

**RECOGNITION OF SURNAMES IN CZECH LEGISLATION
AND JUDICATURE**

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ABSTRACT

There are more than 13 million EU citizens living outside of the country of their nationality and the recognition of their legal status, incl. their names and surnames, is often essential for the maintenance of their personal and cultural identity. This article focuses on the allowed form and recognition of surnames of natural persons in the EU. This question will be examined within the Czech legal system, but the emphasis will be placed on the case-law of European courts that greatly affects and shapes this area of law in the EU member states. The regulation of surnames represents questions of the national, international and European law, as well as private law, public law and primary and secondary Union law.

Key words: Recognition of surnames, private international law, EU, Czech Republic

1. INTRODUCTION

The area of recognition of foreign judgments is dynamic, it is a subject of legislative intervention, both at national and international level and currently it is heavily shaped by judiciary and jurisprudence. A specific part of the recognition of foreign decisions is represented by the decisions that

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may not be judicial in nature but have a significant impact on civil matters. Such decisions are significantly increasing in numbers since according to the available statistics 13.6 million EU citizens live outside of the country of their nationality¹. Recognition of foreign decisions concerning the form of the surname is therefore a topic not only very current but also very practical.

The issue of recognizing legal acts relating to the civil status of natural persons stands on the border between private and public law. The private dimension is seen in the possible infringement of the rights and obligations of natural persons, the public law overlap is reflected in regulation of the Registers². In the recodification of private law in the Czech Republic in 2014, changes were made also in the regulation of private international law³. National legislation in matters of civil status is even more complicated because of the many cultural and political influences on these issues. Generally, the recognition of civil status depends on the national rules concerning family law, which are often linked to history, tradition, religion, but also the constitutional rights inherent in a particular society that justify the possibility of using the public order reservation⁴.

This article will focus on the allowed form and recognition of surnames of natural persons⁵. This question will be examined within the Czech legal system, but the emphasis will be placed on the case-law of European courts that greatly affects and shapes this area of law in EU Member States. The regulation of surnames represents questions of the national, international and European law, as well as private law, public law and primary and sec-

¹ EUROSTAT, "EU citizenship - statistics on cross-border activities", 1st September, 2016 http://ec.europa.eu/eurostat/statistics-explained/index.php/EU_citizenship_-_statistics_on_cross-border_activities, [date of access: April 2013].

² The issue of Registry, name and surname falls under Administrative Law in the Czech Republic.

³ Act No 97/1963 Coll., International Private and Procedural Law Act, further „IPPLA“ was from 1st January 2014 replaced by Act No. 91/2012 Coll., International Private Law Act, further „IPLA“.

⁴ § 4 IPLA.

⁵ Some thoughts mentioned in this article has been presented in Czech language in the conference proceedings MÍLENIKY PRÁVA V STREDOEURÓPSKOM PRIESTORE 2016. Available on http://www.lawconference.sk/share/The_Milestones_of_Law_in_the_Area_of_the_Europe_2016.pdf

ondary Union law. Not by chance we are currently in a situation which is referred to as a legal patchwork of laws⁶ or in the legal jungle.

LEGAL JUNGLE

A. Private law

The names and surnames in Czech law are governed by the Civil Code⁷. This regulation is to be found in the first part, General part, but also in part two, Family Law. Generally, the name is regulated by article 77 CC, according to which a person's name is their personal name and surname, other names and maiden name, which are legally entitled to them. Everyone has the right to use his name in legal relations, as well as everybody has the right to protect their names and enforce respect for them⁸.

The rules determining the surnames of children are incorporated to the Second part of CC, the parent-child relationship, in articles 860-864 CC. The basic rule for determining a child's surname is to state it in marriage proceedings of the parents of a child that they have in common. If the child's surname is not determined according to that proclamation, parents choose for the child the surname of one of them. If parents do not choose, the surname will be determined by the court. In the case of a child whose parents are not married, the parents choose for the child the surname of one of them. In the event that they do not choose, the name will be determined by the court. If a mother of a child whose father is unknown enters into the marriage, the child's mother and her husband may both before a Registry state that the surname determined for their other children this child will also have. In this case, however, it is already in place to examine the child's opinion, and if the child is over 15 years old, his consent is needed. The possibility of such changes is available only

⁶ Jürgen Basedow, „The Law of Open Societies – Private Ordering and Public Regulation of International Relation“, General Course on Private International Law, Leiden/Boston: Martinus Nijhoff Publishers, 2013, p. 216.

⁷ Act No 89/2012 Coll., Civil Code, further „CC“.

⁸ § 78 odst. 1 CC.

before reaching adulthood. If neither parent is known, the court, also on its own motion, determines the surname of the child.

In respect to a conflict of law rules this matter has not been expressly regulated in the former act no 97/1963 Coll., International Private and Procedural Law Act⁹. It was deduced that the regulation of the names and surnames can be included in civil status and assessed according to the law applicable to the personal statute, ie. according to the law of nationality¹⁰. The issue of names and surnames is relevant not only at birth but also during marriage, eventually partnership. The former PILA rule was based on nationality, the new PILA regulates the question of the name and surname of the person expressly. The provisions of article 29 para. 3 PILA indicates that the regulation of the names of natural persons is governed by the law of the state of which the person is a citizen. This person may however opt for the application of the law of the state in which he or she has habitual residence. According to the explanatory report to the Act, the regulation of the names and surnames is based on the connecting factor of nationality, but the importance of this question reflects on the position a person may have in the society in which the person lives. Thus it is allowed for a person to apply to this issue the law of a State in which he or she has its habitual residence¹¹. Because the tendency is to weaken the importance of nationality as a connecting factor in favor of habitual residence (*lex domicili*), there is a shift in the cases of determining civil status. Recently a limited choice in law is introduced when a person can choose between the law of the state of their nationality and place of habitual residence. The conflict rule in paragraph 3 impacts also on the issues of obtaining surnames in the registered event of divorce, dissolution of a registered partnership or adoption, the modification of the transcription of foreign surnames and its grammatical changes, use of peerage and nobility

⁹ In effect till 31st December 2013.

¹⁰ § 3 IPPLA stated, that the capacity of natural person to rights and legal acts is determined, unless stipulated differently in this Act by the legal order of the State, whose citizen is the natural person. Agrees also Magdalena Pfeiffer, "§ 29", In: Monika Pauknerová, Naděžda Rozehnalová, Marta Zavadilová and coll., „Zákon o mezinárodním právu soukromém. Komentář“. Praha: Wolters Kluwer ČR, 2013, p. 226.

¹¹ Explanatory Report to § 29 IPLA. p. 55. "Explanatory Report", 18 November, 2017 <http://obcanskyzakonik.justice.cz/images/pdf/Duvodova-zprava-k-ZMPS.pdf>

titles, acting under a pseudonym and the regulation of changes of natural persons' names. The interference, with the right of protection of the names does not fall under this conflict rule. It should be considered as a non-contractual obligation arising out of violations of privacy and rights relating to personality, including defamation under article 101 PILA¹².

B. Public law, Public international law and Constitutional law

As already mentioned, the recognition of surnames is also a matter of public administrative law since the name and surname, *inter alia* indicate a person's belonging to a given state. A way of giving names and surnames is influenced by both tradition and cultural and historical development. For example the taking on of a husband's surname by the wife and children has its roots in Roman law, in *patria potesta* institute¹³.

The administrative dimension of the question of the surnames of natural persons is regulated by the Act on Registry, especially its second head and the provisions or articles 68 to 79. The surname of women is formed in consistence with Czech language grammar rules¹⁴, namely by adding the suffix *-ová* to the masculine form of the surname, for example Novak – Novakova. The Act contains an exclusive list of cases where it is possible for a woman to use the masculine form of the surname. This is mostly in the case of foreigners or even Czech nationals residing abroad. Traditionally, when entering into the marriage, the woman accepts her husband's surname in altered form, however in recent years women are increasingly, beside the surname of their husband, keeping their maiden surname. This is one of the exhaustively defined cases when a Czech citizen may use more than one surname, while the common name is placed first¹⁵, for example in the case of Jana Dvorakova marrying Jan Novak, her surname would be

¹² Magdalena Pfeiffer, "§ 29", In: Monika Pauknerová, Naděžda, Rozehnalová, Marta Zavadilová and coll., *Zákon o mezinárodním právu soukromém. Komentář*, Praha: Wolters Kluwer ČR, 2013, 226 - 227.

¹³ Constanza Honorato, "Free Circulation of Names for EU Citizens?", *Il Diritto Dell'unione Europea* 3(2009):379.

¹⁴ § 69 odst. 1 Coll. Registry Act.

¹⁵ § 70 (1), c) Registry Act.

Novakova Dvorakova. Provided that the marriage was celebrated abroad the Special Registry will upon a request of the citizen record their last name as it appears on the foreign marriage certificate¹⁶.

According to article 79 of the Act on Registry the decisions on the change of the surname of Czech citizens is issued by the foreign authorities valid for the Czech authorities if it so stipulated by an international treaty. Among the most important bilateral treaties that govern the issue of the recognition of the decision on the name and surname, is the treaty between the Czech and the Slovak Republic issued as the Notice of the Ministry of Foreign Affairs no. 235/1995 Coll. Article 6 of this international treaty states that the decisions of the authorities of either Contracting Party for permission to change the name or surname of a citizen of the other Party are valid without further recognition in the territory of both parties. The condition of the validity of the decision is a residency in the territory of the Contracting Party which issued the decision. Regarding permission to change the name or the surname of spouses or parents and children, the validity of a decision is recognized authorizing on the territory of both Parties, if at least one of the subjects has a permanent residence in the territory of the Contracting Party which issued the decision. The authorities of either Contracting Party shall send a notice of the decisions referred to in paragraphs 1 and 2 to the authorities of the other Party, if the birth or marriage is registered in their Registry Books. This bilateral treaty thus provides for the automatic recognition of names and surnames of the Slovak Republic and the Czech Republic.

According to Article 10 of the Czech Charter of Fundamental Rights and Freedoms, everyone has the right to protect their name. The name and surname of a natural person are a fundamental element of their identity and personal life, whose protection is enshrined in article 7 of the EU Charter of Fundamental Rights. Although the name and surname are not stated expressly in article 7, the name and surname are connected to personal and family life of a natural person as a means of personal identification connected to a certain family. Furthermore it's protection is granted in article 8 of the European Convention on Human Rights signed on 4th of November 1950 in Rome. The decision of the European Court of Human

¹⁶ § 70 (5) Registry Act.

Rights in the case No 44378/05 *Daróczy* against Hungary received its reflection in Czech ARNS. In this case, the Hungarian citizen filed a lawsuit against the Republic of Hungary, because after entering into marriage her new surname, her husband's surname, was inaccurately registered in the Register. However the error surfaced only after 50 years of marriage. Although everyone has the right to protect their name, request to change surnames would be in conflict with article 8 of the European Convention on Human Rights. On the basis of this decision paragraph 5 was added to article 58 ARNS, according to which if a natural person in good faith for at least 5 years uses his surname in the wrong form, he or she can before any Registry office declare that he or she will continue to use her last name in the form in which the name is shown in the issued documents. If it is a common surname of spouses, the declaration can be made only with the consent of the other spouse or their minor child older than 15 years.

Another decisions concerned with the protection of the surname of a natural person according to Article 8 of the European Convention are for example decisions *Burghartz*¹⁷ and *Stjerna*¹⁸. The court held in these decisions that it is necessary to find a balance between the requirement of the proper identification of a person through his name and the right to the surname as the right to personal and family life. In both contexts regard must be given to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole (see, for instance, the *Keegan v. Ireland* Judgment of 26 May 1994, Series A no. 290, p. 19, para. 49)¹⁹. *Henry Kismoun*²⁰ stated that it is necessary to properly assess whether the State is acting in the protection of the public order and therefore does not violate the right to private and family life. Each case must be individualized and based on careful consideration.

¹⁷ The decision of the European Court of Human Rights from 22nd February 1994, No 16213/90, *Burghartz* against Switzerland.

¹⁸ The decision of the European Court of Human Rights from 25th November 1994, No 18131/911, *Stjerna* against Finland.

¹⁹ *Ibid.*

²⁰ The decision of the European Court of Human Rights from 5th December 2003, No 32265/10, *Henry Kismoun* against France.

C. EU law and CJEU judicature

The European Union sees the question of names and surnames rather as an object of national regulations. This legal issue does not fall within the exclusive competence of the EU, yet the Court of Justice has on several occasions expressed the EU's position on the matter. The specific rules on the recognition of names and surnames may in fact violate the right to freedom of movement and the prohibition of discrimination on grounds of nationality²¹. Furthermore according to article 1, paragraph 3 point. b) of Regulation 2201/2003, Brussels II bis²², name and surname of the child is excluded from the scope of this family law regulation.

Part Two of the TFEU, entitled Non-discrimination and citizenship of the Union contains provisions of articles 18 to 21, which mainly deal with non-discrimination, citizenship and freedom of movement and residence of Union citizens in EU Member states. Within the application of the Treaties, without prejudice to any special provisions contained therein, any discrimination on the grounds of nationality is prohibited. The European Parliament and the Council, under the ordinary legislative procedure, may adopt rules to prohibit such discrimination. Citizenship of the Union is established, when every person who has the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union complements national citizenship but does not replace it.

Union citizens shall have the rights and obligations under the Treaties. 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 the measures taken to implement them. If to achieve this proves necessary as action by the Union and the Treaties have not provided the necessary powers, the European Parliament and the Council under the ordinary legislative procedure, may adopt provisions to facilitate the exercise of the rights referred to in paragraph 1. For the same purposes as those referred to in paragraph 1, unless the Treaties

²¹ These issues are regulated in Treaty on Functioning of the EU, further „TFEU“.

²² Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

have the necessary powers, the Council may, with a special legislative procedure, adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.

Although the issue of the name and surname does not fall into the exclusive competence of the EU, national regulation has to be in conformity with the primary law and cannot breach the freedom of movement and cannot be discriminatory. The CJEU dealt with the prohibition of discrimination and violation of right to free movement in several decisions. The case law is however not based on the provisions of the Charter but on articles 18 to 21 TFEU.

The first in line of significant cases is the decision in case C-148/02 *Carlos Garcia Avello v. Belgium*²³. The legal guardian of children and a Spanish national pursued registering the Spanish form of surname for their children, which would reflect both the Belgian name after his mother and the name of their Spanish father. Belgian authorities refused to register a compound surname with the name of the mother with the explanation that the children's surname is determined by the Belgian law and Belgian children have their father's surname. In this regard, the Court stated that it already has been ruled that the principle of non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated equally²⁴. In contrast to persons having only Belgian nationality, those who also have Spanish nationality, have the possibility to determine different surnames under the two legal systems concerned. More specifically, in a situation such as this, the children concerned are refused the right to bear the surname which results from the application of the legislation of the Member State which determined the surname of their father.

In this case, which was heard even before the Commission, Belgium has tried to defend its position with the wording of the Hague Convention²⁵. It

²³ The decision of the Court of Justice of the European Union from 2nd October 2003, C-148/02, *Carlos Garcia Avello* against Belgium.

²⁴ See namely the decision of the Court of Justice of the European Union from 17th July 1997, C354/95, *National Farmers' Union and others*, point 61.

²⁵ Article 3 of the Hague Convention of 12 April 1930 on certain questions relating to the conflict of nationality laws, under which a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses.

was stated that their own nationality may indeed be prioritized, on the other hand, in some cases a person must be given an opportunity to prioritize foreign nationality. This approach then clearly disproves the previously accepted interpretation in the Czech Republic, if a foreign element lies solely in the fact that a person has multiple citizenships, and one of them is Czech nationality, this issue is not deemed as a relationship with a foreign element²⁶.

In the case C-353/06²⁷ Stefan Grunkin and Dorothee Regina Paul the CJEU was asked to answer a preliminary question whether a connecting factor of the nationality in conflict of laws norm governing the law applicable to the person's name may be discriminatory in nature. In this case the parents to the child had German nationality, but demanded that in accordance with Danish law, ie. the law of the state of habitual residence, the child bears both surnames of the mother and the father. According to the Danish law it is possible that the name of the child will be governed by the law of the place of habitual residence. The German law on the other hand is based solely on the nationality as a connecting factor. At the time of the child's birth parents were married, after the divorce the son had his habitual residence with his mother still in Denmark but he visited his father in Germany frequently. The German authorities, however, refused to recognize the combined surname of the son. This can lead to complicated situations where an EU citizen with the name specified under the law of a Member State which is the place of the habitual residence may face problems in identifying his person in another Member State which registers him under another name determined eg. by the law of the state of his nationality. In such a situation we can speak about so called "limping" name²⁸. The Court stated that this approach represented a violation of the TFEU, namely a violation of Article 21 governing the free movement of persons. The fact that the person concerned must in the Member State of

²⁶ See Petr Bříza, Tomáš Břicháček, Zuzana Fišerová, Pavel Horák, Lubomír Ptáček, Jiří Svoboda, *Zákon o mezinárodním právu soukromém. Komentář*. 1. edition. Praha: C. H. Beck, 2014, p. 171.

²⁷ The decision of the Court of Justice of the European Union from 14th October 2008, C-353/06, Stefan Grunkin and Dorothee Regina Paul.

²⁸ Magdalena Pfeiffer, "§ 29", In: Monika Pauknerová, Naděžda, Rozehnalová, Marta Zavadilová and coll., *Zákon o mezinárodním právu soukromém. Komentář*. Praha: Wolters Kluwer ČR, 2013, 228.

which he is a national, use a different name than what has been registered in the Member State in which he was born and where he is resident, is liable to restrict the exercise of the right of free movement and residence in the territory of the Member States, as enshrined in Article 21 TFEU. The Court however did not give a clear answer on whether the connecting factor based on nationality is in fact discriminatory, on the contrary he stated, that the discriminatory consequences need to be assessed in connection with the substantive law and if the Member States refused to recognize the surname of a child the way it was determined and registered in another Member State according to the national law, in which the child, who has only the same nationality as his parents and that is the nationality of the first state, was born and has from that moment of the habitual residence is a breach of article 18 EC (21 TFEU).

In the case C391/09²⁹ Ms Runevič-Vardyn the Court dealt with the question whether it is a breach of article 21 and 18 TFEU when the national authorities refuse to register the name and surname of a person in accordance with the law of the place of existing habitual residence. The surname in question was formulated under the Polish language grammar rules and then adjusted according to the Lithuanian grammar and belonged to the Lithuanian national with habitual residence in Poland. Ms Runevič-Vardyn was born in Vilnius and is a Lithuanian national as well as member of the Polish minority in the Republic of Lithuania but does not have Polish nationality. In her birth certificate issued in 1977 her forename and surname were registered in their Lithuanian form 'Malgožata Runevič'. In 2006 the Polish authorities issued a Polish birth certificate where her forename and surname are entered in accordance with the rules governing the spelling of the Polish language, namely as 'Małgorzata Runiewicz'. After living and working in Poland for some time, Ms Runevič-Vardyn married Mr. Vardyn. On the marriage certificate issued by the Lithuanian authorities 'Łukasz Paweł Wardyn' is transcribed as 'Lukasz Paweł

²⁹ The decision of the Court of Justice of the European Union from 12th May 2011, C-381/09, Malgožata Runevič-Vardyn, Łukasz Paweł Wardyn against Vilniaus miesto savivaldybės administracija, Lietuvos Respublikos teisingumo ministerija, Valstybinė lietuvių kalbos komisija, Vilniaus miesto savivaldybės administracijos Teisės departamento Civilinės metrikacijos skyrius.

Vardyn', using the characters of the Roman alphabet but not using diacritical modifications, whilst his wife's name appears in the form 'Malgożata Runevič-Vardyn' – indicating that only Lithuanian characters, which do not include the letter 'W', were used, including for the addition of her husband's surname to her own surname. Currently the family is living with their son in Belgium. In 2007 Ms Runevič-Vardyn submitted a request to the Lithuanian authorities for change in her forename and surname, as they appear on her birth certificate, namely 'Malgożata Runevič', to be changed to 'Małgorzata Runiewicz' and for her forename and surname, as they appear on her marriage certificate, namely 'Malgożata Runevič-Vardyn', to be changed to 'Małgorzata Runiewicz-Wardyn'. The Lithuanian authorities however informed her that it was not possible under the applicable national rules, where the official documents may be issued only in the Lithuanian language.

In the present case the Court held that, when a citizen of the Union moves to another Member State and subsequently marries a national of that other State, the fact that the surname which that citizen had prior to marriage, and her forename, cannot be changed and entered in documents relating to civil status issued by her Member State of origin except using the characters of the language of that latter Member State cannot constitute treatment that is less favourable than that which she enjoyed before she availed herself of the opportunities offered by the Treaty in relation to the free movement of persons. Article 21 TFEU however must be interpreted as not precluding national authorities to refuse to change the name according to the national rules on spelling and transcription. In the case of joint surnames of a married couple such alteration may be possible but must not give rise to serious inconvenience at administrative, professional and personal level.

In the case C-208/09³⁰ which concerned Ilonka Sayn-Wittgenstein against the Landeshauptmann von Wien. Ilonka, an Austrian national, was adopted by a German national and acquired his name. Her full name was Ilonka Fürstin von Sayn-Wittgenstein. According to Austrian law it is not possible to enjoy peerages, and therefore the Austrian Government

³⁰ The decision of the Court of Justice of the European Union from 22nd December 2010, C-208/09, Ilonka Sayn-Wittgenstein against Landeshauptmann von Wien.

basing its position on the argument that even in cases where, under Austrian law, the peerage „Fürstin“ (Princess) and the aristocratic title „von“ are removed, substantial elements of individualization are preserved in the surname, and therefore the surname may be changed to Sayn - Wittgenstein. In fact, Austria argues, the applicant in the main proceedings uses in Germany in everyday life the name „Fürstin von Sayn-Wittgenstein and when she would identify herself with ID issued in the name of Sayn-Wittgenstein, the German authorities will be able to be identified her with certainty and recognize it, the more that between Germany and Austria there is no language barrier. The Court stated that it is possible to refuse to recognize a name that would violate public order. In this case it was a name that contained a peerage. The Czech government has commented on this case and stood up for the view that the fact that in a Member State based on the application of legislation such as the legislation at issue, a part of the name that is authorized in another Member State was not recognized, would not constitute a breach of article 21 TFEU. The function of peerage is significantly different from the function of surname. While the function of a name is to identify its bearer, functions of peerage is to recognize a certain social status. The decision whether a Member State wants this or that person to represent a certain social status, belongs to the exclusive national competence of each Member State. Consequently, article 21 TFEU must be interpreted as not precluding the authorities of a Member State, in circumstances such as these, to refuse to recognize all the elements of the surname of a national of that State, as determined in another Member State where that national resides, in its adoption as an adult by a national of another Member State where that surname includes a title of nobility which in the first Member State is not permitted under its constitutional rights if the measures are adopted by those authorities in that context justified on grounds of public policy, therefore, necessary to protect the interests which they are secure and are proportionate to the legitimate aim pursued.

From the decisions of the CJEU it is apparent that the Member states should recognize the surname that the citizens of EU acquired in another Member state. The only exception is the possible violation of public policy and that is up to every Member state to assess on their own. The CJEU ruled on this issue in the latest decision *Nabiel Peter Bogendorff*

von Wolffersdorff v Standesamt der Stadt Karlsruhe, Zentraler Juristischer Dienst der Stadt Karlsruhe, C 438/14³¹, where he examined whether articles 18 TFEU and 21 TFEU are to be interpreted as meaning that the authorities of a Member State are obliged to recognise the change of name of its national, if he is at the same time a national of another Member State and in the state of his second nationality and habitual residence he has acquired by freely changing his name several tokens of nobility, where it is possible he will lose future substantial link with the state of habitual residence and in the state of first nationality, the nobility has been abolished by constitutional law but the titles of nobility used at the time of abolition may continue to be used as part of a name³². One of the greatest differences between this case and Ilonka Sayn-Wittgenstein case is, that the change of the name occurred without change in personal status. Nevertheless, also in this case the Court stated that the courts of the Member states may refuse to recognize a foreign surname however only if it would violate public policy which has to be ascertained by the referring court. The court has to evaluate whether the refusal to recognize is justified by reasons connected to public order which ascertains equality of all citizens of the Member state in front of the law.

2. THE REFLECTION OF CURRENT TRENDS OF REGULATION IN THE CZECH LEGISLATION

From the above mentioned facts it is clear that current regulation on the recognition of a surname is significantly casuistic. In the last couple of years the judicature of international courts largely influenced the legal

³¹ The decision of the Court of Justice of the European Union from 2nd June 2016, C-438/14, Nabil Peter Bogendorff von Wolffersdorff against Standesamt der Stadt Karlsruhe, Zentraler Juristischer Dienst der Stadt Karlsruhe.

³² Request for a preliminary ruling from the Case C-438/14 Amtsgericht Karlsruhe (Germany) against Nabil Peter Bogendorff von Wolffersdorff lodged on 23 September 2014.

regulation in the Czech Republic that reflects significant court decisions in this area.

Today's rules in PILA state that the regulation of the name of a natural person is governed by the legal order of the state of his nationality. This person however may claim the legal order of the state where he is habitually residing. For example if a Czech citizen was born abroad, in the state that has also become the place of his habitual residence, the parents choose whether the child will be named according to the *lex domicile* or *lex patriae*. This question should be addressed generally when issuing identification documents, eg. birth certificate, certificate of citizenship, passport and in later age an identity card and driving license. According to the Explanatory Report the regulation is based on the connecting factor of nationality, however giving the importance of this question for a position of a person in the society where he lives, it is permitted to claim the legal order of the state of his habitual residence. This new regulation is reflecting particularly the decisions in *Grunkin and Paul*.

This regulation however does not deal with a situation when a child with dual nationality, one of which is Czech and the second is of another Member State, is born in the Czech Republic. Although PILA stipulates that if one of the decisive nationalities is Czech, this nationality is binding for the authorities³³, such an application would be contrary to the decision in the case *Garcia Avello*. Although in the case of *Garcia Avello*, the Belgian authorities referred to The Hague Convention on certain questions relating to the conflict of nationality laws, the Court did not agree with this argumentation and said that it is necessary to approach people who only have Czech citizenship and those who have Czech citizenship alongside other EU citizenship differently. In this case, it is necessary to view both citizenships equal and confer to the person with dual nationalities the possibility to invoke the rights granted to him under the other EU legal order. The rules governing a person's surname fall within the competence of the Member States, but Member States must exercise that competence consistently with EU law³⁴, in particular with the provisions of the TFEU,

³³ § 28 odst. 1 PILA.

³⁴ The decision of the Court of Justice of the European Union from 2nd December 1997, C-336/94, *Eftalia Dafeki* against *Landesversicherungsanstalt Württemberg*.

which shall grant to every citizen of the Union the right to move and reside freely within the territory of the Member States³⁵. Another interpretation of the relevant provisions of IPLA could be in conflict with Articles 18 and 21 TFEU, since it would preclude children who have dual nationality to bear the surname to which they are entitled under the law and tradition of another Member State. A different approach to the interpretation of article 28 odst. 1 PILA would be in violation with for example the decision in Hadadi case³⁶, where the Court in connection with Brussels II bis regulation emphasized the obligation to approach the nationalities of citizens of the Member States equally. Although this decision focused on procedural law it is possible to apply it on the issues of conflict of laws.

A direct reflection of the Court's ruling was an amendment of ARNS in 2013³⁷, with effect from 1st January 2014. This amendment inserted the provisions of article 70a into the Act reflecting Garcia Avello decision³⁸. Until the amendment came into the effect a person could achieve a change of the surname by submitting an application pursuant to article 72 of the Act on Registry. The change has been generally granted, since there were other serious reasons especially that the name was derogatory or ridiculous. According to item 11 of Tariff annexed to the Act no. 634/2004 Coll. on administrative fees, the change of the name and surname of the natural person who is a citizen of the Czech Republic and simultaneously a citizen of another EU member state to form that the law and tradition of the second Member State allows is exempted from the fee. According to the adopted amendment a simpler way of changing the name and surname of a citizen of the Czech Republic who is also a citizen of another EU member state is established, by a simple declaration before the Registry

³⁵ The decision of the Court of Justice of the European Union from 23rd November 2000, C-135/99, Ursula Elsen against Bundesversicherungsanstalt für Angestellte.

³⁶ The decision of the Court of Justice of the European Union from 16th July 2009, C-168/08, Laszlo Hadadi (Hadady) against Csilla Marta Mesko, married name Hadadi (Hadady).

³⁷ The Amendment was provided by Act No 312/2013 Coll., which changed Act No 301/2000 Coll., ARNS.

³⁸ House of Representatives, "Document 1000/0 - The draft amendment to the Law on Classified Information", 10 November, 2017 <http://www.psp.cz/sqw/text/tiskt.sqw?O=3&CT=1000&CT1=0>.

Office in either the Book of births or the Book of marriage, is the name or names, or surnames, registered. The Registry office, based on the statement by a citizen, who is also a citizen of another Member State of the European Union, indicates the name or names or surnames of the citizen in a form that the law and tradition of that other Member State allows him to use in the particular Book, provided that the citizen proves its use by a registry document, or any other public document that the other Member State of the European Union has issued.

Similar problems were also discussed in Sweden, where eventually, after the intervention of the Commission, the law has changed and those citizens with dual citizenship may now register the name and under the laws of the State of which the child is a national. This is not a special proceeding and procedure is exempt from any fee³⁹.

Regarding the recognition of decisions on the surname, this is usually done on the basis of a document that is issued by a public authority in the state where the registered event took place. In reality it is the effect of this documents that get authorised, ie. recognized. For every public authority is primarily binding its own law, and therefore the document issued in accordance with law of the forum - *lex loci actus*. Nowadays ARNS regulates also the situation that a foreign authority decided on a change of Czech citizen's surname in connection with marriage. The provisions of the article 78 ARNS states that the final decisions of a foreign state concerning changes to Czech citizen's surname, which occurred during the marriage with a foreigner at a time when the Czech citizen had a permanent residence in a foreign country, are valid without further recognition by the Czech Republic. If the citizen did not have a permanent residence in a foreign country, the decisions on change are also valid in the Czech Republic after the Ministry recognize their validity.

The approach of the Czech lawmakers can thus be assessed as fairly conservative, when they are willing to amend the Czech legislation in the light of the Court of Justice of the EU's decisions but they do not think about a more complex solution. This opportunistic approach has

³⁹ European Commission, "Free movement: Swedish nationals can now register their full surnames", 1st November 2017 http://europa.eu/rapid/press-release_IP-12-644_en.htm.

fully manifested itself in the recent case dealt with before the Supreme Court as well as the Public Defender.

Given that registered partnerships are regulated very differently, the capacity to enter into this union is determined according to the *lex loci actus*. It is generally required that at least one of the persons entering into the partnership is a national, as it is a case of article 4 para. 2 ARNS in Czech law. Eligibility, unlike with engaged couples to be married, is examined in accordance with the *lex patriae*⁴⁰.

At the beginning of 2010, I. K. born as I. L. submitted a request to the Office of the city of Brno - Center, so called Special registry⁴¹, to register a certificate of a registered partnership into the Book of Registered Partnership⁴², then a request to issue a proof of registered partnership and subsequently request for a new identity card reflecting the change in civil status. On October 16th that year I. K. sent a letter addressed to the Ministry of Interior Affairs of the Czech Republic, in which she asked for a change in her documents because her name is no longer I. L. but I. K. as a result of entering into a registered partnership in Germany, where she adopted the surname of her partner K, and thus now she is I. K. also in the Czech Republic. The Ministry of Interior Affairs replied that the legislation on registered partnership in the Czech Republic does not regulate agreement on the common surnames of persons entering into the partnership, as is the case of marriage. However, if I. L. wished to enjoy the same surname as her partner, this could have been achieved by changing the last name. I. K. a change of surname refused for family reasons and turned the Office of the city of Brno - Center with the request to correct her surname in accordance with submitted German documents. The special registry refused that and I. K. subsequently initiated administrative proceedings and filed a complaint with the Ombudsman.⁴³

⁴⁰ Determination of capacity is regulated in § 67 ARNS.

⁴¹ The Special Registry is regulated in § 42 – 44 of Act No 301/2000 Coll., Act on Registry, Name and Surname, further „ARNS“.

⁴² Registered partnership in the Czech Republic is regulated by Act No 115/2006 Coll., Registered Partnership Act, further „RPA“, in effect from 1st July 2006.

⁴³ Ombudsman, "The Report of Ombudsman's Enquiry from 20th May 2011", 1st November 2016 http://www.ochrance.cz/fileadmin/user_upload/STANOVISKA/Matriky/5108-10-MV-ZZ.pdf.

The Ombudsman was asked by I. K. to do the enquiry, in which he criticised not only the procedural error on the part of the authorities but the lack of focus on the consistency of national and EU legislation. Only on the basis of the national legislation the ombudsman had to agree with the procedure of the Office of the Special Registry. When making entries into the Special registry, the process of registering the records shall be conducted in accordance with Czech regulations in force at the time when the registered event occurred, and the Czech legal order really does not recognize agreements on the use of common surnames in a registered partnership. In article 70 par. 4 ARNS, under which a Special registry at the request of a citizen states his surname in a form as referred to by a foreign registry document, is not applicable in this case because it concerns only the registration of a marriage entered into in a foreign country, not a partnership. The Czech Republic by adopting the Registered Partnership Act created the legal framework for a permanent partner cohabitation of persons of the same-sex, changing a series of laws which alleviate dealing with various life situations for these individuals. However, it is necessary to take into account that a registered partnership does not equal marriage, therefore, just differences may be drawn between these institutes⁴⁴.

Finally, the Ombudsman, based on the research on foreign judicature, concluded that the Special registry did wrong when while registering a registered partnership entered into in the Federal Republic of Germany, only applied national legislation, without taking article 21 TFEU into account ensuring EU citizens' the right to freedom of movement and residence within the territory of the Member States.

I. K. born I. L. filed a law suit against the decision not to correct the entry in the Book of registered partnership with the Regional Court in Brno seeking the annulment of that decision. The essence of the case was to assess the procedure of the defendant, who from the position of the Appellate Body upheld the Registry's decision, which the applicant sees as unlawful due to the incorrect legal assessment according to which the entry of a surname in the Book of registered partnership cannot be registered, respectively corrected. This position of the defendant is based on that the Registered Partnership Act or any other legislation of the Czech

⁴⁴ Such differences may be the regulation of the joint property of spouses.

Republic does not address the issue of common surnames for partners of registered partnerships. Therefore an agreement on a common surname cannot be recognized in the case of a registered partnership in the Federal Republic of Germany, as it is clear from the original German registry document - document on registered partnership. As a result the actual issue is a question of recognition of the effects of a foreign document, namely a document certifying civil status⁴⁵.

The Regional Court in Brno in its arguments evaluated the relationship of marriage and registered partnership as the two forms of legal cohabitation in Czech law. In the case of marriage, there are several variants of agreement on a common surname. Conversely the Registered Partnership Act, unlike the German legislation, does not regulate any agreement like that, but does not prohibit it too. In practice, it is assumed that the surnames of the persons after entering into a partnership do not change, and each uses their surname. Regarding the use of the common surname, this can be achieved by changing the surname upon request according to articles 72 et seq. ARNS. This would have been a possible solution to the situation of which the applicant was repeatedly informed. The complainant, however, argued in the appeal that this solution is not an option for her, as it would change her surname from birth, and it would be a gesture of disrespect to her parents and the to the entire origin of the family. This attitude can be certainly understood from a human point of view. Today article 73a ARNS as result of the amendment made by Act no. 167/2012 Coll. clearly states that: „For individuals who have changed the civil status and who were allowed to change their maiden name, the permissible

⁴⁵ A document certifying civil status is a written document issued by the competent governmental authority in the case of life events of each citizen such as birth, marriage or death, but also to determining whether the name has changed eg. as a result of marriage, divorce or registered partnership. There is therefore no doubt that in the present matter the question is of civil status, ie. the status of the person concerned - applicants for which personal identification is the basis of her name and surname; these are the basic elements of her identity and the entire private life. However the situation where some of the suggested registry events occurs abroad raises doubts, the more so in the cases of the name, respectively. surname, and its change, the relevant provisions are subject to a variety of historical, religious, linguistic or cultural factors, and they vary from state to state.

change of surname will be recorded in the Book of marriage or Book of partnership, or a Book of deaths in the Minutes of death of the deceased spouse or partner.“ That means that the change of surnames will not be registered in the Book of births, as I. K. feared. In all registry documents the unique bond will remain, although the person bears more surnames during her lifetime. At the time of the defendant’s case, however, such legislation did not exist and in accordance with previous practice, the records of changes to surname were registered in the Book of births.

The stability of civil status nor its continuity in the case of the applicant was not guaranteed and can be a source of objective difficulties, especially in Germany, which may very significantly affect the use of her right to free movement and residence. The applicant had adopted the surname of her partner in accordance with the law of an EU member state in whose territory she lives, and it clearly in this respect she enjoys that right of free movement and residence. That right is one of the fundamental rights of the European Union, which allows the mobility of European citizens. As it turned out, the primary mistake of the administrative authority was the negligence of the The European dimension of the given case. It is true that the issue of the names and surnames is not regulated by EU legislation and is left to individual Member States to regulate, moreover that the laws of the Member States of the European Union differ from each other. In the exercise of its powers the public authorities must respect the right of the citizens of the European Union, unless it is an internal situation with no link to European Union law as is clear from the relevant case law of the Court. In the present situation the relation to European law is more than obvious⁴⁶.

3. CONCLUSION

In light of the present case, Mrs. I. K. born I. L. should be notified that the error that had indeed occurred on the part of administrative authority,

⁴⁶ The Decision of the Regional Court in Brno from 28th November 2013, 30 A 128/2011-44.

was based on the neglect of the EU primary law, including the relevant case law of the Court of Justice of the EU. The administrative authority dismissed the applicant only with reference to national law without any consideration for the difficulties of the applicant arising from the barrier to free movement within the EU, which can only be accepted on the assumption that there were given sufficient objective grounds. No such reasons were proved by the defendant and therefore its decision could not stand.

Moreover, during the proceedings the legislature responded to this discrepancy by amending the Act on Registers, Names and Surnames. Inserting provisions of article 73a to ARNS made it possible for individuals who have changed the civil status and who were allowed to change the maiden name, registration thereof in the Book of marriage or partnership, or in the Book of death in the Minutes of death of the deceased spouse or partner, finally not in the Book of births, which would rewrite the person's identity. The question is whether the solution adopted is from the perspective of primary law sufficient. As follows from the above, not only Czech law faces in the cases of regulation of names and surnames a struggle with the complexity of standards, potential discrimination or restriction of freedom of the establishment and free movement of EU citizens. EU institutions were aware of this situation and thus created the Green Paper, which should have covered, inter alia regulation on the recognition of civil documents of EU citizens. The second part was focused on the issue of recognition of the consequences that these documents certify⁴⁷. Unfortunately, because a large number of different answers from the Member States, it was finally decided to incorporate only the first part into the Regulations Regulation (EU) No 1024/2012 Of The European Parliament And Of The Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing the Commission Decision 2008/49/EC which more or less makes it easier for EU citizens to recognize the decisions on their names and surnames formally when there is now no need to attach Apostille and or provide official translations⁴⁸.

⁴⁷ European Commission, "Green Paper on „Less bureaucracy for citizens“, 1st September 2016 http://ec.europa.eu/justice/newsroom/civil/opinion/110510_en.htm.

⁴⁸ European Commission, "Public Documents: European Parliament backs Commission proposal to slash red tape in the Member States", 1st September 2016 <http://europa.eu/rapid/>

Czech legislation is amended based on CJEU case law and so the substantive rules of private international law are unsystematically incorporated into the legal system⁴⁹, which should ensure its compliance with primary law. Therefore it is possible to expect more problematic cases in the future that may end up before the Court of Justice of the EU before the law that will take on as its own the doctrine according to which it is necessary to automatically recognize the surname of that person has acquired in the territory of another Member State in accordance with its laws and regulations, regardless of their nationality is introduced. The only case when the possibility of non-recognition will continue to be guaranteed is the violation of the public policy of the state where the surname is being recognized. Currently, it is possible to achieve this approach under the provisions of article 79 of the Act on Registry, which states that the decision to change the name or surname of citizens issued by foreign authorities are also valid for the Czech authorities, if so provided by an international treaty. Also according to Art 10 of the Czech Constitution next to the already mentioned bilateral agreements concerning the recognition of surnames, even the TFEU has to be considered relevant, which guarantees the free movement of persons and the prohibition of discrimination on grounds of nationality.

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⁴⁹ See Christian Kohler, "Towards the Recognition of Civil Status in the European Union", In: Andrea Bonomi, Gian Paolo Romano (eds.), *Yearbook of Private International Law*, Vol. 2013/2014, Munich: Sellier European Law Publishers and Swiss Institute of Comparative Law, 2014, p. 24.

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