Nobility Titles and Free Movement: Case C-438/14 Nabiel Peter Bogendorff von Wolffersdorff[1]

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On 2 June 2016, the Court of Justice of the European Union delivered its latest judgment in a line of cases dealing with rules on the construction of names and, more specifically, rules on nobility titles. Our case provides a concise overview of the judgment[2], and provides some critical remarks.

Keywords: Court of Justice of the European Union, nobility titles, free movement

1. The Facts of the Case

Nabiel 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 Graf von Wolffersdorff Freiherr von Bogendorff.[3] 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.[4] 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.[5] 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 proceeding, the Register office claimed that the reason for the refusal of the registration of the name requested by the applicant was due to it being manifestly incompatible with essential principles of German law.[6]

It should be noted that the family previously already had to take legal action to get the name of their daughter registered in accordance with her "British name": The daughter of Mr. Bogendorff von

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[2] Case C-438/14 Nabiel Peter Bogendorff von Wolffersdorff v Standesamt der Stadt Karlsruhe and Zentraler Juristischer Dienst der Stadt Karlsruhe 2016].

[3] Case C-438/14, paras 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". Joachim Whaley, *Germany and the Holy Roman Empire*, vol II, *The Peace of Westphalia to the Dissolution of the Reich, 1648-1806* (OUP 2012) 71.

[4] Case C-438/14, para 16.

[5] His claim was based on Paragraph 48 of the EGBGB [Einführungsgesetz zum Bürgerlichen Gesetzbuch – the German Law introducing the Civil Code – of 21 September 1994 (BGBl. 1994 I, p. 2494, and corrigendum BGBl. 1997, I, p. 1061)], entitled 'Choice of a name acquired in another Member State of the European Union. This provides: '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 European Union 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, para 9 and 21.

[6] Case C-438/14, paras 23-24.

Wolffersdorff and his wife has double German and British nationality, her birth was declared at the Consulate General of the United Kingdom in Düsseldorf, Germany. The name entered into her British birth certificate and British passport is Larissa Xenia Gräfin von Wolffersdorff Freiin von Bogendorff. The register office of Chemnitz (where the family resided) however refused to register her under her British name in 2006.[7] The refusal was based on German law: accordingly, a persons name 'is subject to the law of the State of which that person is a national'[8], 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 that application in 2011.[9] 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.[10] This includes Article 109 of the 'Weimar Constitution' of Germany[11], 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.[12] 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)[13]; it was introduced following the Grunkin and Paul judgment of the Court.[14]

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-Wittgenestein*. 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 constitutional law but the titles of nobility used at the time of abolition may continue to be used as part of a name?'[15]

[7] Case C-438/14, paras 17-18.

[8] Para 10, EBGB.

[9] Case C-438/14, paras 19-20.

[10] Paragraph 123(1) of the Grundgesetz für die Bundesrepublik Deutschland (BGBl. 1949, I, p. 1)

[11] Verfassung des Deutschen Reichs, 11 August 1919 (Reichsgesetzblatt 1919, p. 1383)

[12] EGBGB, Paragraph 48. See footnote 9 above.

[13] 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)

[14] Case C-438/14, para 10.

[15] Case C-438/14, paras 24-25.

2. 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.[16] 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.[17] 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.[18]

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 (…)'[19] 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 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 of Justice looked at four possible justifications which were mentioned by the referring German court:

Ad 1) Under German law, a change of name by an intentional act, independent of any change of personal status following the application of the provisions of 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 its judgment in Grunkin and Paul held that although those principles may be legitimate, they do not, in themselves, warrant a refusal by the

[16] Case C-438/14, paras 28-31.
[17] Case C-438/14, para 32.
[18] Case C-438/14, paras 33-34.
[19] Case C-438/14, para 37.

competent authorities of a Member State to recognise the surname of the person concerned as already lawfully determined and registered in another Member State.[20]

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 – the German court 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 the city of Karlsruhe.[21] The Court of Justice once again pointed out that a person's surname was a 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 European Court of Human Rights.[22]

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.[23]

Ad 4) The final consideration, and the one that carried most weight, was the one related to 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 in this regard (as, contrary to

[20] Case C-438/14, paras 50-51, referencing Case C-353/06, paras 30-31.

[21] 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 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, para 53)

[22] Specifically, the Court of Justice mentioned Stjerna v. Finland (ECLI:CE:ECHR:1994:1125JUD001813191, § 38 and 39), 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, para 55)

[23] Case C-438/14, paras 59-60.

Austrian law, German law does not contain a strict prohibition on the use and transmission of titles of nobility, which may be borne as an integral part of a name).[24]

Contrary to the first three considerations, which were quickly dismissed by the Court of Justice, the fourth possible justification received a more detailed analysis. The German prohibition was interpreted by the Court of Justice as relating to a ground of public policy. As is apparent from CJEU case law, a public policy justification must be 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 however 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.[25] It was also noted by the Court that the European Union 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 (equality) it is pursuing.[26]

The Court of Justice stated that there was 'no doubt' that the objective of observing the principle of equal treatment [which was apparently sought by Germany] was compatible with EU law, thus the Court moved on to verify the proportionality of the measure. In this regard however the Court of Justice held that to be able to determine 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 of Justice did provide some guidance for the national court: 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 is the result of a purely personal choice and not a change in status. Furthermore, however the national court decides, it must be borne in mind that the possible public policy exception may only be valid as regards the surname of the applicant in the main proceedings, and cannot justify the refusal to recognise his change of forenames.[27]

Thus the answer to the question referred by the German court 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 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, in that context, justified on public

[24] Case C-438/14, paras 61-64.

[25] Case C-438/14, paras 65-68. This was elaborated upon by the Court in Case C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I – 09609 and also in Sayn-Wittgenstein.

[26] Case C-438/14, paras 71-73 and 76.

[27] Case C-438/14, paras 77-83.

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.[28]

3. Comments

The judgment of the Court of Justice did not follow the opinion of the Advocate General in the present case: Advocate General Wathelet laid more emphasis on the situation of dual nationality and the disadvantages arising from it in general[29] and on the fact that the nobility titles in question never actually existed neither in Germany nor the United Kingdom.[30] Wathelet also took note of the fact that the Weimar Constitution allowed for already existing nobility titles to exist, albeit only 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 danger to the German public policy, especially taking into account that apparently the daughter's similar name did not pose such a danger either.[31] 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 then the Austrian prohibition, and secondly, the current case concerned an individual with multiple (dual) citizenship, both tying him to EU Member States. Yet as we have seen these differences did not have a decisive effect on the Court's judgment.

The *Garcia Avello* judgment was the first case where the Court of Justice has established a connection between the right of free movement and residence as it results from the status of EU citizenship on the one hand, and national laws governing names. This judgment essentially accepted that Union citizens have a right to be 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 Wolffersdorff in this regard, and why the Court of Justice felt 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. It has been suggested that this is a result of the Court concluding that as the matter of dispute falls within the sphere of German constitutional identity, the Court has no competence to rule on the proportionality of the German regulations.[32] However, the Court merely states in the judgment (para 78) that the referring court is in a better position to carry out the proportionality analysis than its EU counterpart and does not bring up competence questions.

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"

[28] Case C-438/14, para 84.

[29] Case C-438/14. Opinion of Advocate General Wathelet delivered on 14 January 2016, para 46.

[30] Ibid., para 94.

[31] Ibid., para 109.

[32] Jacques Bellezit, 'Il nome suo nessun saprà...: A commentary on the CJEU Bogendorff von Wolffersdorff ruling on the use of names recognised by other Member States' (EU Law Analysis, 1 September 2016)

states however are mostly hostile towards the issue of nobility, with numerous states adopting restrictive or prohibiting regulations, such as Austria[33], Italy[34], Greece[35] and Hungary[36]. 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[37]) 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 the *Omega* case[38] – what is more it has effectively already placed national identity before internal market freedoms in a concrete case[39] in its judgment in *Groener*.[40] The first *expressis verbis* reference to Article 4 (2) TEU was nevertheless made by the Court of Justice in *Sayn-Wittgenstein*[41], albeit only as a subsidiary point used to clarify the concept of public policy as a justification for the restriction of fundamental freedoms.[42] 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.[43] The current wording of the

[33] Law on the abolition of the nobility, the secular orders of knighthood and of ladies, and certain titles and ranks (Gesetz über die Aufhebung des Adels, der weltlichen Ritter- und Damenorden und gewisser Titel und Würden) of 3 April 1919 (StGBl. 211/1919) which has constitutional status under Article 149(1) of the Federal Constitutional Law (Bundes-Verfassungsgesetz) – as analysed by the Court in Sayn-Wittgenstein (paragraph 3)

[34] See Article XIV of the Transitional and Final Provisions of the Constitution of Italian Republic (adopted in 1948): „Titles of nobility shall not be recognised. The place-names included in those existing before 28 October 1922 shall serve as part of the name (…)" Available in English at:
https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (1 September 2016)

[35] 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.

[36] In Hungarian law, Act IV of 1947 on the abolition of certain titles and ranks has *inter alia* abolished all Hungarian noble ranks and titles and prohibited the future bestowment of such titles. The Act remains in force ever since its adoption; although the Act 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 (HCC) in 2008 [Decision 1161/B/2008] and in 2009 [Decision 988/B/2009]. The HCC has among others 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 as well [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 doesn't. [For a summary of the latter judgment (in Hungarian) see Naszladi, Georgina, *Alkotmánybírósági határozat a nemesi előnevek és címek használatának alkotmányosságáról*, Közjogi Szemle 2011/4, p. 66] The HCC has referenced its aforementioned decisions also following the entry into force of the Fundamental Law of Hungary (2011, replacing the previous Constitution) in a recent decision [Decision 27/2015 (VII. 21.)].

[37] According to Articles 2 and 49 of the TEU

[38] Case C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I – 9609.

[39] Noted by Besselink, Leonard F.M.: 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.

[40] Case C-379/87 Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee [1989] ECR I – 3967.

[41] Anastasia Iliopoulou Penot 'The Transnational Character of Union Citizenship' Dougan, Michael, Shuibhne, Niamh Nic and Spaventa, Eleanor (Eds) *in Empowerment and Disempowerment of the European Citizen* (Hart Publishing 2012) 25.

[42] Von Bogdandy, Stephan Armin-Schill, *Overcoming Absolute Primacy, Respect for National Identity under the Lisbon Treaty*, [2011] vol. 48. CML Rev. p. 8.

[43] Treaty on European Union [1992] OJ C191, 29/7, Article F: „1. The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy. (…)".

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.[44] 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 most national constitutional courts which follow a sort of relative primacy doctrine (which acknowledges the primacy of EU law subject to certain constitutional limits).[45]

In *Bogendorff von Wolffersdorff*, the Court of Justice once 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, 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.[46] (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."[47]) The Court emphasized that the abovementioned constitutional choice "must be interpreted as relating to a ground of public policy."[48] 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 itself however 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.[49] 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[50]). 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 the concept of public policy should not be defined based on the national understanding of the term, but autonomously as a concept of EU law (even if national authorities must be allowed an area of discretion within the limits imposed by primary EU

[44] Giacomo Di Federico, *Identifying constitutional identities in the case law of the Court of Justice of the European Union*, [2014] IX World Conference of the International Association of Constitutional Law, 2: http://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws9/w9-federico.pdf (1 September 2016)

[45] Von Bogdandy & Schill, (n 47) pp. 1-38.

[46] Case C-438/14, para 64.

[47] *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, para 24)

[48] Case C-438/14, para 65.

[49] For an elaboration of the concept see Alexander J. Belohlavek, *Public Policy and Public Interest in International Law and EU Law*, in Alexander J. Belohlavek and Naděžda Rozehnalova (Eds.), *Czech Yearbook of International Law 2012 - Public Policy and Ordre Public* (Juris Publishing 2012) pp. 117-147 (most notably at pp. 129-137)

[50] Ibid 118.

law).[51] It would be wrong however, in our view, to argue that the remit of the national identity clause would be 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.[52]

To sum up and to get back to the case at hand: in our view, the conclusion reached by the Court of Justice, i.e. that Member State authorities are not bound to recognise the name (lawfully) acquired in another Member State seems too lenient from the point of view of EU citizens' rights and the EU law principle of equal treatment. The recognition of the German regulations 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 run counter to German public policy. So instead of true equality, one may ask whether or not in this particular situation German citizens are in fact "more equal than others"?[53]

[51] See *inter alia* Case 36/75 Rutili v Ministre de l'intérieur [1975] ECR I – 1219 and Case 41/74 Vand Duyn v Home Office [1974] ECR I – 1337.

[52] Von Bogdandy – Schill (n 47) 27.

[53] David de Groot, *Pending Case C-438/14 Nabiel Peter Bogendorff vonWolffersdorff – Or is it Peter Mark Emanuel Graf von Wolffersdorff Freiherr von Bogendorff?*, National Centres of Competence in Research, Working Paper Series #5, p. 13, alluding to George Orwell's Animal Farm. http://nccr-onthemove.ch/publications/pending-case-c-43814-nabiel-peter-bogendorff-von-wolffersdorff-or-is-it-peter-mark-emanuel-graf-von-wolffersdorff-freiherr-von-bogendorff-2/1 September 2016)