CONFLICTS OF NATIONALITIES AND EU PRIVATE INTERNATIONAL LAW
Many questions and some tentative answers
(S. Bariatti)

Nationality is relevant under EU private international law rules as (a) a connecting factor for determining the applicable law, (b) a criterion for determining the court vested with jurisdiction, and (c) a criterion for determining whether the court of origin was competent to issue a decision whose recognition/enforcement is sought in another MS.

Many rules on conflicts of laws and jurisdictions provided for by the EU PIL regulations apply nationality as the relevant factor/criterion both as the nationality of one individual and the common nationality of the parties. However, while there is a general common understanding that in order to assess whether an individual possesses the nationality of a country the law of such country should apply, no common solutions are provided or have developed concerning multiple nationalities.

Regulation No 1259/2010 for the first time addresses this issue, but it leaves the solution to the domestic law of each MS. Yet,

- while some general trends or generalised solutions may be traced [to be verified], the domestic laws of MS differ on these matters, and

- the practical consequences of the application of the general principles of EU law and of the case-law of the ECJ have never been assessed in depth.

In fact, the ECJ has adopted several decisions concerning – directly or indirectly – nationality and conflicts of nationalities and providing certain guiding principles. However,

- the case-law does not cover all cases that might arise in practice in the three traditional sectors of PIL;
- the ECJ decides on a case-by-case basis and does not provide clear guidance for the generality of cases;
- it may be that the solutions adopted in other sectors (civil service, free movement, etc.) are not appropriate to solve PIL cases (and vice-versa: see *Devred)*;
- it appears that the solutions adopted in one PIL sector (applicable law, jurisdiction, recognition of judgments) may not suit the needs of the others.

Thus, it is appropriate to analyse the state of the art of such principles as applied in this field and the problems that may arise in practice, and to propose solutions, if possible or advisable, in order to increase predictability and avoid or at least reduce abuses and forum shopping. It shall also be verified whether different solutions should apply in the three traditional sectors of PIL.

Among the various issues that may arise under the heading “conflicts of nationalities”, this preliminary paper addresses only multiple nationalities since in case of statelessness persons and refugees international conventions provide for connecting factors and jurisdiction criteria that are followed in the [totality/majority of the] MS. [to be verified]

General principles of EU law

- Non discrimination
- Proportionality
- EU citizenship
- Unicité du statut du citoyen européen
- General interest
- …

Relevant rules and provisions (acts, declarations, etc.)

- Declaration on the nationality of a Member State (annexed to the Maastricht Treaty)

  The Conference declares that, wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned. Member States may declare, for information, who are to be considered their nationals for Community purposes by way of a declaration lodged with the Presidency and may amend any such declaration when necessary.

- Denmark and the Treaty on European Union, Decision of the Heads of State and Government, meeting within the European Council, concerning certain problems raised by Denmark on the Treaty on European Union, Section A, Citizenship (92 C348/01)

  The provisions of Part Two of the Treaty establishing the European Community relating to citizenship of the Union give nationals of the Member States additional rights and protection as specified in that Part. They do not in any way take the place of national citizenship. The question whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned.

- Regulation No 1259/2010 (Rome III)

  Rec. 22: Where this Regulation refers to nationality as a connecting factor for the application of the law of a State, the question of how to deal with cases of multiple nationality should be left to national law, in full observance of the general principles of the European Union.

ECJ case-law

In a number of cases the ECJ has assessed the criteria for the acquisition and loss of the nationality of Member States (*Kaur, Airola, Van den Broeck, Rottman, Chen, Ruiz Zambrano*).

The ECJ has decided various cases where the nationality of a MS concurred with the nationality of another MS or of a third country, as well as a case where the parties had two common nationalities, mainly in the context of free movement, freedom of establishment and freedom to provide services.

Case	**Nationalities**	
Gullung (19.1.1988, 292/86)	F+D national Registered as Rechtsanwalt in D, wishes to practice in F	Freedom of movement for persons, freedom of establishment and freedom to provide services, which are fundamental in the Community system, would not be fully realized if a MS were entitled to refuse to grant the benefit of the provisions of Community law to those of its nationals who are established in another MS of which they are also a national and who take advantage of the facilities offered by Community law in order to pursue their activities in the territory of the first state by way of the provision of services. (citing *Knoors*, 7.2.1979, 115/78, which concerned a NL national living and working in B, who wanted to enjoy EC freedoms in respect to NL)
Gilly 12.5.1998, C-336/96)	D+F national living in France German national, has acquired French nationality by marriage, works in Germany Application of the bilateral convention on double taxation	*G must therefore be considered in France as a worker exercising her right to freedom of movement, as guaranteed by the Treaty, in order to work in a Member State other than that in which she resides. The circumstance that she has retained the nationality of the State in which she is employed in no way affects the fact that, for the French authorities, she is a French national working in another Member State*
Micheletti (7.7.1992, C-369/90)	ITA+ARG national in Spain No real connection with Italy	*§ 10. Under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality.* Moreover, it is not permissible for a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty. It implicitly rejects *Nottebohm* insofar as it does not allow a MS to scrutinize the “genuine link” between another MS and the individual.

Mesbah (11.11.1999,C-179/98)	Morocco-B national Request of allowance made by a relative based upon the Moroccan nationality of the son-in-law	The ECJ refused to follow *Micheletti* since the son-in-law was a national of the MS where he was established and to which the benefit were requested and no issue of free movement was involved. *§ 40. Il appartient dès lors à la seule juridiction de renvoi, dans le cadre de sa compétence exclusive pour interpréter et appliquer son droit national dans le litige dont elle est saisie, de déterminer la nationalité du gendre de M^{me} Mesbah conformément au droit belge, et en particulier à la loi sur la nationalité et au droit international privé, applicable à la date de la présentation de la demande d'allocation pour handicapés litigieuse de même que pendant les périodes de référence pertinentes pour l'appréciation du droit au bénéfice de cette prestation de sécurité sociale*
Kaur (20.2.2001, C-192/99)	British Overseas Citizen in UK	Same as *Micheletti* (§ 19)
Airola (20.2.1975, 21/74)	B+ITA national living in Italy, member of EC staff Belgian national had acquired Italian nationality by marriage; she had declared the will to maintain the Belgian nationality, but it was impossible to renounce the Italian one under Italian law	In order to avoid any discrimination between male and female EC staff, the Italian nationality shall not be taken into account for purposes of the expatriation allowance
Van den Broeck (20.2.1975, 37/74)	X+B national living in Belgium National of MS had acquired Belgian nationality by marriage; had not renounced the Belgian nationality, but she could do so	Since VdB could have renounced the Belgian nationality but did not do it, she is considered a Belgian national for purposes of the expatriation allowance (which is denied)
Devred née Kenny-Levick (14.12.1979, 257/78)	UK+B national living in Belgium National of UK had acquired Belgian nationality by marriage; had not renounced the Belgian nationality, but she could do so	Since D could have renounced the Belgian nationality but did not do it, she is considered a Belgian national for purposes of the expatriation allowance *§ 14. The concept of effective nationality is used mainly in private international law in order to resolve positive conflicts of nationality. The concept cannot be transferred to a quite different sphere from that for which it was developed, specifically the scope of the staff regulations for officials of the Communities*

B (11.7.2007, F-7/06)	UK+B national living in Belgium National of UK had acquired Belgian nationality by the mother after change of Belgian law on nationality	B is considered a Belgian national for purposes of the expatriation allowance (the period of residence in Belgium exceeds the condition set forth by the staff rules)
Rottmann (2.3.2010, C-135/08)	A+D national National of MS1, acquires nationality of MS2 by naturalisation, which is later revoked for fraud	EU law does not prevent this situation to happen provided that the application of MS2's law concerning revocation respects the principle of proportionality [Would the solution have been different had R been the national of a non-EU MS rather than of Austria?]
Chen (19.10.2004, C-200/02)	China+IRL national in UK National of non-MS acquires Irish nationality upon birth in the UK (Northern Ireland) and moves to UK invoking free movement also for the mother	Same as *Micheletti* *§ 38. None of the parties that submitted observations to the Court has questioned either the legality, or the fact, of Catherine's acquisition of Irish nationality (§ 38)* *§ 39. Moreover, it is not permissible for a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty (see, in particular, Micheletti, paragraph 10, and Garcia Avello, paragraph 28).* *§ 40. However, that would be precisely what would happen if the United Kingdom were entitled to refuse nationals of other Member States, such as Catherine, the benefit of a fundamental freedom upheld by Community law merely because their nationality of a Member State was in fact acquired solely in order to secure a right of residence under Community law for a national of a non-member country.*
Saldanha (2.10.1997, C-122/96)	UK+USA national living in US Requested to pay cautio iudicatum solvi in Austrian judicial proceedings	*§ 15. The mere fact that a national of a Member State is also a national of a non-member country, in which he is resident, does not deprive him of the right, as a national of that Member State, to rely on the prohibition of discrimination on grounds of nationality enshrined in the first paragraph of Article 6* (citing *Micheletti*)
Garcia Avello (2.10.2003, C-148/02)	E+B nationals living in B	Belgium could not prevent the registration of the minors under Spanish law (Garcia Weber) § 28. *It is not permissible for a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty*

Hadadi (16.7.2009, C-168/08)	H+F nationals living in F Recognition of H divorce judgment in F under Regulation No 2201/2003	*§ 39. Article 3(1) of Regulation No 2201/2003 does not make any express reference to the law of the Member States for the purpose of determining the exact scope of the 'nationality' ground of jurisdiction.* *§ 40. Moreover, Regulation No 2201/2003 does not appear, at least in principle, to make a distinction according to whether a person holds one or, as the case may be, several nationalities.* *§ 41. Accordingly, where the spouses have the same dual nationality, the court seised cannot overlook the fact that the individuals concerned hold the nationality of another Member State, with the result that persons with the same dual nationality are treated as if they had only the nationality of the Member State of the court seised. …* *§ 42. On the contrary, in the context of Article 64(4) of the regulation, where the spouses hold both the nationality of the Member State of the court seised and that of the same other Member State, that court must take into account the fact that the courts of that other Member State could, since the persons concerned hold the nationality of the latter State, properly have been seised of the case under Article 3(1)(b) of Regulation No 2201/2003.*
Ruiz Zambrano (8.3.2011, C-34/09)	Belgian children of Colombia parents	*§ 40. Article 20 TFEU confers the status of citizen of the Union on every person holding the nationality of a Member State. Since Mr Ruiz Zambrano's second and third children possess Belgian nationality, the conditions for the acquisition of which it is for the Member State in question to lay down, they undeniably enjoy that status.*
McCarthy (5.5.2011, C-434/09)	IRL+UK national living in UK invokes Irish nationality in order to obtain family unification (husband from Jamaica)	EU law does not apply since McC never exercised the right to free movement (always lived in UK) *Adv. Gen. Kokott: § 35. The position that may obtain in relation to fields such as that of the rules governing a person's name cannot, however, necessarily be transposed to the right of residence at issue here and the related possibility of family unification. Rather, the issue is whether, in this context too, the position of Union citizens differs, in view of their dual nationality, in a legally relevant way from the situation of other Union citizens who are nationals of the host Member State only.*

The *Blais* case (4.12.2008, F-6/08) does not seem relevant for the purposes of this paper since under Article 3.7.4 of the rules applicable to BCE staff "*Lorsque un membre du personnel a deux nationalités, dont celle de l'État sur le territoire duquel est situé le lieu de son affectation, cette dernière nationalité détermine ses droits*". The case concerned primarily the residence of B prior to employment by the BCE.

A. NATIONALITY AS A CONNECTING FACTOR

The provisions concerning multiple nationalities may mainly come into consideration

a. when determining the law applicable to a status of an individual (legal capacity, personality rights, right to a name, succession)
   or
b. when determining the law applicable to a relationship with another individual, where the law designates the law of common nationality (separation, divorce, matrimonial property regimes, personal relations between spouses, a.s.o.).

   Moreover,
c. in certain cases the law applicable to one individual may have effects of the establishment of a status/situation vis-à-vis another party (the establishment of parentage (*filiation*) is governed by the national law of the child; the capacity to succeed is governed by the law applicable to the succession).

- Should one differentiate among these cases? Should the solution differ where a situation/status is created v. where a situation/status already created is invoked?

- Should one differentiate where a situation/status is invoked vis-à-vis a EU institution?

- What would be the solution under national law in a case falling under (b) where the couple has one common nationality and one of the spouses has also another nationality?
  A practical example concerning divorce according Italian PIL provisions may help: the law provides that the law of the common nationality of the spouses applies, and that lacking a common nationality, the law of the localisation of their life applies.

Spouse 1	**Spouse 2**	**Common nationality**	
ITA + F	F	F	Italian courts would consider that spouse 1 possesses the Italian nationality only, which would prevent the common French nationality to be taken into consideration. The law of the localisation of the life of the couple applies
ITA + F	ITA	ITA	In this case Italian courts would apply Italian law
US + MEX	MEX	MEX	Supposing that Italian courts have jurisdiction, Italian courts would check which nationality of Spouse 1 is effective. If US nationality prevails, the law where the life of the couple is localised applies If MEX nationality prevails, Mexican law applies
F + UK	F	F	EU case-law prevents Italian courts from checking which nationality of Spouse 1 is effective. They will probably still decide that the couple has one common nationality (F)
ITA (+ X)	F (+ Z)	No common nationality	Localisation of the life of the couple

- How would the situation change according to the court seised?

Possible application in PIL cases of the principles established by the ECJ

Legenda: MS1 = State of the forum
MS2 , MS3 etc = other Member States
Non-MS= third countries

Law applicable to the status/situation of an individual (right to name, status)

Forum State	Nationalities		ECJ
MS1	MS1 + MS2	Can MS1 consider the individual exclusively as its national?	*Garcia Avello, Hadadi*: **NO** If the individual has "activated" or is activating the nationality of MS2, MS1 has to recognise the effects. What would be the solution of a PIL issue in *Airola* (i) before an Italian court; (ii) before a Belgian court? And *Van den Broeck*?
MS1	MS2 + Non-MS	How would the capacity/name of Chen or Micheletti be decided if MS1 follows the nationality principle? According to Irish or Chinese Law? Argentine or Italian law? Would effectiveness/genuine link be a criteria to solve this conflict? Do EU general principle require the application of the effective nationality? Or does a general principle of closest connection exist in EU law? In *Micheletti* effectiveness of nationality would have led to the application of Argentine law. What would have happened in *Chen*?	*Micheletti, Chen*: **MS1 may not impose conditions for the effectiveness of the nationality of MS2.**
MS1	MS2 + MS3	How would MS1 in this case chose between the nationalities of two MSs? Would *Hadadi* prevent MS1 from considering only the nationality based on effectiveness? Or would MS1 be bound to equate the nationalities of MS2 and MS3? Which law would apply? What would be the solution of a PIL issue in *Airola* (iii) before the courts of a MS other than Belgium or Italy?	Hadadi: **?**

MS1	MS1 + Non-MS	Are Member States free to give precedence to their nationality?	Yes according to *Mesbah*
MS1	Non-MS 1 + Non-MS 2	Are Member States free?	Yes, they can apply the principle of effective nationality

Law applicable to the relationship between two parties (eg, divorce, Art. 8(c) Reg. 1259/2010)

Forum State	**Spouse 1**	**Spouse 2**		**ECJ**
MS1	MS1 + MS2	MS2	Can MS1 consider Spouse 1 exclusively as its national? Should the spouses be considered as having a common nationality for the purposes of Art. 8(c) of Reg 1259/2010? Should the attitude of the parties and/or residence be relevant?	*Garcia Avello, Hadadi*: **NO**
MS1	MS2 + Non-MS	MS2	Can MS1 consider Spouse 1 exclusively as a national of MS2? Would this depend upon the attitude of Spouse 1? Would effectiveness be a suitable/legitimate criterion to solve this conflict?	According to *Micheletti* MS1 may not impose conditions for the effectiveness of the nationality of MS2.
MS1	MS1 + MS2	MS1 + MS2		Possible lesson from *Hadadi*: MS1 is entitled to apply its national law as the law of common nationality under Art. 8(c) in case 8(a) and (b) do not apply The same applies if the parties have seized the courts of MS2. It would appear inconsistent if the spouses seize MS1 and request the application of MS2's law And viceversa
MS1	MS2 + MS3	MS2 or MS3	How would MS1 in this case chose between the two nationalities of Spouse 1?	

MS1	MS2 + MS3	MS2 + MS3	How would MS1 in this case chose between the two common nationalities?	
MS1	MS2 + MS3	MS2 + MS1	Can MS1 consider Spouse 2 exclusively as its national? Should the common MS2 nationality prevail?	
MS1	MS1 + Non-MS 2	MS1 or Non-MS2	Are Member States free?	
MS1	Non-MS 1 + Non-MS 2	Non-MS 1 +/or Non-MS 2	Are Member States free?	

NB: In all the above cases under Article 5(1)(c) of Regulation 1259/2010 the spouses would be free to choose any nationality of either of them.

B. NATIONALITY AS A JURISDICTION CRITERION (compétence directe)

- As under *Hadadi*, multiple nationalities of MSs may offer a plurality of fora.
- In principle, the nationality of non-MS is irrelevant since the EU rules on jurisdiction establish the jurisdiction of MS only
- How should the notion of common nationality be interpreted?
- Should different solutions be adopted where the nationality of a MS concurs with the nationality of a non-EU MS?

C. NATIONALITY AS A JURISDICTION CRITERION IN THE CONTEXT OF THE RECOGNITION/ENFORCEMENT OF A FOREIGN JUDGMENT(compétence indirecte)

- *Hadadi*

ANNEX

NATIONAL PROVISIONS ON CONFLICTS OF NATIONALITIES

Country	Multiple nationalities
AUSTRIA	
BELGIUM	**Art. 3.** § 1er. La question de savoir si une personne physique a la nationalité d'un Etat est régie par le droit de cet Etat. § 2. Toute référence faite par la présente loi à la nationalité d'une personne physique qui a deux ou plusieurs nationalités vise : 1° la nationalité belge si celle-ci figure parmi se s nationalités; 2° dans les autres cas, la nationalité de l'Etat av ec lequel, d'après l'ensemble des circonstances, cette personne possède les liens les plus étroits, en tenant compte, notamment, de la résidence habituelle.
BULGARIA	
CZECH REPUBLIC	
CYPRUS	
DENMARK	
ESTONIA	
FINLAND	
FRANCE	
GERMANY	
GREECE	
HUNGARY	
IRELAND	
ITALY (Law No 218/95)	**Art. 19.2.** If the individual has more nationalities, the law of the country of nationality with which he/she is more closely connected applies. If among such nationalities he/she possess also the Italian nationality, the latter prevails.
LATVIA	
LITHUANIA	
LUXEMBOURG	
MALTA	
NETHERLANDS	
POLAND	
PORTUGAL	
ROMANIA	
SLOVAKIA	
SLOVENIA	
SPAIN	
SWEDEN	
UNITED KINGDOM	
ICELAND	
NORWAY	
SWITZERLAND	*III. Nationalité* **Art. 22** La nationalité d'une personne physique se détermine d'après le droit de l'Etat dont la nationalité est en cause. *IV. Pluralité de nationalités* **Art. 23** [1] Lorsqu'une personne a une ou plusieurs nationalités étrangères en sus de la nationalité suisse, seule la nationalité suisse est retenue pour déterminer la compétence du for d'origine. [2] Lorsqu'une personne a plusieurs nationalités, celle de l'Etat avec lequel elle a les relations les plus étroites est seule retenue pour déterminer le droit applicable, à

	moins que la présente loi n'en dispose autrement. [3] Si la reconnaissance d'une décision étrangère en Suisse dépend de la nationalité d'une personne, la prise en considération d'une de ses nationalités suffit.