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NAVIGATING THROUGH HABITUAL RESIDENCE DETERMINATION

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Abstract Within the private international law area today, habitual residence seems to be omnipresent. Almost irrespective of the context, there seems to be no more appealing connecting factor than a habitual residence. It makes one wonder what exactly is so appealing about it. Is it the ease of determining habitual residence? Or maybe legal certainty? Uniformity? Flexibility? All these questions are legitimate and require answers in order to grasp the concept, its advantages and disadvantages. Therefore, this article provides an overview of the development of the concept, both in theory and in case law, with the aim of consolidating existing knowledge and seeking answers to the remaining questions.

Keywords
habitual residence determination, connecting factor, private international law, EU Case-law, legal certainty

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1 Introduction

Private international law always was and still is an exotic discipline. Even for lawyers, it requires an effort to follow its postulates and the way it operates. It may be the reason why, in the world as interconnected as it is today, private international law still causes discomfort rather than relief. As if the world has sided with the German doctrinal thinking that „the abstraction of general terms and concepts that they could not explain adequately to their students" (Hess, 2021: 524) is a bite too big to swallow.

Even within the EU, private international and procedural law is so fragmented that there are a number of sectoral instruments dealing, among other things, with general concepts. Thus, instead of establishing a general framework regulation - so-called „Rome 0" Regulation (Leible and Müller, 2012/2013; Wagner, 2016), providing „uniform definitions and establishing concepts in a transversal way for all EU instruments of private international and procedural law" (Hess, 2021: 524), we are faced with almost 20 different instruments and their sectoral approaches to general institutes of private international and procedural law.

However, this does not affect the transversality of concepts like habitual residence, since its factual nature allows it to serve the purpose in different legal settings. It makes it more obvious that its content must be flexible enough to serve the purpose of the respective sectoral instrument. However, adaptability of the concept does not affect the neutrality of habitual residence as a connecting factor since it „ensures the application of the law which is deemed to be most closely related to the legal relationship in question" (Pfeiffer, 2024: 53), unlike the so-called material or substantive justice method applied in USA which aims, first and foremost, at a just and fair result (Symeonides, 2001: 125-140).

Due to its versatility, habitual residence as a connecting factor prevails in almost all of the EU private international and procedural law instruments, to the extent that it makes the classical connecting factors, such as nationality and domicile, utterly secondary.

In order to encompass all elements relevant for understanding of the challenges brought by introduction of habitual residence as a prevailing connecting factor in

European (but also national and international) legislation, this article reviews strengths and weaknesses of the classical connecting factors (nationality and domicile) as well as the development of habitual residence as the new connecting factor - in theory and in case law. It also reflects on some newly emerging areas in which habitual residence may appear as a primary connecting factor and the issues that may arise in that context.

2 Departing from domicile and nationality

2.1 Starting with the domicile …

„Prior to the 19th century, there was no room for the complex of problems arising nowadays from the antithesis between nationality and domicile, because the concept of nationality was still unknown." (de Winter, 1969: 366). Ever since, the two concepts have been almost exclusive competitors (de Winter, 1969: 358).[1] Today, domicile as well as nationality are losing their appeal. They are still there but barely hanging in. The law, just like life, „is a constant state of flux" (de Winter, 1968: 357). Domicile originates from the Roman law, where „domicilium was held in the place of permanent residence and was where the person in question was to be found" (Von Savigny, 1849: 353). Yet, in the sense we use it nowadays, it gained its importance from the 14th century onwards (de Winter, 1969: 364).

However, there were a number of difficulties in determining a person's domicile. First, the concept was used differently in civil law countries compared to *common law* countries. In *common law* countries, the domicile was understood as „the place where a person considers where his roots are or where the person has his permanent home", thus as a connection between a person and a given system or rule of law (Zhang, 2018: 170). In a way, its understanding in *common law* systems was closer to the understanding of nationality (than the domicile) in civil law systems (de Winter, 1969: 419). This misconception on the side of civil law systems, together with the complexity of the meaning of the term itself, made it difficult to apply.

[1] According to the Argentinian scholar Zeballos, in 1909, approximately 500 million people were subjects of countries that upheld the principle of domicile, whereas about 460 million were subjects of countries adhering to the principle of nationality. The ratio remained almost the same in 1968 – 1450 million subjects to the domicile principle and 1600 million subjects to the nationality principle.

This brings us to the second weakness of the domicile as a connecting factor. Namely, there are: a domicile of origin (received at birth, in the country in which the person is considered to have their permanent home), a domicile of choice (the combination of residence and intention of permanent or indefinite residence (*animus manendi*)) and a domicile of dependency (which follows the domicile of the person of whom they are dependent). Each of these categories is subject to its own set of rules (Dicey and Morris, 1967: 84, 86, 107). The difficulty here lies in the determination of the intention of the person, because clear and convincing evidence is needed to prove that the domicile of origin is lost and domicile of choice acquired. It is particularly tricky in those cases in which the factual circumstances contradict the person' subjective choice (Trakman, 2015: 325-326).

In any case, in the 19th century, with the emergence of nationality, domicile as a connecting factor started to lose its importance (Zhang, 2018: 168).

2.2 … to the rise of nationality …

For decades, nationality was the most important connecting factor for personal and family matters in civil law states, „a golden standard of private international law on the continent" (de Winter, 1969: 361). The first time it made its way into the legislation was the Galician Civil Code from 1979, although (officially) art. 3(3) of the French Civil Code is considered to be the first to establish nationality as a link for the determination of legal capacity and capacity to act (though, only with regard to French nationals) (Sajko, 2009: 112). Ever since, also due to Mancini's teaching, nationality has been introduced in many national civil codifications as a main connecting factor (Mancini, 1851). According to Mancini, nationality represents an essential link between the State and the individual. Each State is free to determine who its nationals are. The same has been confirmed by the League of Nations 1930 Convention,[2] the 1997 European Convention on Nationality,[3] and the CJEU case

[2] League of Nations' Convention on Certain Questions Relating to the Conflict of Nationality Law, 13 April 1930. Available at: https://www.refworld.org/legal/agreements/lon/1930/en/17955 , 3. 2. 2025.

[3] European Convention on Nationality, 6 November 1997, Council of Europe, ETS No 166. Available at: https://rm.coe.int/168007f2c8 , 13. 2. 2025.

law.[4] According to the *Nottebohm* judgment (5 April 1955) (Sloane, 2009),[5] the only limitation to the State's determination with regard to someone's nationality was the strength of the legal link between the person and the State (Zhang, 2018: 170).[6] In a way, it was a predestination of the time to come since the post-war migrations and, consequently, loosening of the ties with the national state, started to question the suitability of a nationality as a connecting factor.

However, there were still many advantages in favour of nationality. First and foremost, its stability. Due to strict and explicit legal requirements, nationality is not easily acquired but also not easily changed. Therefore, whether or not it actually represents a strong link with a certain state, it is stable and easy to prove and ascertain. Also, in most cases parties are unaware of the existence of specific rules dealing with cross-border disputes, thus, they often expect the law of their nationality to be applicable.

The second weakness of a connecting factor of nationality is the possibility of dual or multiple nationalities. Despite the fact that many states allow for dual or multiple nationality (Dutta, 2017: 139), the way some of them deal with it in their national PIL codifications (although in line with the art. 3 of the League of Nations' 1930 Convention)[7] hardly fits into today's human rights based setting. Namely, one of the main human rights postulates is the principle of non-discrimination. However, number of States, Croatia being one of them, in case of dual or multiple nationality, if applicable, give preference to the nationality of the forum State. In line with art. 3(2) of the Croatian PIL Act,[8] if a person has dual or multiple nationality and one of the nationalities is Croatian, they will be considered to have exclusively Croatian nationality.

[4] C-369/90 *Mario Vicente Micheletti and Others v Delegación del Goberno en Cantabria*, ECLI:EU:C:1992:295.
[5] Nottebohm (Liech. V Guat.), 1995 I.C.J. 4 (Apr 6).
[6] From the point of view of private international law and politics that is all that matters, however, „the civil matter focus often makes the local or presence more relevant than the personal affiliation with regard to the civil rights and obligations of the person, including personal status".
[7] „Subject to the provisions of the present Convention, person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses."
[8] Croatian Private International Law Act, Official Gazzette 101/17, 67/23, 29. 1. 2019.

If none of the nationalities are Croatian, then the closest connection, i.e., „effective" nationality, prevails. In case of multiple nationalities, the determination of „effective" nationality may conflict with the requirement of legal certainty, since it leaves room for different interpretations. It also ignores the wishes of the parties. Thus, instead of using the party autonomy to widen the parties' options in case of dual or multiple nationality, here as well, the State chooses the least favourable option.

Another weakness is related to the legal identity or nationality of corporations. In the interconnected, global world, a lack of national provisions dealing with the nationality of corporations became an obstacle to the free movement (Astorga, 2007: 417-472; de Stefano, 2021: 59-80).

Last but not least, the phenomenon of „stateless" persons made the nationality as a connecting factor inoperative. Thus, the alternative was needed to deal with such situations (Pfeiffer, 2024: 58).[9]

2.3 … and its diminished role in EU law

Due to its stability, easy ascertainment, and „in case of dual or multiple nationalities, possibility of widening parties' options",[10] the nationality as a connecting factor has been considered acceptable for the EU law as well. However, mainly as a subsidiary connecting factor with respect to jurisdiction and applicable law, and only to the extent that it does not violate the principle of non-discrimination on grounds of nationality.

In cases of common nationality possibility of discrimination based on nationality is excluded. However, there are other possible scenarios involving nationality that may prove to be problematic, such as dual nationality, parallel dual nationality, or nationality of only one of the parties.

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[9] And it was found in the UN Convention relating to the Status of Stateless Persons (1954), which substituted nationality with domicile or, failing that, residence. Available at: https://www.unhcr.org/ibelong/wp-content/uploads/1954-Convention-relating-to-the-Status-of-Stateless-Persons_ENG.pdf , 3. 2. 2025.

[10] See: C-148/02 *Garcia Avello*, ECLI:EU:C:2003:539 and C-168/08 *Hadady*, ECLI:EU:C:2009:474.

As has been clearly stated in art. 12 (ex. Art. 6) of the EC Treaty, art. 18 of the TFEU and in more than one CJEU judgment, the principle of non-discrimination on ground of nationality is „a special expression of the general principle of equality which is one of the fundamental principles of EU law", which „requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified".[11] While the principle in itself is perfectly understandable, it is sometimes difficult for States to give in, especially if their national law contains the „primacy provision". There are a number of cases in which the CJEU was asked to consider different factual scenarios and to rule on the non-discrimination principle in the context of nationality-driven battles.

In the C-148/02 *Garcia Avello*[12] case, concerning a Spanish-Belgian couple living in Belgium with their children, who were also born there. Both children acquired Belgian as well as Spanish nationality at birth. The parents named their children in conformity with the Spanish tradition regarding surnames, yet were rejected when they tried to register the same surname in the Belgian Register of Births; due to the precedence of Belgian rule on names, based on national rule considering the Belgian nationality as the effective nationality in cases of dual nationality. The question referred to the CJEU included, among other things, a referral to art. 12 of the EC Treaty and the role of the non-discrimination principle in cases such as this. The CJEU clearly stated that dual nationals are not in the same position as only Belgian nationals (paras. 31-32). Therefore, the CJEU stated that „Member State is precluded from refusing to grant an application for a change of surname made on behalf of minor children resident in that State and having dual nationality of that State and of another Member State" (operative part of the Judgment).

Some years later, the CJEU was called again to „arbitrate" about a different set of circumstances, yet with the same unacceptable result. In C-168/08 *Hadady*[13] case,

[11] See: Joined cases 117-76 i 16-77 – *Albert Ruckdecshel and Others*, ECLI:EU:C:1977:160 (para 7); C-354/95 *National Farmers' Union and Others* (para 61); ECLI:EU:C:1997:379; C-127/07 – *Arcelor Atlantique and Lorraine and Others*, ECLI:EU:C:2008:728 (para 23); C-336/19 – *Centraal Israëlitisch Consistorie van België and Others*, ECLI:EU:C:2020:1031 (para 85); Joined cases C-517/19 P and C-518/19 P *Alvarez y Bejarano and Others v Commission*, ECLI:EU:C:2021:240 (paras 52 and 64).

[12] C-148/02 *Garcia Avello*, ECLI:EU:C:2003:539.

[13] C-168/08 *Hadady*, ECLI:EU:C:2009:474.

concerning the recognition of the divorce of dual nationals in another Member State whose nationality they both also have, the CJEU was asked to answer whether: in a situation where the spouses hold both the nationality of the State of the court seized and the nationality of another EU Member State, the nationality of the State of the court seized must prevail (para. 23(1)). If the answer is negative, does the more effective of the two nationalities prevail (para. 23(2)) or the spouses may choose the seizing of the courts of either of the two States of which they both hold the nationality (para. 23(3)). The CJEU was very clear that parallel dual nationality of the spouses „precludes the court of the Member State addressed from regarding the spouses who each hold the nationality of both of that State and the Member State of origin as nationals only of the Member State addressed" (point 1. of the operative part of the Judgment). Further on, the CJEU unequivocally introduced the „autonomy principle" in the „relevant nationality" determination, since it stated that parallel dual nationality of the spouses „precludes the courts of one of those Member States from being rejected on the ground that the applicant does not put forward other links with that State" and that spouses may „seise the court of the Member State of their choice" (point 2. of the operative part of the Judgment).

Later on, in C-522/20 – *OE (Résidence habituelle d'un époux – Critère de nationalité)*,[14] the CJEU was asked, also in the context of the jurisdictional criteria (para. 18),[15] to interpret whether the requirement for a longer stay at the territory of the forum State with regard to the foreign national (compared to the national of that State), in order to exercise the jurisdiction of that State, can be considered discriminatory on grounds of nationality. In short, the CJEU concluded that „the principle of non-discrimination on grounds of nationality, enshrined in Article 18 TFEU, must be interpreted as not precluding a situation in which the jurisdiction of the courts of the Member State in the territory of which the habitual residence of the applicant is located, … is subject to the applicant being resident for a minimum period

[14] C-522/20 – *OE (Résidence habituelle d'un époux – Critère de nationalité*), ECLI:EU:C:2022:87.

[15] Literally, the CJEU was asked „whether the principle of non-discrimination on grounds of nationality, enshrined in Article 18 TFEU, precludes a situation in which the jurisdiction of the court of the Member State of residence, as provided for in the sixth indent of Article 3(1)(a) of Regulation No 2201/2003, is subject to the applicant being resident for a minimum period immediately before making his or her application which is six months shorter than that provided for in the fifth indent of Article 3(1)(a) of that Regulation on the ground that the person concerned is a national of that Member State."

immediately before making his or her application which is six months shorter than that provided (for non-national) on the ground that the person concerned is a national of that Member State".[16] In other words, connecting factor based on nationality of one party, followed by additional connections to the Member State of the forum, may not be considered discriminatory. In the CJEU's view, „the difference in the minimum period of actual residence … is based on an objective factor which is necessarily known to the applicant's spouse, namely the nationality of his or her spouse" (para. 34).

While, in the context of EU law, which carefully balances different interests when deciding on acceptable connecting factors, it might be the case that „nationality of one of the parties" has been misused in national laws. This happens when national law, based solely on nationality criteria, allows the jurisdiction of the courts of a State with which there is no substantial connection, i.e., the nationality of the plaintiff is not effective. Such exorbitant use of nationality as a connecting factor (Clermont; 2025; Struyven, 1998-1999: 521-548) does not correspond with the aims of the private international law (which is the application of the most closely connected law). Also, it is strictly forbidden in EU law (Raiteri, 2014: 311-312).

Furthermore, „the criteria of domicile (or habitual residence)[17] have been identified as a more genuine connection between the court and the dispute which avoids the creation of exorbitant jurisdiction, above all when the nationality is connected to only one of the parties" (Raiteri, 2014: 312).

For all the above reasons, nationality as a connecting factor is on a downward trajectory. It will always be acceptable as a subsidiary connecting factor (in most scenarios), yet it looks like its glorious days are now past.

3 Rise of the habitual residence

[16] C-522/20 – *OE (Résidence habituelle d'un époux – Critère de nationalité*), ECLI:EU:C:2022:87, para 42. The CJEU noted that the Regulation seeks to ensure that there is a real link with the Member State whose courts exercise jurisdiction and determine an application for divorce. In case of nationals of that State there are institutional and legal ties, as well as cultural, linguistic, social, family and other ties, thus, the spouses of which one is not a national of that Member State are not in a comparable situation. Consequently, there is no room for discrimination.

[17] Added by the authors of this article.

The inception of habitual residence can be traced back to 1972 and the Council of Europe Resolution (72)1 on the standardisation of the legal concepts of „domicile" and of „residence".[18] Due to various interpretations of these concepts in different States, the Convention aimed at standardisation of fundamental legal concepts, habitual residence being one of them. According to its Annex (no. 9.), „In defining whether a residence is habitual, account is to be taken of the duration and the continuity of the residence as well as of other facts of a personal or professional nature which point to durable ties between a person and his residence." According to no. 10, „The voluntary establishment of a residence and a person's intention to maintain it are not conditions of the existence of a residence or an habitual residence, but a person's intentions may be taken into account in determining whether he possesses a residence or the character of that residence." Finally, according to no. 11, „A person's residence or habitual residence does not depend upon that of another person."

However, habitual residence as a connecting factor „is very much the child of the Hague Conference of Private International Law" (Pfeiffer, 2024: 62). It gained its momentum as a response to all the difficulties encountered with the application of a domicile as a connecting factor. Conflicts of domicile qualification in different jurisdictions were considered a threat to the objectives of international agreements, and a new approach was needed.

Since its foundation in (mainly) factual elements, habitual residence was considered a genuinely international connecting factor, independent of any national system of law. It was first applied in conventions in the 1902 Convention relating to the Settlement of Guardianship of Minors, although as a subsidiary connecting factor.[19] Later on, it was incorporated in conventions dealing with family law as a main connecting factor (Hess, 2021: 531-532), and ever since its presence only grows.

[18] Adopted by the Committee of Ministers on 18 January 1972 at the 206th meeting of the Ministers' Deputies, available at https://rm.coe.int/native/09000016804dd56f, 22. 3. 2025.

[19] Available at: https://www.hcch.net/en/instruments/conventions/the-old-conventions/1902-guardianship-convention , 3. 3. 2025.

It has also found its way into European regulations. Consequently, it has become a subject of the CJEU jurisprudence. The CJEU case law clearly confirms that there is no universal definition and that its notion in the EU PIL should be interpreted autonomously (Tomasi *et al.*, 2007: 341-388)[20] and in line with the aim and purpose of the respective legal instrument (Gociu, 2023: 283).[21] On top of that, it has to be determined on a case-by-case basis,[22] which makes it „a chameleon concept" (Weller and Rentsch, 2016:173), but also not always easy to ascertain.

There is still a controversy about whether habitual residence is a factual concept[23] or a legal standard (Perez Vera, 1980: 66; Schuz, 2013: 179; Kunda, 2019: 299-300; Rentsch, 2017: 58). Confusion is mainly caused by predominance of its factual elements (physical presence,[24] length of residence,[25] integration in the social and family environments[26] and *animus manendi*[27]), and the lack of definition. However, „standard" implies the establishment of minimum requirements to be met (Gociu, 2023:283) and a pattern according to which actions and behaviour are coordinated and evaluated. It can be established by legislation or by jurisprudence. Looking from that perspective, it is very hard to claim that „habitual residence" is just a factual

[20] C-283/91 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, ECLI:EU:C:1982:335 (para. 19).

[21] See also: C-523/07 *A*, ECLI:EU:C:2009:225 (paras. 34-35); C-497/10 *Mercredi*, ECLI:EU:C:2010:829 (paras. 44-46).

[22] See: C- 523/07 *A*, ECLI:EU:C:2009:225 - „… It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case." (para. 2 of the ruling); C-497/10 Mercredi, ECLI:EU:C:2010:829 – „The place must be established by the national court, taking account of all the circumstances of fact specific to each individual case." (para. 47 of the Judgment). C-512/17 *HR*, ECLI:EU:C:2018:513 - „ … determining the child's place of habitual residence for the purpose of Article 8(1) of the Regulation No 2201/2003 requires a global analysis of the particular circumstances of each individual case. Therefore, the guidance provided in the context of one case may be transposed to another case only with caution." (para. 54).

[23] The CJEU has explicitly stated that habitual residence is a factual concept. See: C-85/18 PPU *CV v. DU*, ECLI:EU:C:2018:220 - „… concept of „habitual residence" reflects essentially a question of fact…" (para. 49).

[24] C- 523/07 *A*, ECLI:EU:C:2009:225 (para. 38); C-449/15 PPU *W.,V. v X.* ECLI:EU:C:2017:118 (para. 60), C-111/17 PPU *OL v PQ*, ECLI:EU:C:2017:436 (para. 43).

[25] C-462/22 *BM v. LO*, ECLI:EU:C:2023:553.

[26] C-523/07 *A*, ECLI:EU:C:2009:225 (para. 38); C-111/17 PPU *OL v PQ*, ECLI:EU:C:2017:436 (para. 43).

[27] C-523/07 *A*, ECLI:EU:C:2009:225 (paras. 40, 44); C-497/10 *Mercredi*, ECLI:EU:C:2010:829 (paras. 50, 53-55); C-111/17 PPU *OL v PQ*, ECLI:EU:C:2017:436 (para. 43)

concept. Judging by the CJEU jurisprudence, there is no doubt whatsoever that physical presence, length of residence, integration in the social and family environments, and *animus manendi* are the minimal requirements to be met, and a general pattern according to which the (non)existence of the habitual residence is evaluated.

Thus, the lack of definition in itself changes nothing. Although, it is hard not to see the resemblance between the minimal requirements set by the CJEU and requirements set by the Council of Europe's Resolution (72)1 on the *standardisation* of the legal concepts of „domicile" and of „residence" (nos. 9-11), which only proves that „the legal standard is intended to give guidance as to how to interpret the facts rather than to fetter the Court with rigid rules" (Schuz, 2013).

Also, an acceptance of the habitual residence as a legal standard opens a space for a debate on the influence of policy considerations on its determination. Applying the Treaties/Regulations implies an autonomous interpretation, i.e., interpretation in line with their object and purpose, which are determined by policy considerations (Schuz, 2013: 8; Rentsch, 2017). A consequence of different policy considerations informing different legal instruments is (what justifies) (Schuz, 2013: 7)[28] different „interpretation" of habitual residence in different contexts (Beaumont and McEleavy, 1999:113).[29] Such an approach leads us, not only to differentiated approach within the European PIL, but also to differentiated approach regarding the source of legislation. In most EU Member States it leads to a triad of different interpretations of habitual residence - in autonomous, convention and European PIL, thus a three-stage approach in EU Member States (Bouček, 2015: 905).

4 Determination of habitual residence in different contexts

Following all of the above, it is obvious that habitual residence as a connecting factor (for jurisdiction and/or applicable law) prevails in most branches of private international law. Its factual foundation allows for its versatility, yet it can also be

[28] „If the determination of habitual residence is indeed one of fact, then policy considerations should be irrelevant and the habitual residence of a person should be the same irrespective of the legislative context in which the determination is made."

[29] Different interpretation in different context has been confirmed by the CJEU too (C-523/07 *A*, ECLI:EU:C:2009:225).

challenging to ascertain where someone's habitual residence is. Since the CJEU case law includes number of judgments on the determination of the child's habitual residence in PIL matters, while it has only recently adjudicated in couple of cases on the determination of the adults' habitual residence in PIL matters, in the following sections we will try to explore the determination of habitual residence of the child in different contexts followed by the determination of habitual residence of the adult in these contexts.

4.1 Habitual residence of the child

4.1.1 In family and maintenance matters

Habitual residence is a key concept in cross-border family matters. However, unlike in civil and commercial matters, there is no definition of habitual residence in family matters, because (due to diverse factual circumstances) it is not possible to predict in advance which facts may be decisive in all possible scenarios. Despite the lack of definition, it should be interpreted Euroautonomously, thus reference to the national interpretation is not desirable.[30] Instead, useful criteria must be looked at in EU law and general principles valid throughout the EU (Ricci, 2020:154; Martiny, 2007:69-99), but also the CJEU case law.

In relation to the child's habitual residence, in its seminal case C-523/07 *A*,[31] the CJEU explicitly stated several determinants which paved the way for all future interpretations of the term. First, „… the terms of a provision of a Community law … must normally be given an autonomous and uniform interpretation throughout the European Community…" (para. 34). Second, „… the determination must be made in light of the context of the provisions and the objective of the Regulation" (para. 35), „which are shaped in the light of the best interests of the child, in particular on the criterion of proximity" (para. 35). Third, habitual residence of a child must be established on the basis of all the circumstances specific to each

[30] Except in cases in which the interpretation cannot be ascertained from the EU law or the general principles of EU law. See: T-43/90 *José Miguel Diaz Garcia v. European Parliament*, ECLI:EU:T:1992:120 (para. 36); T-85/91 *Khouri v. European Parliament*, ECLI:EU:T:1992:121 (paras. 32-33); T-172/01 *M. v. Court of Justice*, ECLI:EU:T:2004:108 (paras. 69-73).
[31] C-523/07 *A*, ECLI:EU:C:2009:225.

individual case (para. 37). Fourth, „its case-law relating to the concept of habitual residence in other areas of EU law cannot be directly transposed in the context of the assessment of the habitual residence of children …" (para. 36). Based on these „rules", the CJEU (in this and in subsequent cases) has listed a number of (potentially) relevant criteria for the establishment of „the centre of the child's life",[32] or in other words, the habitual residence of the child: requirement of physical presence, length of residence, integration in social and family environment and intention (*animus manendi*)(Kruger, 2020:123-124).[33]

With regard to physical presence, the CJEU is firmly of the opinion that there can be no habitual residence without physical presence on the territory of the respective State. It is a condition *sine qua non*, due to a factual nature of habitual residence (Beaumont and Holliday, 2021:35).[34] Thus, this condition has to be satisfied before assessing the stability of that presence in the Member State.[35]

In relation to physical presence, some were of the opinion that the lawfulness of the move prevents the acquisition of habitual residence. However, lawfulness does not seem to be an issue. This is a situation which usually occurs in relation to child abduction cases and, according to the CJEU, „… wrongful removal of a child, … should not, in principle, have the effect of transferring jurisdiction from the courts of the Member State in which the child was habitually resident immediately before his removal to those of the Member State to which the child was taken, even if, *following the abduction, the child has acquired a habitual residence in the latter Member State*.".[36] Also, two years later in maintenance matters, „… for the purpose of determining the law applicable to maintenance claim of a minor child removed by one of his or her

[32] C-512/17 *HR*, ECLI:EU:C:2018:513 (paras. 42, 51-52, 56-60).

[33] These elements were further elaborated by national courts which, for children, included also: where the child was hospitalised, the location of the child's doctor, health insurance, the place where a parent works, the child's sports, the child's own relationship with his or her peers.

[34] They are of the opinion that the parental intent should be given much more weight; and the CJEU „elevated the „factual" nature of „habitual residence" into the highest norm even if that is at the expense of human rights of a parent coerced into being present in a jurisdiction they don't want to be in". See also: C-523/07 *A*, ECLI:EU:C:2009:225 (para. 38); C-499/15 PPU *W.,V. v X.*, ECLI:EU:C:2017:118 (para. 61); C-111/17 PPU *OL v PQ*, ECLI:EU:C:2017:436 (para. 43); C-393/18 PPU *UD v XB*, ECLI:EU:C:2018:835 (para. 52).

[35] C-393/18 PPU *UD v XB*, ECLI:EU:C:2018:835 (para. 53).

[36] C- 85/18 PPU *CV v. DU*, ECLI:EU:C:2018:220 (para. 51).

parents to the territory of a Member State, *the fact that a court of that Member State has ordered, in separate proceedings, the return of that child* to the State where he or she was habitually resident with his or her parents immediately before his or her removal *is not sufficient to prevent that child from acquiring a habitual residence on the territory of that Member State*."[37]

In addition to the physical presence in a Member State, other factors must make it clear that the presence is not in any way temporary or intermittent.[38] With regard to the length of stay, there is no prescribed minimum time necessary, neither in international PIL instruments nor in CJEU jurisprudence. In practice, it can range from immediately (e.g. in the case of an adult who has changed their place of residence post-divorce or the family which moved abroad for an indefinite period) (Wilderspin, 2023:66)[39] to some time (e.g. if the person is moving back and forth before settling in one place). Generally, the more open-ended the move is, habitual residence can be faster acquired (Pfeieffer, 2024:67).

In relation to the social and family integration of the child, apart from the duration, the other factors which point to stability may be „regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State".[40] In case of a very young child (an infant) some of these elements will be replaced with the family environment of the parent on whom the child is dependant.[41] However,

[37] C-644/20 *W.J. v. L.J. and J.J.*, ECLI:EU:C:2022:37 (para. 78).

[38] C-523/07 *A*, ECLI:EU:C:2009:225 (para. 38); C-497/10 PPU *Mercredi*, ECLI:EU:C:2010:829 (para. 49); C-376/14 PPU C. v. M., ECLI:EU:C:2014:2268 (para. 51); C-499/15 PPU *W.,V. v X.*, ECLI:EU:C:2017:118 (para. 60); C-111/17 PPU *OL v PQ*, ECLI:EU:C:2017:436 (para. 43); C-512/17 *HR*, ECLI:EU:C:2018:513 (para. 41); C-393/18 PPU *UD v XB*, ECLI:EU:C:2018:835 (para. 50).

[39] See also: C-289/20 *IB v. FA*, ECLI:EU:C:2021:955 (para. 39).

[40] C-523/07 *A*, ECLI:EU:C:2009:225 (para. 39). Elements which may not be decisive are: „the stays which the parent who, in practice, has custody of the child has spent in the past with that child in the territory of that parent's Member State of origin in the context of leave periods or holidays; the origins of the parent in question, the cultural ties which the child has within that Member State as a result, and the parent's relationships with family residing in that Member State; and any intention the parent has of settling in that Member State with the child in the future." - C-512/17 *HR*, ECLI:EU:C:2018:513 (operative part of the Judgment).

[41] C-497/10 PPU *Mercredi*, ECLI:EU:C:2010:829 (paras. 53-55).

these elements (mother's nationality and her residence prior to the marriage) only apply to the determination of the habitual residence of infants.[42]

The role of intention to reside and socially integrate in a certain State, although subsidiary, may be the trickiest part to determine. According to the CJEU jurisprudence this is also an indispensable element of the habitual residence. However, in itself it is not sufficient.[43] Consequently, in relation to children, the parents' intention cannot in itself be decisive for determining the child's habitual residence …, but only an indicator that complements the array of other consensual elements,[44] first and foremost, physical presence in that State. The weight given to parental intent may vary, since it will be assessed in each individual case.[45] In any case, this intention of the parents has to be substantiated by some tangible steps, like the lease or purchase of accommodation.[46]

Following the CJEU's case-law in relation to children, it becomes obvious that the CJEU aims at establishing a uniform interpretation of habitual residence of the child,[47] based on objective (integration) and subjective (parental intention) criteria.

4.2 Habitual residence of the adult

4.2.1 In civil and commercial matters

[42] C-501/20 *MPA v. LCDNMT*, ECLI:EU:C:2022:619 (paras. 72-74, 76-78).

[43] C-512/17 *HR*, ECLI:EU:C:2018:513 (para. 46, 61-65).

[44] C-111/17 PPU *OL v PQ*, ECLI:EU:C:2017:436 (paras. 50-52); C-512/17 *HR*, ECLI:EU:C:2018:513 (para. 60); C-393/18 PPU *UD v XB*, ECLI:EU:C:2018:835 (para. 62).

[45] According to the CJEU jurisprudence, parental intent will be given more weight in case of a child's very young age than in case of older children. Thus, in C-532/907 *A* and C-111/17 PPU *OL v. PQ*, it was required that the parents' intention be accompanied by some tangible steps, while in C-497/10 PPU Mercredi, due to the child's young age, greater importance was given solely to parental intent.

[46] C-497/10 PPU *Mercredi*, ECLI:EU:C:2010:829 (para. 53-55); C-111/17 PPU *OL v PQ*, ECLI:EU:C:2017:436 (para. 43).

[47] C-376/14 PPU C. v. M., ECLI:EU:C:2014:2268 (para. 54); C-111/17 PPU *OL v PQ*, ECLI:EU:C:2017:436 (para. 41) - „.. the meaning of the concept of „habitual residence" in Regulation 2201/2003 must be uniform. …"

In civil and commercial matters, the content of habitual residence is defined within the Rome I[48] and Rome II[49] Regulations. In Rome I Regulation it operates as a subsidiary connecting factor in cases in which the parties have not agreed on the applicable law, while in the Rome II Regulation it is used only in some of the matters covered by the Regulation. According to art. 19 para 1 of the Rome I Regulation, as well as art. 23 of the Rome II Regulation, „habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration. Habitual residence of a natural person acting in the course of his business activity shall be his or her principal place of business." Also, the habitual residence of a branch, agency, or any other establishment is the place where a branch, agency, or any other establishment is located. This is a sort of exception from the general rule that habitual residence should remain undefined; however, it does not affect its factual foundation.

Namely, there is only a limited number of relevant facts for the determination of habitual residence in civil and commercial matters - either a place of central administration/principal place of business or a place where a branch, agency, or any other establishment is located. Also, the fact that incorporation/business activity is happening in a particular country encompasses both elements relevant for the determination of habitual residence, objective (factual) and subjective (the intention of the founder to run its business from/in that country). Consequently, in the interests of legal certainty, the legislator has chosen to give a definition. Such a solution is very convenient for the competent authority since it leaves no doubt regarding the elements relevant for the determination of habitual residence in certain civil and commercial cases, and „does not require a full assessment of all circumstances of an individual case" (Hess, 2021: 531).

However, in case of a natural person acting outside of his/her business activity, e.g., consumer or employee, the determination of habitual residence is subject to the „factual proximity and intention" criteria. Taking into account the importance of contextual interpretation, it may be challenging, e.g., in consumer cases (where the

[48] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4. 7. 2008.
[49] Regulation (EC) No 846/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31. 7. 2007.

Regulation itself places the emphasis on economic as well as protective criteria) (Ragno, 2009:154; de Lima Pinheiro, 2017: 804), or in the case of concurrent residencies.

4.2.2 In family and maintenance matters

According to the Borrás Report (Borrás, 1998: 30-32): „The (jurisdictional) grounds adopted (in matrimonial matters) are based on the principle of a genuine connection between the person and a Member State." That explains the wide use of the habitual residence criterion. However, until recently,[50] the CJEU has given no guidance for the determination of habitual residence of adults within the meaning of the BU II ter Regulation[51] (or its predecessor, BU II bis) or the Rome III Regulation.[52] Its interpretation of the notion in another fields (Ricci, 2020: 162),[53] which considers that habitual residence refers to the State „where the habitual centre of person's interests were to be found" (Ricci, 2020:162), although not entirely applicable to family matters, has led to the crystallization of the common denominators,[54] which are: requirement of physical presence, length of residence, integration in social environment and intention (*animus manendi*) (Kruger, 2020: 123-124).[55] However,

[50] See: C-80/19 *E.E. v. K.-D.E.*, ECLI:EU:C:2020:569; C-289/20 *IB v. FA*, ECLI:EU:C:2021:955; C-501/20 *MPA v. LCDNMT*, ECLI:EU:C:2022:619; C-61/24 *DL v. PQ*, ECLI:EU:C:2025:197.

[51] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), OJ L 178, 2. 7. 2019.

[52] 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, OJ L 343, 29. 12. 2010.

[53] Namely: fiscal matters, social security and Staff Regulation.

[54] See: C-13/73 *Angenieux v. Hakenberg*, ECLI:EU:C:1973:92 (pp. 949-951); C-76/76 *di Paolo v. Office nationale*, ECLI:EU:C:1977:32 (para. 22); C-284/87 *Schäeflein v. Commission*, ECLI:EU:C:1988:414 (paras. 9-14); C-297/89 *Rigsadvokaten v. Ryborg*, ECLI:EU:C:1991:160 (para. 19); C-102/91 *Knoch v. Bundesanstalt für Arbeit*, ECLI:EUI:C:1992:303 (paras. 21 and 23); C-452/93 *Fernández v. Commission*, ECLI:EU:C:1994:332 (para 22); C-90/97 *Swaddling v. Adjudication Officer*, ECLI:EU:C:1999:96 (para. 29); C-169/03 *Wallentin v. Riksskatteverket*, ECLI:EU:C:2004:403 (para. 15); C-329/05 *Finanzamt Dinslaken v. Meindl*, ECLI:EU:C:2007:57 (para. 23).

[55] These elements were further elaborated by national courts, which for adults have considered also: „employment, bank accounts, loans, owning immovable property, owning driver's licence, where their children attend school, where the children live, the receipt of important mail such as bank statements, the receipt of large amounts of mail, where their children received medical care, personal and

since the interpretation of the habitual residence is contextual, the significance of these (and other) elements varies depending on the context of the case.

In the *IB v. FA* case,[56] the CJEU was dealing with the question which resurfaces every so often, and not only in family law matters – whether it is possible to have two habitual residences (Boiché, 2022: 1339-1343). The CJEU justified its decision by referring to the: literal interpretation (Art. 3(1) (a) of the Brussels II bis refers to habitual residence in the singular) (paras. 37 and 40); existing case law (adjective „habitual" indicates that the facts of the case must demonstrate the intention of the person to establish the permanent centre of their interest in a certain Member State)(para. 41); need for legal certainty and predictability of jurisdictional rules (para. 44) not only in family matters but also in relation to maintenance and matrimonial property matters (para. 48). Also, the CJEU dismissed the claim that it is possible to draw a parallel between the decision in the *Hadadi* case[57] and the facts of the present case.[58] Based on these arguments, in the Court's view, it is crystal clear that a spouse, who divides their time between two Member States, may only have one habitual residence. The contrary solution would jeopardise the balance achieved between free movement of persons and legal certainty. Also, in child abduction cases it would make it impossible to determine whether one of the parents abducted a child (Kruger, 2020:131). Based on earlier CJEU's judgment in succession matters,[59] the judgment in *IB* case with regard to the impossibility of having two habitual residences was no surprise. However, it is interesting to see what criteria has the

administrative relations, where they paid social assistance contributions, owning a company, looking for a job," etc..

[56] C-289/20 *IB v. FA*, ECLI:EU:C:2021:955. The case involves a French husband and Irish wife, who lived in Ireland with their three grown up children. Husband started the divorce proceedings in France, but the court considered that he had no habitual residence in France, since his employment in France was not sufficient to demonstrate his intention to establish his habitual residence there. In July 2019, he lodged an appeal claiming that he worked (since May 2017, on stable and permanent basis) in France during the week, he had an apartment in there, he was registered with social security there and he paid his taxes in France. His wife claimed that it was never envisaged that the family should settle in France and that he continued to travel to family home in Ireland and led the same life there until the end of 2018 when they began to contemplate divorce. In doubt whether it is possible to have two habitual residences Paris Court of Appeal referred the question to the CJEU.

[57] C-168/08 *Hadadi*, ECLI:EU:C:2009:474 (para 56).

[58] C-289/20 *IB v. FA*, ECLI:EU:C:2021:955 (paras. 49 and 50).

[59] C-80/19 *E.E.*, ECLI:EU:C:2020:569.

CJEU envisaged as relevant for the determination of habitual residence of the adult. It begins with the statement that the criteria relevant for the determination of the child's habitual residence cannot be conflated with the criteria for the determination of the adult's habitual residence (para. 54). Thus, „a spouse may, as a result of a marital crisis, decide to leave the couple's former habitual residence in order to settle in another Member State and apply there for the dissolution of matrimonial ties …. while remaining entirely free to remain some social and family ties in the Member State of the couple's former habitual residence" (para. 55). Also, „… the environment of an adult is necessarily more varied, composed of a significantly wider range of activities and diverse interests, concerning, *inter alia*, professional, sociocultural and financial matters in addition to private and family matters. In that regard, it cannot be required that those interests be focused on the territory of a single Member State … to facilitate applications for the dissolution of matrimonial ties …" (para. 56). Thus, „a spouse …. must necessarily have transferred his or her habitual residence to the territory of a Member State and, therefore, first, have manifested an intention to establish the habitual centre of his or her interests in that other Member State and, secondly, have demonstrated that his or her presence in the territory of that Member State shows a sufficient degree of stability" (para. 58). What is unexpected in this case is the fact that the CJEU seemed to give preference to the place of one's professional activity, which is a departure from its previous judgments.

In the *MPA v. LCDNMT* case,[60] the CJEU was asked to consider the determination of the habitual residence of spouses (EU contract staff members in a third country,

[60] C-501/20 *MPA v. LCDNMT*, ECLI:EU:C:2022:619. The case involves the mother of Spanish nationality, the father of Portuguese nationality, and children of dual Spanish and Portuguese nationality, born in Spain. The couple married at the Spanish Embassy in Guinea–Bissau in 2010 and lived there, with their children, until 2015, when they moved to Togo. In Togo, spouses were living as part of an EU Delegation, i.e., EU contract staff members who are employed for an indefinite period of time. Thus, they all enjoyed diplomatic status in Togo. In accordance with art. 40 of the Spanish Civil Code, during the diplomatic assignment, the mother and the children remain habitually resident in Spain. The *de facto* separation took place in July 2018, since when the mother and children continued to live in their family home in Togo, while the father has lived in a hotel in that State. In March 2019, the mother brought „divorce proceedings, together with applications for the determination of the regime and arrangements for exercising custody and parental responsibility in respect of the couple's minor children, the maintenance payments for them and the grant of enjoyment of the family home in Togo", before the Spanish court. She relied on art. 40 of the Spanish Civil Code and the reports stating

who are employed for an indefinite period of time) and their children, not only in family but also in maintenance matters. With regard to marital dispute, the CJEU expressly reminded „that concept has to be given an autonomous and uniform interpretation, taking into account the context of the provisions referring to that concept and the objectives of the Regulation 2201/2003" (para.43). The CJEU particularly stressed the two factors, the intention of the person concerned to establish the habitual centre of his or her interests in the particular place and a presence which is sufficiently stable in the Member State concerned (para. 44), i.e. implies a sufficient degree of stability, to the exclusion of a temporary or occasional presence (para. 49). In relation to intention, the CJEU reiterated that it has to be substantiated through the facts of the case. In this particular case, the spouses deliberately requested to be placed in Togo, they spent several years outside of Spain, and despite their separation neither of the spouses has left Togo. Thus, the facts are not supporting the (presumed) intent, and (eventual) future intent has no influence on the determination of the habitual residence of the adult (para. 59). With regard to the second tier of the habitual residence determination („the center of one's interests in the particular place"), in light of the perennial physical absence from the territory of Spain, the periods of leave or birth of children (which are considered occasional and temporary interruptions in one's everyday life) do not refer to a sufficiently stable presence in the territory of Spain (paras. 57-59). Although seemingly just following the established case-law, there are some intricacies in this judgment. Comparing the language in relation to family matters with the language in relation to maintenance matters it is close but not the same. In maintenance matters, the CJEU refers to the „usual centre of the creditor's life" (para. 53), while in family matters refers to the „habitual center of one's interests" (para. 44). In our view, the CJEU wanted to draw attention to the importance of the relationship of the maintenance creditor's residence and „the existence and amount of the maintenance obligation", which might be relevant determinant in case of concurrent (habitual)

„the lack of adequate and continuous training of judges and a persistent climate of impunity for human rights violations" of the Togolese courts. However, the father claimed that their work in the EU Delegation in Togo as members of a contract staff is regulated by the Protocol on Privileges and Immunities (and not by the Vienna Convention) and that it does not imply having a diplomatic passport but barely a safe conduct pass or travel document. Also, the Protocol neither precludes the jurisdiction of the Togolese courts nor makes it necessary to apply *forum necessitatis*. In doubt with regard to the determination of habitual residence of the mother (and children) Provincial Court, Barcelona, Spain, referred the question to the CJEU.

residencies of the maintenance creditor; and not to depart from the CJEU case law in relation to family matters (para. 51).[61] Although, following this approach may lead to the determination of different habitual residences in maintenance compared to family matters.

In the *Lindenbaumer* (*DL v. PQ)* case,[62] the CJEU was asked for clarification in relation to the determination of a habitual residence of a diplomat, in the context of the Rome III Regulation.[63] In its judgement the CJEU first referred to its previous case law,[64] pointing out the need for autonomous and uniform interpretation (para. 39); two-tier determination (intention and a sufficiently stable presence) (para. 42); the need for unitary conception of the concept of habitual residence (para. 44) and the need for legal certainty (para. 47). Only then the CJEU emphasised that it is essentially a question of fact (para. 48). In view of the CJEU, „since diplomatic agents are generally subject to principle of rotation, the duration of their stay in the receiving State may be perceived as *prima faciae* temporary, even though it may sometimes be of a significant length in practice" (para, 59). Social integration may

[61] See also: C-644/20 *W.J. v. L.J. and J.J.*, ECLI:EU:C:2022:37 (paras. 62-67). „… the maintenance creditor will use his or her maintenance in order to live, it is necessary to appreciate the concrete problem arising in connection with a concrete society: that in which the maintenance creditor lives and will live" (para. 65).

[62] C-61/24 *DL v. PQ*, ECLI:EU:C:2025:197. The case involves German nationals, married in 1989, with two grown up children. For more than 10 years, they lived in a rented accommodation in Germany, which they considered to be their family home. In June 2017, the couple declared that they were leaving their domicile in Germany, and they moved to Sweden, where the husband was employed at the German embassy. They kept their German home with the view of returning to Germany after the husband's posting, but in September 2019, they moved to Russia to accommodation located in the compound of the German embassy. Both spouses hold diplomatic passports. In January 2020, the wife traveled to Germany due to medical reasons, but she returned to Russia in February. At the end of May 2021, the couple separated, and the wife returned to Germany while the husband remained in Russia. In July 2021, the husband initiated divorce proceedings in Germany, which the wife contested, as the mandatory period required by German law had not yet elapsed. The husband appealed, and the German regional court divorced the marriage in accordance with Russian substantive law, as it assumed that the last common habitual residence in Moscow did not end until the wife returned to Germany in May 2021 (less than one year before the court was first seized). Then, the wife appealed to the German Federal Court, seeking a divorce under German substantive law. In doubt regarding habitual residence, the German Federal Court referred the question to the CJEU.

[63] 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, OJ L 343, 20. 12. 2010.

[64] C-61/24 *DL v. PQ*, ECLI:EU:C:2025:197.

„give concrete expression to the subjective element relating to the intention of the persons concerned to establish the habitual centre of their interests in a particular place" (para. 61), e.g. „ where the diplomatic agent and his or her spouse privately acquire accommodation in the receiving State in order to settle there together after the end of his or her posting" (para. 56) or have family ties either in the sending State or the receiving State (para. 62). Consequently, „the status of diplomatic agent of one of the spouses and his or her assignment to a post in the receiving State preclude, in principle, the habitual residence of the spouses from being considered to be established in that State, unless it is determined, following an overall assessment of all the circumstances specific to the case, including, in particular, the duration of the spouses physical presence and their social and family integration in that State that the spouses intend to establish in that State the habitual centre of their interests and that there is a sufficiently stable presence in the territory of that State" (para. 67).

4.2.3 In succession matters

In succession matters, habitual residence is the basic criterion for the determination of general jurisdiction and also a connecting factor for the determination of the applicable law. Due to the continuity principle used in the interpretation of habitual residence in other EU instruments, when deciding on someone's habitual residence, national courts may rely on the criteria and guidelines provided by the existing CJEU jurisprudence in PIL cases. What it means is the application of the three indisputable principles: the Euroautonomous interpretation of the notion of habitual residence, its existence at the time of the creation of the relevant legal relationship, and its factual foundation (Bouček, 2015: 899). *In concreto*, it means determination of the „centre of person's life" (Bonomi and Wautelet, 2012: 174) or „centre of his/her interests",[65] based on objective elements (such as physical presence, length of residence, integration in the social and family environments) and subjective element (*animus manendi*). However, in recitals 23 and 24 of the Succession Regulation[66] there are some additional instructions for the competent authority.

[65] Joined cases C-509/09 and C-161/10 *eDate Advertising*, ECLI:EU:C:2011:685 (para. 49).

[66] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27. 7. 2012.

„Recital 23 proposes method, content, and purpose of the procedure in order to determine habitual residence according to the Regulation.“ (Re, 2020: 139). Generally, „the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death (*method*), taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence (*content*). The habitual residence thus determined should reveal a close and stable connection with the State concerned, taking into account the specific aims of the Regulation (*purpose*)“.[67] Thus, the determination of the habitual residence in succession matters cannot be carried out *via* an automatic transposition of the CJEU case law on the same concept (Re, 2020: 137). It has to be established „having regard to the context of the provision and the objective pursued by the legislation in question“.[68] The determination has to include personal, family, professional and economic interests. Generally, personal and family interests are a better indicator of someone's center of social relations than professional or economic interests (Re, 2020: 139).

„In exceptional cases, the authority dealing with the succession may … arrive at the conclusion that the law applicable to the succession should not be the law of the State of the habitual residence of the deceased but rather the law of the State with which the deceased was manifestly more closely connected. There are number of situations that this may concern: situation in which the deceased maintained the close and stable connection with their State of origin, despite going to live and work abroad for professional and/or economic reasons; or situation in which the deceased alternated between the two States without settling in any of them permanently (Kunda et al., 2020:108-109) or situation in which the deceased has no successors nor property in that State (Zgrabljić Rotar and Hoško, 2020:219). However, this should not be resorted to as a subsidiary connecting factor whenever the determination of the habitual residence of the deceased at the time of death proves complex.“[69]

[67] Regulation (EU) No 650/2012, recital 23.
[68] C-523/07 *A*, ECLI:EU:C:2009:225, para. 34.
[69] Regulation (EU) No 650/2012, recital 24.

The CJEU's jurisprudence has so far confirmed the recitals.[70] The last habitual residence of the deceased at the time of his or her death, within the meaning of the Succession Regulation, must be established by the authority dealing with the succession in only one of … Member States, since Regulation itself implicitly excludes the option of two (or more) habitual residencies (para. 45). Namely, Regulation envisages adjudication of succession as a whole, which would not be possible in case of more than one habitual residence of the deceased.[71] When determining the habitual residence of the deceased, the authority must take into account „all of the circumstances of the life of the deceased during the years preceding his or her death and at the time of his or her death, taking into account all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection between the succession and the Member State concerned." (para. 38). In other words, recital 23 should be followed. Thus, „the element of stability relating to the deceased's physical presence at the time of death must be sought in the reasons (subjective element) and the conditions (objective element) of his or her stay showing a close and stable link between the succession and the given State." (para. 37). In the absence of stability, competent authority „should refer to the deceased's nationality (personal factor) and/or assets (economic factor)" (para. 39) as ancillary determiners of habitual residence (para. 57). As in recital 24, recourse to „manifestly closest connection" is left to the discretion of competent authority but it should not

[70] Last judgment being the *E.E.* case - C-80/19 *E.E.*, ECLI:EU:C:2020:569. The case involves, *inter alia*, the determination of the habitual residence of a Lithuanian woman who married a German national and changed her residence, in order to live with her son in her husband's home in Germany. In 2013, in Lithuania, she drew a will before a notary, in which she designated her son as the heir to her entire estate (immovable property located solely in Lithuania). In 2017, after she died, the notary refused to draw up a certificate of succession on the grounds that the habitual residence of the deceased was in Germany. Upon the son's appeal, the District Court decided that the deceased had her habitual residence in Lithuania, on the ground that the deceased had not cut ties with Lithuania. Then the notary appealed to the Regional Court, in which proceedings the deceased's son made an application, including a statement from the husband that he has no claim on the estate of the deceased and that he agrees on the jurisdiction of Lithuanian courts. In 2018, the Supreme Court of Lithuania annulled the contested decision and referred the questions to the CJEU.

[71] C-218/16 *Kubicka*, ECLI:EU:C:2017:755 (para. 57); C- 20/17 *Oberle*, ECLI:EU:C:2018:485 (paras. 53-55), C-80/19 *E.E.*, ECLI:EU:C:2020:569 (para. 41).

be misused, i.e. turned into subsidiary connecting factor whenever the determination of habitual residence of the deceased gets burdensome (para. 45). However, the CJEU has not yet identified any elements related to „manifestly closest connection".

5 Conclusion

As it can be inferred from all of the above, habitual residence is deliberately not defined in any of the statutes or Conventions, and in most of the EU Regulations, in order to prevent the rigidity associated with the alternative concepts of domicile and nationality. Some even consider it „as a conceptual counterpart of party autonomy, since both concepts represent individual mobility, habitual residence explicitly and party autonomy implicitly" (Weller and Rentsch, 2016:187). Over time, this initially purely factual concept (Beaumont and Holliday, 2021:28) evolved into a „hybrid (factual and intentional) concept". However, subjective elements in „habitual residence" determination so far play a subsidiary role, and only to the extent that they are materialized.

It is also a time-sensitive concept, a concept tolerating illegal situations, a concept referring to only one place (Pfeiffer, 2024:53-71). Yet, is it a unitary concept?!

Some national courts have reiterated the principle that the words bear the same meaning in all cases unless the statute itself provides otherwise (Rogerson, 2000:87). Easier said than done. On the other hand, the CJEU insists on consistent but also purposive interpretation. Looking at the corpus of law the CJEU refers to, it seems counterintuitive. Although the general aims of the relevant legislation may be the same (predictability, legal certainty, protection of the weaker party, etc.), the policy considerations behind it are different and require different weighing of the same facts, thus, the consistency can only go so far. And this is visible at every step (e.g. civil and commercial matters (legal certainty) vs. family matters (proximity); family matters (center of interests) vs. maintenance (center of life); maintenance (future-oriented evaluation) vs. succession (past-oriented evaluation), etc.). Even the CJEU, despite avoiding explicitly admitting any impact of policy considerations on the determination of habitual residence (as can be inferred from the case law), struggles to reconcile consistent and purposive interpretation. The principle that habitual residence (even in PIL) is a singular concept regardless of the context is therefore illusory (Rogerson, 2000:88).

Identifying one's habitual residence is not quite as straightforward as it appears at first sight (Rogerson, 2000:99). For example, in cases in which the child's physical presence in a certain State is a result of an unlawful behaviour of one parent, and the other parent is forced to remain with the child in a State in which they don't want to live in; or if it appears that the person has two habitual residences; or if the child has been born through surrogacy, which is usually in a State different than intended parents' State of habitual residence. Already at this moment, there is a question of whether parental intentions and/or parental behaviour should have more impact to the determination of a child's habitual residence. What else will appear *via facti* is hard to say.

In any case, even at this moment it is not easy being a national court trying to establish a habitual residence. There is a general uniformity, yet only limited predictability and limited legal certainty. Without the CJEU's guidance, it would end up worse than domicile or nationality. However, the concept satisfies the requirements of flexibility and proximity.

At this moment, it is very ungrateful to predict the future of habitual residence. We believe that it is here to stay. However, there are more and more complex cases in which some of the necessary requirements established by the CJEU jurisprudence are being questioned. Thus, it is the CJEU's task to find the way to further „manoeuvre "between consistency and purpose in a convincing manner.

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Povzetek članka v slovenskem jeziku (abstract in Slovene language):

Na področju mednarodnega zasebnega prava gre dandanes zaznati, da je običajno prebivališče vseprisotno. Skoraj ne glede na kontekst se zdi, da ni bolj atraktivnega povezovalnega dejavnika kot običajno prebivališče. To vzbuja vprašanje, kaj točno je tako atraktivno. Je to enostavnost določanja običajnega prebivališča? Ali morda pravna varnost? Enotnost? Prilagodljivost? Vsa ta vprašanja so upravičena in zahtevajo odgovore, da bi lahko razumeli predmetni pojem ter njegove prednosti in slabosti. Zato ta članek ponuja pregled razvoja koncepta, tako v teoriji kot v sodni praksi, z namenom utrditi obstoječe znanje in poiskati odgovore na odprta vprašanja.