

THE RELEVANCE OF DOUBLE NATIONALITY TO CONFLICT-OF-LAWS ISSUES RELATING TO DIVORCE AND LEGAL SEPARATION IN EUROPE

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Abstract: The number of transnational couples, in which spouses have different nationalities or double nationality, or reside in different States, has been increasing in the last years. The aim of this article is to analyse the issue of double nationality in European family law, limiting the scope of research on matrimonial matters. It will be first argued that double nationality is not a new topic in the European Court of Justice (ECJ) case law, starting from the well-known *Micheletti* judgment. The principle outlined twenty years ago has been recently confirmed in the *Hadadi* case, regarding the determination of the competent court in divorce proceedings, thus in the field of private international law. It will then be analysed whether situations of double nationality are also likely to occur in conflict-of-laws issues. Reference must be made today to EU Regulation no. 1259/2010 on implementing enhanced cooperation in the area of the law applicable to divorce and legal separation. Since situations of double nationality are probable, three solutions will be envisaged, among which a possible «renewal» of the «effective nationality» principle in EU law. This article will finally argue that nationality, a traditional connecting factor well rooted in civil law countries, still resists and may have an important role in the choice of the applicable law by the parties to a dispute regarding divorce or legal separation.

Key words: nationality, divorce and legal separation, applicable law, connecting factors, European Court of Justice.

Abstract: Negli ultimi anni, il numero di coppie «transnazionali», ovvero di coppie all'interno delle quali gli sposi hanno diverse nazionalità o doppia nazionalità, o risiedono in Stati differenti, è sensibilmente aumentato. Lo scopo di questo articolo è di analizzare la questione della doppia nazionalità nel diritto dell'Unione europea in materia di famiglia, limitando l'ambito della ricerca ai profili inerenti il divorzio e la separazione personale. La Corte di giustizia ha affrontato negli anni vari casi nei quali veniva sollevato il problema della doppia nazionalità, a partire dalla ben nota sentenza *Micheletti*. Il ragionamento seguito vent'anni fa è stato recentemente confermato nella sentenza del caso *Hadadi*, relativa all'individuazione del giudice competente in un procedimento di divorzio, dunque nel campo proprio del diritto internazionale privato. Nell'articolazione del lavoro, ci si chiederà se situazioni di doppia nazionalità possano emergere anche per profili inerenti la determinazione della legge applicabile ad un caso di divorzio. Il riferimento va fatto oggi al recente regolamento n. 1259/2010 relativo all'attuazione di una cooperazione rafforzata nel settore della legge applicabile al divorzio e alla separazione personale. Tre soluzioni saranno prospettate, tra cui il possibile riemergere del principio della «nazionalità effettiva» nel diritto UE. L'articolo si conclude argomentando che la cittadinanza, tradizionale criterio di collegamento negli ordinamenti di civil law, nonostante sembri superato dalla nozione di residenza abituale, può al contrario avere ancora un ruolo importante per quanto riguarda la scelta da parte dei

coniugi della legge applicabile al divorzio e alla separazione personale. Key words: international sale of goods, principles, interpretation, integration.

Parole chiave: cittadinanza, divorzio e separazione personale, legge applicabile, criteri di collegamento, Corte di giustizia.

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I. Introduction

1. In Europe, the number of transnational couples, in which spouses have different nationalities or double nationality, or reside in different States, has been increasing in the last few years due to several factors, among which the free movement of persons and the enlargement of the European Union (EU)¹. This state of affairs requires a response capable of superseding, or limiting the adverse effects of, the differences existing in legislations of Member States as far as family law is concerned.

The European Union is not vested with a specific competence in family substantive law². Article 81 TFEU provides a legal basis for the development of «judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments», which may include the adoption of measures aimed at ensuring «the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction». Judicial cooperation in civil matters is the object of a concurrent competence. Since family law is a sensitive matter for Member States, para. 3 of article 81 provides that «measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament»³.

¹ European Commission, *Green Paper on applicable law and jurisdiction in divorce matters*, COM(2005) 82 final, 14 March 2005, para. 1. Recently, European Commission, *Clearer rules for international couples*, press release, MEMO/10/100, 24 March 2010: «There are around 122 million marriages in the EU, of which around 16 million (13 %) are considered «international» (couples of different nationalities, couples living apart in different countries or living together in a country other than their home country). There were more than 1 million divorces in the 27 EU Member States in 2007, of which 140 000 (13 %) had an «international» element». C. MARGIOTTA/O. VONK, «Doppia cittadinanza e cittadinanza duale: normative degli Stati membri e cittadinanza europea», *Diritto, immigrazione, cittadinanza*, 2010, pp. 13-34, at 15. See also D. KOCHENOV, «Double Nationality in the EU: An Argument for Tolerance», *European Law Journal*, 2011, pp. 323-343, at 327, describing the factors which lead to the multiplication of people with multiple nationality, among which the rise of international migration, international marriages, the grounds on which States attribute nationality to individuals. A deep analysis on the notion of nationality in EU Member States in L. PILGRAM, *International Law and European Nationality Laws*, EUDO Citizenship Observatory, 2011, available at <http://eudo-citizenship.eu/docs/Pilgram.pdf>.

² S. M. CARBONE/I. QUEIROLO, «Unione europea e diritto di famiglia: la progressiva «invasione» degli spazi riservati alla sovranità statale», in S. M. CARBONE/I. QUEIROLO (eds), *Diritto di famiglia e Unione europea*, Torino, Giappichelli, 2008, pp. 1-27, at 6.

³ Unanimity was also required before the entry into force of Lisbon Treaty. However, another provision was added by Lisbon Treaty, allowing national Parliaments to block the «family law passerelle»: «The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament. The proposal referred to in the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision» (article 81, para. 3).

Notwithstanding these limits imposed by the Treaty, the European Union law is exercising a growing influence on family law⁴. In matrimonial matters, the European Union has clearly defined its position in view of facilitating the dissolution of marriage (*favor divortii*)⁵.

This paper will explore the relevance of double nationality to the functioning of EU provisions governing conflict-of-laws issues in the field of legal separation and divorce.

II. Double nationality viewed from the standpoint of the European Court of Justice: the lesson of *Micheletti*

2. The European Court of Justice (ECJ) has often dealt with cases concerning double nationality, starting from the well-known *Micheletti* judgment in 1992. In *Micheletti*⁶, a person with double Argentinean and Italian nationality asked for a permanent residence card in Spain as a Community national. Spanish authorities refused according to Spanish law which, in cases of double nationality, gives priority to the nationality of the last residence, in that case the Argentinean one. The *Tribunal Superior de Justicia of Cantabria* referred a question to the ECJ for a preliminary ruling on the interpretation of some provisions of the then EEC Treaty and of relevant secondary EU legislation⁷. The ECJ held that even though «[u]nder 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», the legislation of a Member State cannot «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»⁸.

The ECJ developed an «autonomous» standard which departed from the international notion of «effective nationality» developed by the International Court of Justice in its *Nottebohm judgment*⁹. It is worth pointing out, though, that under international law «effective nationality» comes into play for the purpose of identifying the State entitled to exercise diplomatic protection¹⁰. On the contrary, in *Micheletti*, what was at

⁴ R. LAMONT, «Habitual Residence and Brussels II-bis: Developing Concepts for EU Private International Family Law», *Journal of Private International Law*, 2007, pp. 261-281, at 261. The author underlines the «increasing willingness by the EU to intervene in family law as an aspect of its expanding competence under Title IV of Part III of EC Treaty».

⁵ «European integration and the principle of free movement of persons has extensively undermined the principle of the stability of the marriage»: see S. M. CARBONE/I. QUEIROLO, «Unione europea e diritto di famiglia: la progressiva «invasione» degli spazi riservati alla sovranità statale», in S. M. CARBONE/I. QUEIROLO (eds), *Diritto di famiglia e Unione europea*, Torino, Giappichelli, 2008, pp. 1-27, at 19-20. See also R. BARATTA, «Verso la «comunitarizzazione» dei principi fondamentali del diritto di famiglia», *Rivista di diritto internazionale privato processuale*, 2005, pp. 573-606, at 586. The *favor divortii* is clearly inferable from the ample selection of criteria to establish jurisdiction in the regulation (EC) no. 2201/2003. Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, in O.J. L 338, 23 December 2003, p. 1. See, F. SALERNO, «I criteri di giurisdizione in materia matrimoniale», *Rivista di diritto internazionale privato e processuale*, 2007, pp. 63-84.

⁶ Court of Justice, judgment of 7 July 1992, *Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria*, C-369/90, *EC Reports*, 2009, 1992, p. 4239 *et seq.*

⁷ Reference was made in particular to articles 3(c), 7, 52, 53 and 56 of the EEC Treaty, and to the Council Directive no. 73/148 of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (O.J. L 172, 28 June 1973, p. 14).

⁸ Court of Justice, *Micheletti*, para. 10. See H.U. JESSURUN D'OLIVEIRA, «Case C-369/90, M.V. Micheletti and others v. Delegación del Gobierno en Cantabria, Judgment of 7th July 1992», *Common Market Law Review*, 1993, pp. 623-637; D. RUZIÉ, «Nationalité, effectivité et droit communautaire», *Revue générale de droit international public*, 1993, pp. 107-120.

⁹ International Court of Justice, judgment of 6 April 1995, *Nottebohm, Lichtenstein v. Guatemala*, p. 22: «International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection. They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.» See S. FORLATI, «La cittadinanza nel diritto internazionale», in L. ZAGATO (ed.), *Introduzione ai diritti di cittadinanza*, third edition, Venezia, Cafoscarina, 2011, pp. 65-82. See also, for an analysis of the evolution of the concept of «genuine link», R.D. SLOANE, «Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality», *Harvard International Law Journal*, 2009, pp. 1-60.

¹⁰ I. BROWNLIE, *Principles of Public International Law*, Seventh Edition, Oxford, Oxford University Press, 2008, at 407-418.

stake was the exercise of one of the four liberties enshrined in the Treaty of the European Community. The ECJ has consistently supported this view in its following case law¹¹. Only recently has double nationality arisen in a decision concerning private international law matters.

III. ... and *Hadadi*

3. In the *Hadadi* case¹², decided in 2009, the ECJ had been asked to interpret article 3.1 (b) of Regulation no. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (*Brussels II bis*). According to this provision, nationality of both spouses is one of the grounds of jurisdiction¹³. The case concerned divorce proceedings pending in France between Mr Hadadi and Mrs Mesko in Hadadi. Both spouses had double French and Hungarian nationality and spent all their marital life in France where they emigrated soon after their marriage. In 2002, Mr Hadadi quickly obtained a divorce judgment in Hungary, while Mrs Mesko tried to continue the proceedings started in France. After the Paris Court of Appeal held that the divorce granted by the judgment of Pest Court could not be recognized in France, thus confirming the admissibility of the proceedings started by the wife, Mr Hadadi appealed against the decision before the *Cour de Cassation*.

The French *Cour de Cassation* asked the ECJ whether article 3.1, (b) is «to be interpreted as meaning that, in a situation where the spouses hold both the nationality of the State of the court seized and the nationality of another Member State of the European Union, the nationality of the State of the court seized must prevail». The ECJ held that «the court seized cannot overlook the fact that the

¹¹ Court of Justice, judgment 2 October 1997, *Saldanha and MTS v. Hiross Holding AG*, C-122/96, *EC Reports*, 1997, p. 5325 *et seq.*, par. 15. See also Court of Justice, judgment 2 October 2003, *Carlos Garcia Avello v. Belgian State*, C-148/02, *EC Reports*, 2003, p. 11613 *et seq.*, par. 28: «That conclusion [the fact that a person, having the nationality of a Member State, although resident in another one, have a link with the Community law, par. 27] cannot be invalidated by the fact that the children involved in the main proceedings also have the nationality of the Member State in which they have been resident since their birth and which, according to the authorities of that State, is by virtue of that fact the only nationality recognised by the latter. 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». On this case, see, among others, C. FIORAVANTI, «Attribuzione del cognome e cittadinanza «comunitaria»: gli effetti, per l'ordinamento italiano, della sentenza Garcia Avello», *Studium Iuris*, 2004, pp. 1180-1185; P. LAGARDE, «Note to Garcia Avello», *Revue Critique de Droit International Privé*, 2004, pp. 184-202; A. LANG, «Cittadinanza dell'Unione, non discriminazione in base alla nazionalità e scelta del nome», *Diritto pubblico comparato ed europeo*, 2004, pp. 247-249; G. R. DE GROOT, *Towards European Conflict Rules in Matters of Personal Status*, *Maastricht Journal of European and Comparative Law*, 2004, pp. 115-119; B. CORTESE, «Il rilievo della cittadinanza nel sistema dell'Unione europea: l'interazione tra cittadinanze nazionali e cittadinanza dell'Unione», in L. ZAGATO (ed.), *Introduzione ai diritti di cittadinanza*, third edition, Venezia, Cafoscarina, 2011, pp. 125-144. Recently, the Court confirmed its position in the case *Rottman* (Court of Justice, judgment of 2 March 2010, *Janko Rottman v. Freistaat Bayern*, C-135/08, *EC Reports*, 2010, p. I-1449 *et seq.*), repeating that Member States «have the power to lay down the conditions for the acquisition and loss of nationality» (at par. 39), but they must «have due regard to European Union law» (at par. 45). For the first time, the Court explains what the latter affirmation means: «in respect of citizens of the Union, the exercise of that power, in so far as it affects the rights conferred and protected by the legal order of the Union, as is in particular the case of a decision withdrawing naturalisation such as that at issue in the main proceedings, is amenable to judicial review carried out in the light of European Union law» (para. 48. See, in this sense, M.E. BARTOLONI, «Competenza degli Stati in materia di cittadinanza e limiti posti dal diritto dell'Unione europea: il caso *Rottman*», *Diritti umani e diritto internazionale*, 2010, pp. 423-429, at 424, and J. HAYMANN, «De la citoyenneté de l'Union comme révélateur de la nature de l'Union européenne (à propos de l'arrêt Rottman)», *Europe*, 2010, pp. 5-8).

¹² Court of Justice, judgment 16 July 2009, *Laszlo Hadadi (Hadady) v. Csilla Marta Mesko, épouse Hadadi (Hadady)*, C-168/08, *EC Reports*, 2009, p. 6871 *et seq.* See L. TOMASI, «Doppia cittadinanza e giurisdizione in materia matrimoniale nel Reg. n. 2201/2003 (Bruxelles II bis)», *Int. 'l Lis*, 2008, pp. 134-141; V. EGGA, «Compétence européenne: divorce d'époux ayant une double nationalité», *Recueil Dalloz*, 2009, pp. 2106-2107.

¹³ Article 3.1 reads as follows: «In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State: (a) in whose territory: - the spouses are habitually resident, or - the spouses were last habitually resident, in so far as one of them still resides there, or - the respondent is habitually resident, or - in the event of a joint application, either of the spouses is habitually resident, or - the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or - the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her «domicile» there; (b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the «domicile» of both spouses».

individuals concerned hold the nationality of another Member State», as the spouses would otherwise be precluded «from relying on Article 3.1 (b) of that regulation before a court of the Member State addressed in order to establish the jurisdiction of the courts of another Member State, even though those persons hold the nationality of the latter State»¹⁴. In other words, the two common nationalities of the spouses are equivalent for the purpose of jurisdiction. The ECJ further clarified in this connection that «there is nothing in the wording of Article 3.1 (b) to suggest that only the ‘effective’ nationality can be taken into account in applying that provision»¹⁵.

In the Court’s view, this situation may favour «forum shopping», inducing the spouses to «rush to the Court» in order to have the most convenient law applied¹⁶. This is one of the reasons which supports the necessity of a regulation dealing with conflict-of-laws issues. The *Hadadi* judgment, though limited to adjudicatory jurisdiction, may be considered a confirmation of the reasoning followed by the ECJ in previous judgments. The European Union cannot affect the grounds on which Member States attribute nationality to an individual. Once the nationality of a Member State is acquired, however, a person benefits from the rights and guarantees derived from European Union law. Moreover, in the case of nationality of both a Member State and a non Member State, it seems that citizenship of the Union exerts a sort of «force of attraction»: the acquisition of the nationality of a Member State is sufficient to include a person among the European Union citizens, even though he/she maintains significant relations with a non-European State¹⁷.

A question naturally arises following the reasoning of the ECJ in *Hadadi*. Should the principle of «equality» of the Member States’ nationalities, as developed for jurisdictional purposes, equally apply to *conflict-of-laws issues* regarding matrimonial matters? In fact, while rules on jurisdiction may well designate the courts of different States as possessing «concurrent» jurisdiction, the «cumulative» designation of two or more national laws for the purpose of substantively regulating one and the same situation – although it is not unknown – may lead to practical problems and ultimately result in unpredictable outcomes¹⁸.

IV. The relevance of double nationality to conflict-of-laws issues relating to divorce and legal separation

4. In order to answer this question, the first step is to understand whether the problem of double nationality may also arise for the purpose of applicable law.

Reference must be made today to the Regulation no. 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation¹⁹. As it is well known, this regu-

¹⁴ Court of Justice, *Hadadi*, par. 41.

¹⁵ Court of Justice, *Hadadi*, par. 51. The reasoning of the Court was in line with the Opinion of Advocate General Kokott, delivered on 12 March 2009. Even though the Advocate General recognized «the principle of the priority of the more effective nationality», which «has long been recognised in international law, where it affects the right of States to afford diplomatic protection» (par. 52 of the Opinion), he affirmed that «if, in the case of persons of dual nationality, account were taken only of the more effective nationality in the context of Article 3(1)(b), this would lead to a restriction of choice. As habitual residence would be of fundamental importance in determining the more effective nationality, the forum of jurisdiction under Article 3(1) (a) and (b) would often be the same. In the case of persons of dual nationality, this would lead in practice to an order of precedence of the grounds of jurisdiction in subparagraphs (a) and (b), which is precisely what is not wanted. Conversely, a couple with only one common nationality could still seise the courts in their home State even if they had long ceased to be habitually resident there and now had only limited real contact with that State» (par. 59).

¹⁶ J. MEEUSEN, «Concorrenza tra sistemi in materia familiare», in S. BARIATTI/C. RICCI (eds), *Lo scioglimento del matrimonio nei regolamenti europei: da Bruxelles II a Roma III*, Padova, Cedam, 2007, pp. 115-164, at 151.

¹⁷ In this sense, B. NASCIMBENE, *Nationality Laws in the European Union*, Milano, Giuffrè, 1996, at 4. «The mere holding of the nationality of Member States is, after all, sufficient to exclude any relevance of the nationality of a third State, without any distinction between present nationality held, and with no further conditions being imposed to this effect, such as the usual residence of the subject». Cf. J. BASEDOW, «Le rattachement à la nationalité et les conflits de nationalité en droit de l’Union européenne», *Revue Critique de Droit International Privé*, 2010, pp. 427-456 at 442; S. CORNELOUP, «Réflexion sur l’émergence d’un droit de l’Union européenne en matière de nationalité», *Journal de droit international*, 2011, pp. 492-516, at 499: according to the author, the European Court of Justice has adopted a functional approach as far as the conflict of nationalities is concerned, which means that it gives priority to the nationality which allows a person to benefit from the fundamental freedoms granted by the Treaties.

¹⁸ See P. FRANZINA, «The Law Applicable to Divorce and Legal Separation Under Regulation (EU) no. 1259/2010 of 20 December 2010», in *Cuadernos de Derecho Transnacional*, 2011, pp. 85-129, at 116.

¹⁹ Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, in O.J. L 343, 29 December 2010, p. 10.

lation is the outcome of the problematic negotiating process started from the Commission proposal of 2006²⁰. The regulation has been adopted following the procedure provided for «enhanced cooperation»²¹. Fourteen States have joined it so far²². Open to all Member States, this legal instrument has in its objective the creation of a «clear, comprehensive legal framework in the area of the law applicable to divorce and legal separation in the participating Member States, provide citizens with appropriate outcomes in terms of legal certainty, predictability and flexibility, and prevent a situation from arising where one of the spouses applies for divorce before the other one does in order to ensure that the proceeding is governed by a given law which he or she considers more favourable to his or her own interests»²³. The regulation will be applicable to legal proceedings related to divorce or legal separation instituted as of 21 June 2012²⁴. The regulation employs habitual residence as its main connecting factor. However, nationality still plays an important role. Under article 5, the spouses are allowed to choose²⁵, *inter alia*, the law of the State of either of the spouses at the time the agreement is made²⁶.

²⁰ Proposal for a Council regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, COM(2006) 399 final, 17 July 2006. A comment in B. NASCIMBENE, «Revisione del regolamento Bruxelles II (n. 2201/2003) e libera circolazione delle persone», *Int. 'l Lis*, 2008, pp. 57-61; ID, «Competenza giurisdizionale e legge applicabile in materia matrimoniale: verso un regolamento Roma III?», *Famiglia e Diritto*, 2009, pp. 529-535; A.-L. CALVO CARAVACA/J. CARRASCOSA GONZÁLEZ, «La ley aplicable al divorcio en Europa: el futuro reglamento Roma III», *Cuadernos de Derecho Transnacional*, 2009, pp. 36-71. To prevent «rush to court», the Commission recognized a significant autonomy to the parties of the dispute, who may choose – although into a limited range of connecting factors – the applicable law to their divorce or legal separation. In the absence of choice, the Commission introduced a «cascade» of four connecting factors, in order to identify the law which is more linked to the couple (article 20b of the proposal): the common habitual residence of the spouses; the last common habitual residence insofar one of the spouses still resides there; common nationality or domicile (in the case of United Kingdom and Ireland); *lex fori*.

Two years after the proposal, the Justice and Home Affairs Council noted that there were difficulties in reaching unanimity and that the objectives of Rome III «could not be attained within a reasonable period by Common law applying the relevant provisions of the Treaties» (JHA Council Meeting 2873, 6-6 June 2008, C/08/146). Common law countries were especially reluctant to adhere. On the negative impact of European family law policy in English and Irish Law, very critical on the EU proposal, see for example M. NÍ SHÚILLEABHÁIN, «Ten Years of European Family Law: Retrospective Reflections From a Common Law Perspective», *ICLQ*, 2010, pp. 1021-1053.

²¹ Council Decision no. 2010/405, 12 July 2010, authorizing enhanced cooperation in the area of the law applicable to divorce and legal separation, in O.J. L 189, 22 July 2010, p. 12. See A. FIORINI, «Harmonizing the Law Applicable to Divorce and Legal Separation – Enhanced Cooperation as the Way Forward?», *ICLQ*, 2010, pp. 1143- 1158; O. LOPES PEGNA, «La proposta di cooperazione rafforzata sulla legge applicabile a separazione e divorzio: profile problematici», *Cuadernos de Derecho Transnacional*, 2010, pp. 126-139; P. DE CESARI, *Diritto internazionale privato dell'Unione europea*, Torino, Giappichelli, 2011, at 441 et seq. It is the first example of enhanced cooperation in the European Union. See F. POCAR, «Brevi note sulle cooperazioni rafforzate e il diritto internazionale privato europeo», *Rivista di diritto internazionale privato processuale*, 2011, pp. 297-306, and I. OTTAVIANO, «La prima cooperazione rafforzata dell'Unione europea: una disciplina comune in materia di legge applicabile a separazioni e divorzi transnazionali», *Il Diritto dell'Unione europea*, 2011, pp. 113-144.

²² Belgium, Bulgaria, Germany, Greece, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia. Greece then withdrew its request. Thirteen Member States did not enter the enhanced cooperation, although in the future they may decide to opt in. The reasons why they did not participate in the enhanced cooperation are different: some States have a historic application of the *lex fori* (UK, Ireland, Cyprus, The Netherlands), others consider the right to divorce as a fundamental right (Sweden, Finland), others for political decisions (Czech Republic, Estonia, Lithuania, Poland, Slovakia). See K. BOELE-WOELKI, «FOR BETTER FOR WORSE: THE EUROPEANIZATION OF INTERNATIONAL DIVORCE LAW», *YEARBOOK OF PRIVATE INTERNATIONAL LAW*, 2010, pp. 1-26, at 11.

²³ Preamble of Regulation no. 1259/2010, recital 6.

²⁴ Article 18 of the Regulation no. 1259/2010.

²⁵ On the choice of law in family matters, see M. PERTEGÁS, «Beyond Nationality and Habitual Residence: Other Connecting Factors in European Private International Law in Family Matters», in J. MEEUSEN, M. PERTEGÁS, F. SWENNEN (eds), *International Family Law for the European Union*, Antwerpen, Intersentia, 2007, pp. 321-340, at 331 et seq.; F. POCAR, «Osservazioni a margine della proposta di regolamento sulla giurisdizione e la legge applicabile al divorzio», in S. BARIATTI (ed.), *La famiglia nel diritto internazionale privato comunitario*, Milano, Giuffrè, 2007, 267-278, at 275; P. FRANZINA, «L'autonomia della volontà delle parti nel regolamento sui conflitti di legge in materia di separazione e di divorzio», *Rivista di Diritto Internazionale*, 2010, pp. 488-496, at 489; T.M. YETANO, «The Constitutionalisation of Party Autonomy in European Family Law», *Journal of Private International Law*, 2010, pp. 155-193; I. VIARENGO, «Il regolamento UE sulla legge applicabile alla separazione e al divorzio e il ruolo della volontà delle parti», *Rivista di Diritto Internazionale Privato e Processuale*, 2011, pp. 601-624, at 610. Party autonomy has developed in contract law. See, among others, G. CARELLA, *Autonomia della volontà e scelta di legge nel diritto internazionale privato*, Bari, Cacucci, 1999; F. MARRELLA, «Funzione ed oggetto dell'autonomia della volontà nell'era della globalizzazione del contratto», in N. BOSCHIERO (ed.) *La nuova disciplina comunitaria della legge applicabile ai contratti*, Torino, Giappichelli, 2009, pp. 15-66.

²⁶ See article 5 of Regulation no. 1259/2010: «1. The spouses may agree to designate the law applicable to divorce and

In the absence of choice, article 8 lays down a «cascade» of four objective connecting factors: habitual residence of the spouses at the time the court is seized, or, failing that, last habitual residence (provided that the period of residence did not end more than one year before the court was seized) insofar one of the spouses still resides in that State, or, failing that, nationality of both spouses, or, failing that, *lex fori*²⁷.

Common double nationality may cause some problems when the first two connecting factors fail²⁸. At first sight, common habitual residence and the last common habitual residence seem to be the connecting factors applicable in the majority of cases. Nevertheless, an hypothetical situation may be envisaged: it may be that two spouses have a common residence in an EU Member State, where they moved from their Member State of origin soon after the marriage. Let us imagine that they hold the nationality of the State where they were born and that they also have the nationality of the State of residence. Let us further imagine that, after some years, one of the spouses moves abroad, leaving the marital house, whereas the other one returns to his/her State of origin. Subsequently, the spouses agree to start divorce proceedings before the Court of the State (bound by the *Rome III* regulation) where one of them is habitually resident. The seized court must determine the applicable law in accordance with Regulation no. 1259/2010. The first two connecting factors cannot be resorted to. The third connecting factor operates, but the common nationality is double. Considered the evolution of European society and the fact that people move frequently from one State to the other, this situation does not seem so uncommon. Which law will the judge apply, since nationalities are considered equivalent as said by the ECJ for the grounds of jurisdiction?

V. Is a renewal of the «effective nationality» principle possible under EU law?

5. Three solutions might be envisaged.

- a) First of all, the preamble of Regulation no. 1259/2010, although not mentioning «dual common nationality», specifies that «where this Regulation refers to nationality as 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»²⁹. For example, in Italy, article 31 of the 1995 Italian law of private international law provides that divorce is regulated by the common national law of the spouses at the moment of the divorce and, failing that, by the law of the State where the «familiar life» is «predominantly localized»³⁰. The latter connecting factor may be also used, although

legal separation provided that it is one of the following laws: (a) the law of the State where the spouses are habitually resident at the time the agreement is concluded; or (b) the law of the State where the spouses were last habitually resident, in so far as one of them still resides there at the time the agreement is concluded; or (c) the law of the State of nationality of either spouse at the time the agreement is concluded; or (d) the law of the forum. 2. Without prejudice to paragraph 3, an agreement designating the applicable law may be concluded and modified at any time, but at the latest at the time the court is seized. 3. If the law of the forum so provides, the spouses may also designate the law applicable before the court during the course of the proceeding. In that event, such designation shall be recorded in court in accordance with the law of the forum». A comment on article 5 in G. BIAGIONI, «Art. 5», in P. FRANZINA (ed.), «Commentario al Regolamento UE n. 1259/2010 del Consiglio del 20 dicembre 2010 relativo all'attuazione di una cooperazione rafforzata nel settore della legge applicabile al divorzio e alla separazione personale», *Le nuove leggi civili commentate*, 2011, pp. 1470-1484.

²⁷ A comment on article 8 in Z. CRESPI REGHIZZI, «Art. 8» in P. FRANZINA (ed.), «Commentario al Regolamento UE n. 1259/2010 del Consiglio del 20 dicembre 2010 relativo all'attuazione di una cooperazione rafforzata nel settore della legge applicabile al divorzio e alla separazione personale», *Le nuove leggi civili commentate*, 2011, pp. 1491-1501.

²⁸ If only one of the spouses have double nationality, the common nationality prevails in order to identify the applicable law.

²⁹ Preamble of regulation no. 1259/2010, recital 22.

³⁰ Article 31 of the Italian Law on Private International Law (law no. 218/1995): «1. La separazione personale e lo scioglimento del matrimonio sono regolati dalla legge nazionale comune dei coniugi al momento della domanda di separazione o di scioglimento del matrimonio; in mancanza si applica la legge dello Stato nel quale la vita matrimoniale risulta prevalentemente localizzata. 2. La separazione personale e lo scioglimento del matrimonio, qualora non siano previsti dalla legge straniera applicabile, sono regolati dalla legge italiana». The first connecting factor is the common nationality of the spouses, failing that, the law of the State where the marital life has been predominantly localized. Insofar legal separation and divorce are not provided for by the foreign law, they will be regulated by the Italian law.

the law is silent on this point, when the spouses have more than one common nationality³¹. If one of the common nationalities is Italian, this one prevails according to the position of some authors interpreting the law no. 218/1995³². Article 19, par. 2, of the same law, provides that, if a person has more than one nationality, the applicable law is the law of the State to which the person is most closely connected; however, the Italian nationality prevails if it is among such nationalities³³. This approach is not acceptable whenever the nationalities at stake are those of two or more EU Member States³⁴. The case law of the ECJ, as it has been described above, seems clear in this respect: nationalities of two different Member States must be placed on an equal footing and one Member State cannot give preference to one nationality instead of the other, e.g. on the ground that it is the nationality of the forum State³⁵. The case is different when the two common nationalities in question are those of a non EU Member State: in this case, the rules of the forum giving preference to one nationality are applicable³⁶.

- b) Secondly, failing the first two connecting factors of article 8, it may be easily concluded that the court should apply his/her own law, considered that the successive connecting factor is *lex fori*³⁷. This solution appears to be the easiest and the most practical one. However, while it is true that spouses often seize the court of a given State on the ground of convenience (including economic convenience)³⁸, this does not mean that the parties want the *lex fori* to apply³⁹.
- c) Thirdly, it is argued that there is a possibility for a renewal of the «effective nationality» principle, as known in public international law. Thus, in order to determine the applicable law in case of double nationality, the court might scrutinise which nationality is «more effective»⁴⁰.

³¹ In this sense, R. CLERICI, «Articolo 31», in A. ZACCARIA (ed.), *Commentario breve al diritto di famiglia*, Padova, Cedam, 2011, pp. 2892-2898, at 2893.

³² R. CLERICI, «Articolo 31, Riforma del sistema italiano di diritto internazionale private, legge 31 maggio 1995 no. 218», *Rivista di diritto internazionale privato processuale*, 1995, pp. 1071-1078, at 1075, according to which «non dovrebbero sussistere dubbi, riguardo all'articolo 31, comma 1, circa la prevalenza della cittadinanza italiana sulle altre concorrenti alla stregua di quanto dispone l'articolo 19 comma 2». See also B. NASCIBENE, «Divorzio e diritto internazionale privato», in R. BARATTA (ed.), *Dizionari del Diritto Privato – Diritto internazionale privato*, Milano, Giuffrè, 2010, pp. 156-169, at 160.

³³ Article 19.2 of the Italian law is applicable, however, insofar the conflict of law rule designate the national law of a single person and not the common national law of two spouses. See in this sense, R. CLERICI, «Articolo 19», in A. ZACCARIA (ed.), *Commentario breve al diritto di famiglia*, Padova, Cedam, 2011, pp. 2870-2873, at 2873.

³⁴ In this sense, I. VIARENGO, «Il regolamento UE sulla legge applicabile alla separazione e al divorzio e il ruolo della volontà delle parti», *Rivista di Diritto Internazionale Privato e Processuale*, 2011, pp. 601-624, p. 620, and R. CLERICI, «Articolo 19», in A. ZACCARIA (ed.), *Commentario breve al diritto di famiglia*, Padova, Cedam, 2011, pp. 2870-2873, at 2872.

³⁵ D. MARTINY, «Objectives and Value of Private International Law in Family Law», in J. MEEUSEN, M. PERTEGÁS, F. SWENNEN (eds), *International Family Law for the European Union*, Antwerpen, Intersentia, 2007, pp. 69-99, at 87: «A simple preferential treatment of the nationality of the *lex fori* would be discriminatory». See also F. MOSCONI/C. CAMPIGLIO, *Diritto internazionale privato e processuale*, V ed., Milano, Utet, 2010, at 205.

³⁶ J. BASEDOW, «Le rattachement à la nationalité et les conflits de nationalité», *Revue Critique de Droit International Privé*, 2010, pp. 427-456, at 454.

³⁷ The *lex fori* doctrine is traditionally followed, *inter alia*, in Common law countries.

³⁸ K. BOELE-WOELKI, «For Better for Worse: the Europeanization of International Divorce Law», *Yearbook of Private International Law*, 2010, pp. 1-26, at 14.

³⁹ See A. BUCHER, «La famille en droit international privé», *RCADI*, 2000, pp. 9-186, at 35: «la priorité donnée à la nationalité de l'Etat du for introduit un élément de souveraineté au détriment de l'intérêt personnel à un rattachement traduisant l'appartenance effective à l'un de ses Etats nationaux». On the pros and cons of the *lex fori* approach, see P. FRANZINA, «The Law Applicable to Divorce and Legal Separation Under Regulation (EU) no. 1259/2010 of 20 December 2010», in *Cuadernos de Derecho Transnacional*, 2011, pp. 85-129, at 93-96. According to J. BASEDOW, «Le rattachement à la nationalité et les conflits de nationalité», *Revue Critique de Droit International Privé*, 2010, pp. 427-456, at 454, «la nette prépondérance de la loi du for qui s'exprime dans les dispositions du droit international privé des Etats membres réglant les conflits de lois constitue une discrimination sans équivoque exercée en raison de la nationalité».

⁴⁰ See S. CORNELOUP, «Réflexion sur l'émergence d'un droit de l'Union européenne en matière de nationalité», *Journal de droit international*, 2011, pp. 492-516, at 512: «l'attachement à la nationalité effective nous semble *a priori* constituer la meilleure solution»; and Z. CRESPI REGHIZZI, «Art. 8» in P. FRANZINA (ed.), «Commentario al Regolamento UE n. 1259/2010 del Consiglio del 20 dicembre 2010 relativo all'attuazione di una cooperazione rafforzata nel settore della legge applicabile al divorzio e alla separazione personale», *Le nuove leggi civili commentate*, 2011, pp. 1491-1501, at 1501: «Ne discende che, laddove i soggetti possiedono più cittadinanze comuni, si dovrà ricercare, alla luce degli elementi concreti di ogni singolo caso,

Truly enough, nationality is still a prerogative of Member States and the ECJ, as demonstrated in *Hadadi*, seems to be extremely cautious in this respect⁴¹. At the same time, it is far from being certain that the «*Hadadi* principle», concerning matters of jurisdiction, is transferrable *sic et simpliciter* to the designation of the applicable law. *Hadadi* concerned jurisdiction: the powers of Member States were at stake. An useful clarification might hopefully come from the ECJ, stating whether, and subject to which accommodations, conflict-of-laws issues in the field of matrimonial matters should be decided in accordance with the «*Hadadi* principle» or whether the notion of «effective nationality» may have a role to play⁴².

VI. A critical look at the recent proposals concerning matrimonial property regimes

6. All the three possible scenarios just envisaged seem however weak and do not provide for predictable solutions. The future evolution of EU private international law in family matters may give a clearer answer to the issue of double nationality, meanwhile confirming the aversion to the effective nationality principle. In the proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes⁴³ (COM (126) 2011), party autonomy in the choice of law is assured, confirming an explicit trend in the evolution of European private international law⁴⁴. In the absence of choice of law, the Commission lists three successive connecting factors: «(a) the law of the State of the spouses' first common habitual residence after their marriage or, failing that, (b) the law of the State of the spouses' common nationality at the time of their marriage or, failing that, (c) the law of the State with which the spouses jointly have the closest links, taking into account all the circumstances, in particular the place where the marriage was celebrated» (article 17). It has then to be observed that the successive paragraph of the article specifies that «Paragraph 1(b) shall not apply if the spouses have more than one common nationality».

First of all, when more than one common nationality exists, the Commission proposal is clearly not in favour of a renewal of the «effective nationality» principle, in line with the ECJ jurisprudence. It does not thus surprise the formulation of article 17. What is more interesting, however, is that the Commission decided in the proposal to change the last connecting factor, which was the *lex fori*, introducing the «closest link», a notion which was particularly used in the field of contractual obligations. The closest link has to be found by the judge «taking into account all the circumstances», in particular the place where the marriage was celebrated. This connecting factor may – or most often may not – find the applicable law in the law of the State of common nationality. Even though the proposal refers to matrimonial property regimes, it seems that European institutions are trying to find a common approach

quella con cui i coniugi risultino maggiormente collegati».

⁴¹ Against the effective nationality approach, see P. FRANZINA, «The Law Applicable to Divorce and Legal Separation Under Regulation (EU) no. 1259/2010 of 20 December 2010», in *Cuadernos de Derecho Transnacional*, 2011, pp. 85-129, at 117. In favour, see P. HAMME, «Le nouveau règlement (UE) n. 1259/2010 du 20 Décembre 2010, mettant en oeuvre une coopération renforcée dans le domaine de la loi applicable au divorce et à la séparation de corps», *Revue critique de droit international privé*, 2011, pp. 291-338, at 328.

⁴² Referring to the *Rome III* proposal, see J. CARRASCOSA GONZÁLEZ/F. SEATZU, «La legge applicabile alla separazione personale dei coniugi ed al divorzio nella proposta di Regolamento Roma III», *Studi sull'integrazione europea*, 2010, pp. 49-77, at 69. According to the authors, in case of double or multiple nationality, it could be opportune to apply the national law which is the most strictly connected to the case.

⁴³ Proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM (2011) 126 final, 16 March 2011. On the fact that EU legislation separates three different aspects of divorce, i.e. decree, maintenance and matrimonial property and, as a consequence, ignores the ties between these three events, see M. HARDING, «The Harmonisation of Private International Law in Europe: Taking the Character Out of Family Law?», *Journal of Private International Law*, 2011, pp. 203-229.

⁴⁴ Article 16 of the proposal reads: «The spouses or future spouses may choose the law applicable to their matrimonial property regime, as long as it is one of the following laws: (a) the law of the State of the habitual common residence of the spouses or future spouses, or (b) the law of the State of habitual residence of one of the spouses at the time this choice is made, or (c) the law of the State of which one of the spouses or future spouses is a national at the time this choice is made».

for the purpose of dealing with family law matters. This is the reason why the evolution reflected in the aforementioned proposal is of extreme interest.

The solution suggested by the Commission in the recent proposal allows to overcome the limits inherent to the choice of *lex fori* as applicable law and the affirmation contained in the preamble of regulation no. 1259/2010 that gives priority to what national laws provide as far as double nationality is concerned.

It will be interesting to analyse the concrete application of regulation no. 1259/2010 and the possible clarification coming from the ECJ in future judgments, answering a question for a preliminary ruling referred to it by a national court. In case of double nationality, will the Court return the case to the national judge for a solution in accordance with the national law, provided the respect of EU law? Or will it be rather in favour of the application of the *lex fori*, considering that the effective nationality principle does not seem in line with ECJ case law⁴⁵?

A final question still remains: what is the future of the nationality as a connecting factor (and thus of the Mancinian theory of nationality)⁴⁶?

VII. Concluding remarks on the role of nationality as a connecting factor

7. Even in a matter so sensitive as family law, nationality has acquired a subordinated position compared to «habitual residence»⁴⁷. This is a different approach compared to the one followed by most Member States, e.g. Italy.

Considering the evolution of European Union law, a new solution might be envisaged in the forthcoming private international law instruments: reference to nationality should be confined to situations where the parties may choose the law governing their relationship, and be one of the options granted to the parties. The *objective determination of the applicable law would therefore be left to factors other than common nationality, such as habitual residence, or the place where the marriage is celebrated*⁴⁸. By the way, some of these «codified» connecting factors may well correspond to the standards according to which the «effective» or «more significant» nationality would normally be identified: this would possibly overcome the difficulties inherent to situations where the spouses have more than one common nationality, without the possible ambiguities of the largely discretionary notion of «effective» nationality.

In the end, the unification of private international law in family matters in Europe remains a difficult task, due to the marked differences between the substantive and conflict-of-laws legislations (and traditions) of Member States. Enhanced cooperation, as the Rome III regulation shows, may be a

⁴⁵ «To be realistic, a more constructive alternative, the only conflicts rule that meets all the conditions, is the one referring to forum law»: in T.M. DE BOER, «The Second Revision of the Brussels II Regulation: Jurisdiction and Applicable Law», in K. BOELE-WOELKI/T. SVERDRUP (eds), *European Challenges in Contemporary Family Law*, Antwerp, Intersentia, 2008, pp. 321-341, at 339-340.

⁴⁶ E. JAYME, «Identité culturelle et intégration: le droit international privé postmoderne», in *RCADI*, 1995, pp. 9-267; E. JAYME (ed.), *Della nazionalità come fondamento del diritto delle genti, Pasquale Stanislao Mancini*, Torino, Giappichelli, 2000; F. MOSCONI, «Sul criterio della cittadinanza: da Mancini ai giorni nostri», *Rivista Diritto Internazionale Privato Processuale*, 2011, pp. 634-641. On the role of nationality in Italian Private International Law and its evolution, see A. PIETROBON, «Cittadinanza e legge applicabile: crisi di una tradizione?», in L. ZAGATO (ed.), *Introduzione ai diritti di cittadinanza*, third edition, Venezia, Cafoscarina, 2011, pp. 85-110, at 87-90.

⁴⁷ The habitual residence is considered by EU a «more flexible» connecting factor, «an appropriate response to the needs of a mobile Europe». See V. GAERTNER, «European Choice of Law Rules in Divorce (Rome III): an Examination of the Possible Connecting Factors in Divorce Matters Against the Background of Private International Law Developments», *Journal of Private International Law*, 2006, pp. 99-136, at 128. The author also analyses pros and cons of the two traditional approaches existing in EU Member States: the *lex fori* doctrine (in Common law countries) and the nationality principle (in Civil law countries). See also M. NÍ SHÚILLEABHÁIN, «Ten Years of European Family Law: Retrospective Reflections from a Common Law Perspective», *ICLQ*, 2010, pp. 1021-1053, at 1037, arguing that EU family law measures are negative for English and Irish law in this field. Indeed, concerning applicable law in divorce proceedings, «when English Courts have themselves assumed jurisdiction, they have never applied any other divorce law than that of England»: L. COLLINS (ed.), *The Conflict of Laws*, London, Sweet & Maxwell, 2006, at 877. See also, A. PIETROBON, «Cittadinanza e legge applicabile: crisi di una tradizione?», in L. ZAGATO (ed.), *Introduzione ai diritti di cittadinanza*, third edition, Venezia, Cafoscarina, 2011, pp. 85-110, at 101-102.

⁴⁸ Although the place where the marriage is celebrated may have no connections with the spouses.

practically useful response to this situation⁴⁹, even though the *lex fori* still plays a role as a last connecting factor (and not, as it could have been, as a residual connecting factor)⁵⁰.

This does not mean, however, that nationality has completely lost its role in private international law⁵¹: properly employed it may still contribute meeting the new challenges posed by a diversified and growingly complex European society.

⁴⁹ This is also the view of A. FIORINI, «Harmonizing the Law Applicable to Divorce and Legal Separation – Enhanced Cooperation as the Way Forward?», *ICLQ*, 2010, pp. 1143- 1158, at 1157.

⁵⁰ In this sense, M. PERTEGÁS, «Beyond Nationality and Habitual Residence: Other Connecting Factors in European Private International Law in Family Matters», in J. MEEUSEN, M. PERTEGÁS, F. SWENNEN (eds), *International Family Law for the European Union*, Antwerpen, Intersentia, 2007, pp. 321-340, at 325. See also F. POCAR, « Osservazioni a margine della proposta di regolamento sulla giurisdizione e la legge applicabile al divorzio», in S. BARIATTI (ed.), *La famiglia nel diritto internazionale privato comunitario*, Milano, Giuffrè, 2007, 267-278», at 274. The author points out that an approach in favour of the *lex fori* implies that the norms providing for different grounds of jurisdiction still have a predominant role.

⁵¹ A. PIETROBON, «Cittadinanza e legge applicabile: crisi di una tradizione?», in L. ZAGATO (ed.), *Introduzione ai diritti di cittadinanza*, third edition, Venezia, Cafoscarina, 2011, pp. 85-110? », at 107: according to the author, the Mancinian tradition is not lost, because the «sense of belonging», fundamental element of the Mancinian idea of nationality, is still relevant, although referred to the residence. See also J. BASEDOW, «Le rattachement à la nationalité et les conflits de nationalité en droit de l'Union européenne», *Revue Critique de Droit International Privé*, 2010, pp. 427-456, at 448. According to the author, «le recours à la nationalité ne peut pas être complètement supprimé», thus this connecting factor could be an «élément important du lien de proximité».