant is not a result of any change in circumstances or personal status, but a voluntary choice of his own – it therefore expressed doubts as to whether such a personal decision warrants legal protection. The Court of Justice however took the view that the voluntary nature of a change of name does not, in itself, undermine the public interest and cannot alone justify a restriction of rights provided by EU law. This point of view was influenced by the submission of the German government in the proceedings, which stated that the German legal regulation of a change of name, adopted with regard to *Grunkin and Paul*, was not limited to situations falling under family law, contrary to the submissions of the Register office of Karlsruhe.<sup>25</sup> The Court of Justice once again pointed out that a person's surname was a

---

<sup>24</sup> Case C-438/14, paragraphs 50-51, referencing Case C-353/06, paragraphs 30-31

<sup>25</sup> The German government pointed out that Paragraph 48 EGBGB created a legal basis permitting a person subject to German law to choose a name acquired and registered in another Member State provided there is no incompatibility with the basic principles of German law. The transcription of that name may be made by a declaration by the person concerned to the Register office stating that he wishes to bear the name acquired in another Member State instead of the name which follows from the application of the German law on personal status, the requirement being that the name be acquired in another Member States during habitual residence there, that is to say residence of a certain duration which led to a degree of social integration. That requirement is

constituent element of his identity and of his private life, making reference to the Charter and to the ECHR and the case law of the ECtHR.<sup>26</sup>

Ad 3) The referring court mentioned that German law aims to avoid the use of disproportionately long names or names which are too complex. The Court of Justice, however, once again pointing to *Grunkin and Paul* held that considerations of administrative convenience cannot suffice to justify an obstacle to freedom of movement.<sup>27</sup>

Ad 4) The final consideration, the one that carried most weight, was the one relating to the abolition of privileges and the prohibition on bearing titles of nobility or recreating the appearance of noble origins. The German government stated that the principle of the equality of German citizens before the law must be safeguarded, and the constitutional choice to abolish the privileges and inequalities based on birth or condition and to prohibit the bearing of titles of nobility as such was one of the means of achieving this aim. All privileges and inequalities connected with birth or position have been abolished in Germany, only titles of nobility which were actually borne when the Weimar Constitution entered into force may continue as elements of a name and may be transmitted as a fact of personal status. According to the German Government, these provisions form part of German public policy and are intended to ensure equal treatment of all German citizens, and constant national court practice shows that the grant, by way of a change of name, of a name including a title of nobility as an element of the name also falls under the aforementioned prohibition. The German government referenced *Sayn-Wittgenstein* to support its reasoning, although noting the difference between the two legal systems (as, contrary to Austrian law, German law does not contain a strict prohibition on the use and transmission of titles of nobility).<sup>28</sup>

This German prohibition was interpreted by the Court of Justice as relating to a ground of public policy. According to the Court's case law, a public policy justification must be

---

intended to prevent German nationals, with the sole aim of circumventing their national law on persons, from residing briefly in another Member State with more advantageous legislation in order to acquire the name that they wish to bear. (Case C-438/14, paragraph 53)

<sup>26</sup> Specifically *Stjerna v. Finland* (ECtHR 25 November 1994, Case No. 18131/91), where the ECtHR „recognised the crucial role of surnames in the identification of persons and considered that the Finnish authorities' refusal to authorise an applicant to adopt a particular new surname could not necessarily be considered an interference in the exercise of his right to respect for his private life, as would have been, for example, an obligation on him to change surname. Nonetheless, it recognised that there may exist genuine reasons prompting an individual to wish to change name, while accepting that legal restrictions on such a possibility may be justified in the public interest; for example in order to ensure accurate population registration or to safeguard the means of personal identification and of linking the bearers of a given name to a family.” (Case C-438/14, paragraph 55)

<sup>27</sup> Case C-438/14, paragraphs 59-60

<sup>28</sup> Case C-438/14, paragraphs 61-64

interpreted strictly, its scope cannot be determined unilaterally by each Member State; public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society. This does not change the fact that the specific circumstances which may be accepted as public policy justifications may vary from Member State to Member State and from one era to another – national authorities therefore necessarily need to be accorded a degree of discretion in determining public policy grounds.<sup>29</sup> It was also noted by the Court that the EU is to respect the national identities of its Member States according to Article 4(2) TEU, which may include the status of the State as a Republic, as shown in *Sayn-Wittgenstein*. The Court accepted that if German nationals, using the law of another Member State, could adopt abolished titles of nobility (although only in name), this would run counter to the intention of the German legislator and the legitimate public policy ground it is pursuing.<sup>30</sup>

The Court stated that there was ‘no doubt’ that the objective of observing the principle of equal treatment was compatible with EU law, and moved on to verify the proportionality of the measure. In this regard however the Court of Justice held that the determination of the proportionate nature of the national measure would require ‘an analysis and weighing-up of various elements of law and fact peculiar to the Member State concerned, which the referring court is in a better position to carry out than the Court.’ The Court did provide some guidance however, as it stated that it was for the national court to determine whether the German authorities have or have not gone beyond what is necessary to ensure achievement of the fundamental constitutional objective which they pursue, and to this end various factors must be taken into consideration: the fact that the UK authorities and a different German court did not consider the name in question to be contrary to public policy, and the fact that the change of name in question was the result of personal choice and not a change in status. Furthermore, the Court of Justice reminded the national court that the recognition of the change of *forenames* of the applicant cannot legitimately be refused.<sup>31</sup>

Thus the answer to the referred question was that Article 21 TFEU must be interpreted as meaning that the authorities of a Member State are not bound to recognise the name of a citizen of that Member State when he also holds the nationality of another Member State in which he has acquired that name which he has chosen freely and which contains a number of

---

<sup>29</sup> Case C-438/14, paragraphs 65-68. This was elaborated upon by the Court in *Omega v Oberbürgermeisterin der Bundesstadt Bonn* (ECJ 14 October 2004, Case C-36/02) and in *Sayn-Wittgenstein*.

<sup>30</sup> Case C-438/14, paragraphs 71-73, 76

<sup>31</sup> Case C-438/14, paragraphs 77-83

tokens of nobility, which are not accepted by the law of the first Member State, provided that it is established, which it is for the referring court to ascertain, that a refusal of recognition is justified on public policy grounds, in that it is appropriate and necessary to ensure compliance with the principle that all citizens of that Member State are equal before the law.<sup>32</sup>

#### COMMENTS

The judgment of the Court of Justice did not follow the opinion of Advocate General Wathelet, who laid more emphasis on dual nationality and the disadvantages arising from it in general<sup>33</sup> and on the fact that the nobility titles in question never actually existed neither in Germany nor the UK.<sup>34</sup> Wathelet also considered that the Weimar Constitution allowed for already existing nobility titles to exist as parts of a name – these considerations lead him to find that the chosen name of the applicant did not present a genuine and sufficiently serious threat to German public policy, especially taking into account that apparently the daughter’s similar name did not pose such a danger either.<sup>35</sup> But can it be said that this outcome is not surprising in light of *Sayn-Wittgenstein*? Acknowledging the obvious similarities in the two cases, the differences also need to be pointed out. Firstly, the German regulation of the use of nobility titles is less categorical than the Austrian prohibition, and secondly, the current case concerned an individual with multiple (dual) citizenship, both tying him to EU Member States. Yet these differences did not have a decisive effect on the Court’s judgment.

*Garcia Avello* was the first case where the Court has established a connection between the right of free movement and residence as it results from the status of EU citizenship, and national laws governing names. That judgment essentially accepted that Union citizens have a right to bear a name of their preference in all Member States, the official recognition of which should not be rejected as it would represent a restriction on free movement. However, as the right to move and reside freely is not a right of an absolute nature, logically, the right to bear “one and the same name” in all Member States – as an element of the previous right – also cannot be considered an absolute right in the Court’s interpretation. Of course, the Court of Justice did not decide the question whether the restrictive German measures were indeed proportionate to the public policy aim, and left this issue in the hands of the referring German court. It would be interesting to know where exactly the difference lies between *Sayn-Wittgenstein* and *Bogendorff von Wolfersdorff* in this regard, and why the Court of Justice felt

---

<sup>32</sup> Case C-438/14, paragraph 84

<sup>33</sup> Case C-438/14. Opinion of Advocate General Wathelet delivered on 14 January 2016, paragraph 46

<sup>34</sup> *Ibid.* paragraph 94

<sup>35</sup> *Ibid.* paragraph 109

not informed enough to decide the proportionality dimension of the latter case and why it had no trouble to rule on the same issue in the former one.

In the majority of the Member States of the EU, namely 21 states (75%) the form of government is that of a republic, whereas seven states (25%) are monarchies. Thus in one quarter of the Member States nobility titles based on lineage or property do not present any specific legal problems. The “republican” states however are mostly hostile towards the issue of nobility, with numerous states adopting restrictive or prohibiting regulations, such as Austria<sup>36</sup>, Italy<sup>37</sup>, Greece<sup>38</sup> and Hungary<sup>39</sup>. One cannot help but wonder about the difficulty of reconciling the facts that a) the monarchic EU Member States are also based on and safeguard equality (which is of course one of the common values of the EU as well and a precondition to accession<sup>40</sup>) and that b) other Member States of the EU consider nobility titles to be contrary to equality and a danger to national public policy. The answer may lie in the concept of “national identity”, which is recognised by Article 4 (2) TEU. According to this provision, the Union shall respect Member States’ national identities, “inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.” The Court of Justice has demonstrated its *willingness* to protect Member States’ national identity already in *Omega*<sup>41</sup> – moreover it has effectively already placed national identity before

---

<sup>36</sup> Gesetz über die Aufhebung des Adels, der weltlichen Ritter- und Damenorden und gewisser Titel und Würden of 3 April 1919 (StGBI. 211/1919) which has constitutional status under Article 149(1) of the Bundes-Verfassungsgesetz – as analysed by the Court in *Sayn-Wittgenstein* (paragraph 3).

<sup>37</sup> Article XIV of the Transitional and Final Provisions of the Constitution of Italian Republic (1948): „Titles of nobility shall not be recognised. (...)” Available in English at:

[https://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf)

<sup>38</sup> According to Article 4 Paragraph 7 of the Constitution of Greece (1975), titles of nobility or distinction are neither conferred upon nor recognized in Greek citizens. Available in English at:

<http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20agglisko.pdf>

<sup>39</sup> In Hungarian law, Act IV of 1947 on the abolition of certain titles and ranks has abolished all Hungarian noble ranks and titles and prohibited their future bestowment. The Act remains in force today, although it does not contain any explicit sanctions in case the law is not observed, Act I of 2010 on the Civil Registry Procedure prohibits the registration of titles and ranks which would be contrary to Act IV of 1947 [55. § (1a)]. The 1947 Act has ‘survived’ two challenges before the Hungarian Constitutional Court in 2008 [Decision 1161/B/2008] and in 2009 [Decision 988/B/2009]. The Court has held in the 2008 decision that the prohibition of ranks and titles is intended to guarantee the equality of Hungarian citizens, as any discrimination based on hereditary titles and ranks would be contrary to the values of a democratic state and society based on equality; the Act itself is based on a firm set of values that forms an integral part of the values deductible from the Constitution [specifically Article 70/A paragraph (1) of the Constitution of Hungary at that time (Act IV of 1949)]. In the 2009 decision the HCC has found that the 1947 Act is not contrary to human dignity (the petitioner had claimed that the right to bear a name, which is deductible from human dignity, had been infringed by the Act), as nobility titles did not form official parts of a name, and that the state had the right to decide what it accepts as part of name and what it does not. The Constitutional Court has also referenced these decisions following the entry into force of the Fundamental Law of Hungary (2011, replacing the previous Constitution) in a recent decision [27/2015 (VII. 21.)].

<sup>40</sup> See Articles 2 and 49 TEU.

<sup>41</sup> Case C-36/02 *Omega*.

internal market freedoms in a concrete case<sup>42</sup> in *Groener*.<sup>43</sup> The first expressis verbis reference to the clause was nevertheless made by the Court in *Sayn-Wittgenstein*<sup>44</sup>, albeit only as a subsidiary point used to clarify the concept of public policy as a justification for the restriction of fundamental freedoms.<sup>45</sup> The identity clause itself presents something of a challenge of legal interpretation. The clause was introduced into primary law via the Maastricht Treaty, using a more simple formulation.<sup>46</sup> The current wording of the clause was developed during the elaboration of the (failed) Treaty Establishing a Constitution for Europe, and is sometimes referred to as the “Christophersen clause”: in the framework of the Convention that was working on the Constitutional Treaty, Henning Christophersen was the chair of Working Group V on complementary competences, and the current formulation of the clause was *based* on his proposal, albeit the final text, which also made its way into the Lisbon Treaty is less precise than (or in any case different from) the original proposal of Mr. Christophersen.<sup>47</sup> What is not evident is what the purpose and function of this clause is supposed to be in the EU legal order. It has been argued by Bogdandy and Schill that the clause may be utilized to reconceptualise the relationship between EU law and domestic constitutional law, and pave the way to a more nuanced interpretation of this relationship, one that goes beyond the position of the Court of Justice, which supports the absolute primacy doctrine even with regard to national constitutions and constitutional law, and may reconcile it with the view of (some) national constitutional courts which follow a sort of relative primacy doctrine (which acknowledges the primacy of EU law subject to certain constitutional limits).<sup>48</sup>

In *Bogendorff von Wolffersdorff*, the Court of Justice again used the identity clause as a subsidiary argument: it held that the German prohibition on titles of nobility should be considered an element of the national identity of Germany in the sense of Article 4(2) TEU,

<sup>42</sup> Noted by L.F.M. Besselink: Case C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, Judgement of the Court (Second Chamber) of 22 December 2010, nyr. *Common Market Law Review* 2012, p. 681.

<sup>43</sup> ECJ 28 November 1989, Case C-379/87 *Groener v Minister for Education and City of Dublin Vocational Educational Committee*.

<sup>44</sup> A.I. Penott, ‘The Transnational Character of Union Citizenship’, in: M. Dougan et al. (eds.), *Empowerment and Disempowerment of the European Citizen* (Hart 2012) p. 25.

<sup>45</sup> A. Von Bogdandy – S. Schill, ‘Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty’ 48 *Common Market Law Review* (2011) p. 8.

<sup>46</sup> Article F, TEU [OJ C 191, 29.7.1992]: ‘1. The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy. (...)’

<sup>47</sup> G. Di Federico: Identifying constitutional identities in the case law of the Court of Justice of the European Union, IX World Conference of the International Association of Constitutional Law, 2014, p. 2 (Available at: <http://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws9/w9-federico.pdf>)

<sup>48</sup> Von Bogdandy – Schill, *supra* n. 45. pp. 1-38.

which *may* be taken into account as an element justifying a restriction on the right to freedom of movement of persons recognised by EU law.<sup>49</sup> (The identity clause was also mentioned by the Court when referring to and summarizing *Sayn-Wittgenstein*, and when summarising the statement of the referring German court where the concept is mentioned as “constitutional identity.”<sup>50</sup>) The Court emphasized that the abovementioned constitutional choice “must be interpreted as relating to a ground of public policy.”<sup>51</sup> It would seem from this reasoning that national (constitutional) identity serves as the underlying rationale of justified restrictions on the fundamental freedoms guaranteed by EU law based on public policy; thus serving as one of the possible public policy exceptions. From Article 4(2) TEU it seems more that public policy is an *element* of national identity as such, and not *vice versa*. It should be noted however that the interpretation of public policy as a concept used by EU law also raises questions of clarification.<sup>52</sup> In civil law public policy (or *ordre public*) is understood as meaning the pillars of the legal system and of social order upon which rests the constitutional and legal order, whereas public policy in common law means a much broader legislative category and to a certain degree also expresses the prevailing political view of societal priorities (and is in this regard closer to the concept of public interest<sup>53</sup>). Public policy is referred to by the Court of Justice when it is called upon to rule on the limits of the fundamental freedoms, and the Court has emphasized on multiple occasions that public policy should not be defined based on the national understanding of the term, but autonomously as an EU law concept (even if national authorities must be allowed an area of discretion within the limits imposed by primary EU law).<sup>54</sup> It would be wrong however, in our view, to argue that the remit of the national identity clause is limited to public policy grounds. Article 4(2) TEU should indeed be regarded as possessing independent legal significance: as shown by the wording “shall respect”, Article 4(2) TEU is construed as a legal obligation of the EU, not just a statement of principle with a mere interpretative function.<sup>55</sup>

---

<sup>49</sup> Case C-438/14, paragraph 64.

<sup>50</sup> Nota bene: the referring court was of the opinion that the constitutional identities of the Republic of Austria in the matter of the use of titles of nobility was comparable only to a limited extent to that of the Federal Republic of Germany (Case C-438/14, paragraph 24).

<sup>51</sup> Case C-438/14, paragraph 65.

<sup>52</sup> For an elaboration of the concept see A.J. Belohlavek, ‘Public Policy and Public Interest in International Law and EU Law’, in A.J. Belohlavek and N. Rozehnalova (eds.), *Czech Yearbook of International Law 2012 - Public Policy and Ordre Public* (Juris Publishing 2012) pp. 117-147 (especially at pp. 129-137).

<sup>53</sup> *Ibid.* p. 118.

<sup>54</sup> See notably ECJ 28 October 1975, Case 36/75, *Rutili v Ministre de l’intérieur*; ECJ 4 December 1974 Case 41/74, *Van Duyn v Home Office*.

<sup>55</sup> Von Bogdandy – Schill, *supra* n. 45, p. 27.

To sum up and get back to the case at hand: in our view, the conclusion reached by the Court of Justice, i.e. that national authorities are not bound to recognise the name (lawfully) acquired in another Member State seems too lenient from the point of view of EU citizenship rights and the principle of equal treatment. The recognition of the German regulation as a public policy exception is questionable as in Germany nobility titles do in fact continue to exist, even if merely as parts of names, yet it seems that nobility titles “brought to Germany” from other Member States (also only as parts of a name) are contrary to German public policy. Instead of true equality, one may ask whether or not in this particular situation German citizens are in fact “more equal than others”?<sup>56</sup>

---

<sup>56</sup> D. De Groot, ‘Pending Case C-438/14, Nabil Peter Bogendorff von Wolffersdorff – Or is it Peter Mark Emanuel Graf von Wolffersdorff Freiherr von Bogendorff?’ National Centres of Competence in Research Working Paper Series #5, p. 13 ([nccr-onthemove.ch/wp\\_live14/wp-content/uploads/2016/04/nccrotm-WPS5-Final-de-Groot.pdf](http://nccr-onthemove.ch/wp_live14/wp-content/uploads/2016/04/nccrotm-WPS5-Final-de-Groot.pdf)), alluding to George Orwell’s *Animal Farm*.