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THE PERSPECTIVES OF HARMONISATION OF FAMILY LAW IN EUROPE: THE CHALLENGES FACED BY THE COMMISSION ON EUROPEAN FAMILY LAW

Master Thesis

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CONTENT

INTRODUCTION

Family – one of the most important constituent elements of the society nowadays faces structural changes. Social researches reveal that the modes of the family evolve in response to the social changes. Social reality shows that, nowadays, more and more relationships are based on cohabitation. Very often marriage or cohabitation are being established between individuals from different Member States of the European Union (hereinafter – the EU), or couples from the same country move to work and live in another Member State. Comparative studies of family law reveal that, because of cultural and political differences, social and economic factors, definition of family and the rules applicable in the field of family law slightly differ across Europe. More liberal countries as a family recognize not only a relationship based on marriage, but also cohabitation, some of them even a relationship of persons of the same sex, while other, more conservative countries, accept as a family only relationship of a man and a woman based on marriage. Differs not only the concept of family, but also the rules applicable to divorce, parental responsibility, matrimonial property, etc. Cultural/political differences which result in different set of rules very often cause the problems in ensuring the rights of family members, as a person who is considered a family member in one country, his or her status and deriving rights, or the procedure completed in one country, may not be recognized in another. This might also become a serious obstacle for the free movement of persons within the European Union. It was realized that in order to avoid this, it is necessary to bring the systems more close to each other, eliminating the basic differences between the countries of Europe in the realm of family law. Therefore, the idea of harmonisation of substantive family law, in response to complexity in this field, arose. In 2001 the Commission on European Family Law (hereinafter – CEFL) was established, which deals solely with family matters, trying to establish the means which would be capable to foster harmonisation of substantive family law in Europe. The CEFL established several sets of non – binding Principles on certain family matters which are expected to gain the harmonising effect in Europe. However, even if the harmonisation process was initiated, despite the efforts of the CEFL, harmonisation of substantive family law meets some challenges, which might endanger the success of the process. This raises the questions whether the non – binding means established by the CEFL under such circumstances are capable to foster the process; and whether desirable effects of harmonisation in this field can be achieved? This is the main **issue** raised in this legal research. In order to answer these questions it is vital to analyze the reasons why family law should be harmonized, which

organizations, institutions or bodies have the competence to harmonise substantive family law in Europe, which peculiarities distinquishe the CEFL from these bodies and what are the main challenges which the CEFL faces trying to foster the harmonisation of substantive family law in Europe.

The **subject** of legal research: the effectiveness of the Principles established by CEFL as the means to foster the harmonisation of substantive family law in Europe.

Since its foundation in 2001 the CEFL has adopted three sets of Principles on family law. However, whether the Principles have received the desirable effect is in doubt. This proves that the legal research on this topic is necessary and may be considered as **actual.** Social changes reveal that reacting to the situation it is necessary to modify the law, establishing common standards. In order to evaluate whether the Principles adopted by the CEFL are capable to gain the harmonising effect on substantive family law in Europe, the challenges which are faced by CEFL while drafting the Principles and after their establishment must be thoroughly examined. Once the challenges are determined, the ways of tackling them can be considered.

Scientific novelty and the level of previous examination: harmonisation of family law in Europe - its effects, strengths, weaknesses and development - was widely discussed by the scholars. However, the challenges that CEFL is facing trying to foster the harmonisation of substantive family law in Europe, and difficulties which complicate the process have always been lacking proper attention, therefore need to be thoroughly examined. The empirical method of examination which has not been used before in this field, but is invoked in this legal research, shall contribute to the identifation of challenges which can be useful in trying to find the solutions.

The sources focused on the harmonisation of family law can be divided into several groups:

Scientific articles: main characteristic – thorough examination of legal acts, deep analysis of its social, economic, political and legal context. Harmonisation of family law in Europe, referring to some aspects of CEFL work was analyzed in depth by scholars: *D. Bradley, D. Martiny, M. R. Marella and W. Pintens*. Of particular importance are the publications of the scholars *M.Antokolskaia* who focuses on the development of harmonisation of family law in Europe (M. Antokolskaia "Harmonisation of Family Law in Europe: A Historical Perspective") and *K. Boele - Woelki* who, while examining whether harmonisation of family law in Europe is necessary and desirable, tries to envisage its perspectives (Katharina Boele – Woelki "Perspectives for the Unification and Harmonisation of Family Law in Europe). However, in most of the legal studies, the analysis is focused on the development and the effects of harmonisation of family law in

Europe, while the challenges of CEFL efforts to foster the substantive family law in Europe and obstacles are left without proper examination.

Social and legal research. The research is useful in order to understand the purpose of legal acts, their context and application. It helps to understand why the family law in Europe needs to be harmonised, and what reacting to the social changes needs to be done in certain fields of the family law (e.g. *Eurobarometer Analytical report on Family law*) or how certain provisions of law have to be interpreted and applied after their adoption (e.g. *Communication from the Commission to the European Parliament andthe Council on guidance for application of Directive 2003/86/EC on the right to family reunification*). However, it is concentrated more on the analysis of the need to harmonise the family law in Europe or the interpretation of the provisions of legal acts than on the obstacles of the harmonisation process, and considerations of how to neutralize them.

The importance of legal research: the analysis made examining the challenges will identify the main obstacles for harmonisation of substantive family law in Europe which CEFL faces, which might be a useful material considering the ways to neutralize them. The empirical research will enable to evaluate whether the Principles established by the CEFL being non – binding means, facing the challenges, are capable to gain the harmonizing effect in practice (the case of the Republic of Lithuania) and what needs to be done in order that project of CEFL would succeed. The present research may offer a look at this process from a different prospective, and promote the change of the skeptics' view about harmonisation and the the role of CEFL in the process. This may facilitate the legislative changes in certain Member States. The results of this analysis might serve as a useful material for other research that will continue the study in this field.

The **goal** of this Master thesis – in the light of the institutions, organizations and bodies acting at the European level which have the competence to foster the harmonisation of substantive family law in Europe, to evaluate the progressiveness of the CEFL assessing whether the Principles established by the CEFL, while facing the various challenges are capable to gain the harmonising effect on substantive family law in Europe.

In order to achieve this goal, legal research has set the following **tasks**:

1. Discuss the importance of the harmonisation of family law.

2. Identify the organizations, bodies which have the competence in Europe to harmonise substantive family law.

3. Disclose the particularities of the CEFL which confirms its uniqueness.

4. Define the challenges which the CEFL faces while trying to foster the harmonisation of substantive family law in Europe.

5. Taking into account the challenges which are faced, evaluate the effectiveness of the Principles established by the CEFL aiming to foster the harmonisation of substantive family law in Europe.

Methology of legal research: While making the research the following methods have been used: descriptive, historical and linguistic method, comparative method, systemic analysis method and method of summarizing.

Analitic method is used to identify the characteristics of a family as a social institution and to describe the main features and the legal nature of the basic subjects of this Master thesis, such as family and harmonisation.

Historical method is used to show how the EU regulation on certain family law aspects or the case law of European Court of Justice or European Court of Human Rights evolved.

Linguistic method is applied to define certain notions: e.g. family, harmonisation, etc.

Comparative method is invoked to compare the regulation of the certain family matters in different European countries.

Systemic analysis method is used to analyze the family law regulation under different legal acts with a different legal hierarchy.

Method of summarizing is applied to summarize the analysis elaborated and to make the conclusions.

Empirical method is invoked conducting the reasearch on the influence of the European Principles established by CEFL within the courts of the Republic of Lithuania while using the survey.

The structure of the legal research: In order to make the analysis consistent and to facilitate the reading for interested parties, the present research is divided into several parts.

As the research can be thorough only when its main notions are determined, the first paragraph of the research is focused on the considerations of the basic notions - family concept, family law, harmonisation of law and the need to harmonise substantive family law in Europe.

The second and part of research is concentrated on the analysis of the competence of organizations, institutions and bodies which take the action at the European level trying to foster harmonisation of substantive family law, particular attention giving to the CEFL activities.

The third and the fourth parts discuss the main challenges which CEFL faces which hinder the process, considering whether these obstacles can reduce the effectiveness of the Principles established by the CEFL which aim to foster the harmonisation of substantive family law in Europe.

The final part summarizes the results of the survey whose main purpose is to evaluate whether the Principles established by the CEFL receive the harmonising effect within the courts of the Republic of Lithuania while examining the family cases.

Hypothesis: Despite the progressiveness of the CEFL, considering the non – binding nature of the Principles adopted by it and other challenges, they have a limited capacity to bring the harmonising effect on substantive family law in Europe.

1. MAJOR CONCEPTS

The research on the topic may be thorough only when the meaning of the basic notions is disclosed. This research with the focus on harmonisation of family law in Europe is not an exception. In order to analyze the complex process of harmonisation in the field of family law, to understand its legal effects, the attention to the fundamental notions, which - while taking into consideration the field of research – are the notions of family, family law and harmonisation must be drawn first.

1.1. The concept of family under European law

Family as a social institution has been the object of analysis of various scientific researches. Because of its specific nature and importance for the development of society it has been the inspiration and interest of research of sociology, psychology, demographics, economy and other sciences. First sources which gave special attention to family in the organization of the State reach the Ancient times. Aristotle believed that the progression of human beings comes from the family, which he described as a special social unit, stating that the state is nothing more than the natural end of the human beings – "<...> it starts in family groups which form the villages which finally form the state"[1].

Even if the structure of family evolved and is not so hierarchical and patriarchal as it was in Ancient times, family is still considered as a social unit which is the pillar of the society. Therefore, every State gives particular attention to the regulation of family matters. However, some important changes in the last centuries occurred. "During the 1950s and 1960s, marriage was almost universal

[1] Jowett, M. A., The Politics of Aristotle, Oxford University Press Warehouse, vol. II, 1885, p. 6, 9.

with most couples marrying at a young age"[2]. As a result, trying to define common family characteristics in the middle of twentieth century, marriage was distinguished as one of the most important family characteristics. Famous American sociologist Rose Laub Coser, who made important contributions to the field of sociology of family (1964), notion of the family linked to the marriage, defining family as "unit, which consists of husband, wife, and children born in their wedlock (though other relatives may find their place close to this nuclear group), united by moral, legal, economic, religious, and social rights and obligations (including sexual rights and prohibitions as well as such socially patterned feelings as love, attraction, piety, and awe)"[3]. However, in the last centuries the concept of family has gone through the transformation. The scholars T. Sobotka and L. Toulemon states that relationships have undergone huge change over the past decades: the marriage rates have decreased, divorce rates have risen, and an increasing number of couples live together without being married[4]. According to Eurostat information: "The proportion of live births outside marriage increased across the EU-28 over recent decades, reflecting a change in the pattern of traditional family formation, <...>, In the EU-28 as a whole 39.3 % of children were born outside marriage"[5]. Reacting to the social changes, contemporary sociologists do not link the concept of family only with marriage as the only basis to establish family relations. Deliberating whether the relationship falls under the scope of family concept, the attention of sociologists is much more concentrated to the content of the relationship, - than to its formal form, taking into consideration characteristics such as: living together, undertaking joint activities, economic cooperation and reproduction[6].

Family as a social unit carries out special mission within the society, therefore the regulation of family matters receives particular attention. Exceptional focus to the family matters is given in the most important international as well as European legal acts concerning human rights protection and the most significant legal acts of each State – national Constitutions. According to UN Declaration of human rights, "Family is the natural and fundamental group unit of society and is

[2] Kiernan, K., The rise of cohabitation and childbearing outside marriage in Western Europe, Oxford Journals, International Journal of Law, Policy and the Family, volume 15(1), 2001, p. 5.

[3] Rose Laub Coser, The family: its structure and functions, in Families and Society: Classic and contemporary readings, edited by S. Coltrane, Belmont, CA, University of California, 2004, p. 15.

[4] Sobotka, T., Toulemon, L., Changing family and partnership behaviour: Common trends and persistent diversity across Europe, Demographic Research, volume 19 (6), 2008, p. 92.

[5] Eurostat information, retrieved from European Commission website 20.10.2014: <http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Marriage_and_divorce_statistics>

[6] Anastasiu, I, The social functions of the family, Academic Journal, Euromentor, vol. 3(2), 2012, p. 23.

entitled to protection by society and the State"[7]. In Charter of Fundamental Rights of the European Union it is set that "Family shall enjoy legal, economic and social protection"[8]. European Social Charter underlines that "Family as a fundamental unit of society has the right to appropriate social, legal and economic protection to ensure its full development. With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Contracting Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married, and other appropriate means"[9]. National Constitutions also draw special attention to the family institution, emphasizing the need to protect it. For instance, the Basic law for the Federal Republic of Germany underlines that "Family shall enjoy the special protection of the state"[10]. Constitution of the Republic of Poland sets that "Family shall be placed under the protection and care of the Republic of Poland. The State, in its social and economic policy, shall take into account the good of the family"[11]. In 1946 Preamble of French Constitution which by reference is incorporated to 1958 French Constitution it is stated that the "Nation shall provide the <...> family with the conditions necessary to their development"[12]. Constitution of the Republic of Lithuania is not an exception. It stipulates that the "Family shall be the basis of society and the State"[13]. It is obvious that considering the importance of the mission which family as a social institution carries out in the society, special attention to the regulation of the family matters is given in every State.

It is obvious that family institution receives special attention also at the European level. However, it could be noticed that even if family is distinguished as a special unit of the society, who is entitled to this special status is not clear, as the concept of family at European level is hardly definable. The analysis of family concept under the European law may be started with considerations about the family concept according to the human rights protection law developed by the Council of Europe and the European Court of Human Rights (hereinafter – ECtHR). The

[7] UN General Assembly Resolution 217A (III) adopting Universal Declaration of human rights, 1948.
[8] The Charter of Fundamental rights, Official journal of the European Communities C 364/1, 2000
[9] European Social Charter (revised), Strasbourg, 3.V.1996.
[10] Basic law for the Federal Republic of Germany, 1949, retrieved 20.10.2014 from: < https://www.btg-bestellservice.de/pdf/80201000.pdf>
[11] The Constitution of the Republic of Poland, 1997, retrieved 20.10.2014 from: <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>
[12] Preamble of 1946 French Constitution, retrieved 20.10.2014 from: < http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/cst3.pdf >
13 Constitution of the Republic of Lithuania, 1992, retrieved 20.10.2014 from: < http://www3.lrs.lt/home/Konstitucija/Constitution.htm>

European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – European Convention on Human Rights), which was ratified by all the Member States of the Council of Europe, gives special attention to the family. According to Article 8 of the Convention "Everyone has the right to respect for family life"[14]. However, the Convention, as most of the national Constitutions, does not provide the definition of family. As a result, ECtHR, whose main task is to oversee the implementation of the Convention in the Member States, is left to determine the concept of family under the Convention. However, analysing the ECtHR case-law, it becomes obvious that there is no common family definition for the purpose of application of the Convention, as whether the established relationship falls under the notion of family depends on each factual situation. On the other hand, ECtHR in its case-law set some guidelines determining what kind of ties may constitute a family. For instance, ECtHR emphasized that "<...> whatever else the word "family" may mean, it must at any rate include the relationship that arises from a lawful and genuine marriage"[15]. Nonetheless, the notion of family evolved. Therefore, reacting to the social changes in one of the cases the Court recognized that the notion of family may encompass also other de facto 'family' ties where the parties are living together outside the marriage[16]. Thus, it seems that ECtHR has expanded the concept of family also to cohabitation. ECtHR states that the "<...>existence or non-existence of 'family life' is essentially *a question of fact* depending upon the real existence in practice of close personal ties"[17]. This shows that ECtHR gives the priority not to the form, but to the content of the relationship and its effectiveness, therefore the concept of the family may vary depending on the situation. Nevertheless, ECtHR set some guidelines which can help to decide whether the relations constitute a family life. Considering that close personal ties are established, significant factors are whether the couple has a common household[18], whether there are elements of financial and/or psychological dependency involving more than normal emotional ties[19], the length of relationship[20], the commitment to each other by having common children[21], etc. However, even if ECtHR recognized de facto relationships under certain circumstances also constituting a family, it refused to consider that it is possible to derive from Article 8 an obligation

[14] Convention for the Protection of Human Rights and Fundamental freedoms, Rome, 4.XI.1950
[15] Abdulaziz, Cabales and Balkandali v. the United Kingdom, 94 Eur. Ct. H.R. § 62 [1985]
[16] Keegan v. Ireland, 290 Eur. Ct. H.R. § 44 [1994]
[17] Brauer v. Germany, Eur. Ct. H.R. § 30 [2009]
[18] Keegan v. Ireland, 290 Eur. Ct. H.R. § 45 [1994]
[19] Emonet and Others v. Switzerland, Eur. Ct. H.R. § 37 [2007]
[20] Quintana Zapata v. Spain, App. No. 34615/97 [1998]
[21] Kroon and Others v. the Netherlands, 297-C Eur. Ct. H.R. [1994]

of Member States to establish a status for unmarried couples analogous to the married couples[22]. The Court held that even if married couples and de facto couples should be treated the same, and different treatment has to have objective justification, as discretion in this area of Member States still remains very wide, the objective to protect traditional families might be considered as legitimate aim and the means used to achieve this aim may be considered as proportionate[23]. Thus, it seems that even if the Court accepts de facto relationships as a family, the preference is stil given to the traditional, marital families and the European countries parties of the Convention are given the discretion to decide whether to grant the status of family to the non-marital relationships. However, as regards children born outside the wedlock, the Court noted that they constitute the family together with their parents no matter if their parents are married or not, threrefore there should be no distinction between the children born inside or outside the wedlock[24]. Moreover, once a mono-parental family is founded, it constitutes a family and the respect for the family life should be granted under the Convention[25]. The ECtHR also held that the relationships between close relatives, e.g. siblings[26], grandparents and grandchildren[27], aunts/uncles and nieces/nephews[28] may also fall under the concept of family. As regards same-sex relationships, case-law of ECtHR has been dynamic. Even if liberal attitude towards stable cohabitation was taken, for some time it was refused to recognize the relationship between homosexual partners as constituting a family. It was held that "<...> despite the modern evolution of attitudes towards homosexuality, a stable homosexual relationship between two women or two men does not give rise to family life and therefore does not fall within the scope of the right to respect for family life, granting them, nevertheless, protection under the concept of "private life"[29]. However, by the decision in case *Schalk and Kopf v Austria*, the Court changed the practice and recognized that same sex relationships fall within the definition of family life[30]. Nonetheless, in the same case as regards granting the status of marriage to the relationships between the same – sex partners, ECtHR referred the matter to the competence of the Member States, emphasizing that "<...> it should be regarded as one of the evolving rigths with no established consensus, where States must enjoy a margin of

[22] Johnston and Others v. Ireland, 112 Eur. Ct. H.R. § 68 [1986]
[23] Quintana Zapata v. Spain, App. No. 34615/97 [1998]
[24] Keegan v. Ireland, 290 Eur. Ct. H.R. § 44 [1994].
[25] Marckx v. Belgium, 31 Eur. Ct. H.R. [1979]
[26] Moustaquim v. Belgium, 193 Eur. Ct. H.R. [1991]
[27] Vermeire v. Belgium, 214-C Eur. Ct. H.R. [1991]
[28] Boyle v. the United Kingdom, 282-B Eur. Ct. H.R. [1994]
[29] Röösli v. Germany, App. No. 28318/95 [1996]
[30] Schalk and Kopf v Austria Eur. Ct. H.R. 995, 95 [2010]

appreciation in the timing of introducing of legislative change"[31]. On the other hand, in *Vallianatos v. Greece* case as regards the opportunity to register the partnership for the same – sex partners, the Court emphasized that the rules which reserves the right to register the partnership exclusively to the different sex couples are discriminatory and the State which had introduced such regulation was recognized as violating the right deriving from the Convention[32]. So, case-law of ECtHR shows that reacting to the social changes, the Court has extended the scope of the family concept, recognizing that the concept of family may include not only marital relationships, biological relationships between parents and children, ties between close relatives, but also stable de facto relationships, and the relationships between the same sex couples if the ties established between these persons are sufficiently close and effective. Nonetheless, the case-law of ECtHR allows to make a conclusion that even if there are some harmonised guidelines which can help to decide whether the relationship constitutes the family, there is no common family definition established under the European human rights protection law, and family definition is reconsidered in each case taking into account the facts of the situation. Moreover, it is necessary to bear in mind that the guidelines on the family concept set by ECtHR are relevant only when the application of the European Convention on Human Rights is considered.

The tendency of absence of common notion of family could also be recognized analyzing the EU legal acts and case law of the European Court of Justice (hereinafter – ECJ). As the ultimate intention of the EU Treaties was to establish common market with free movement of goods, persons, services and capital, notion of family is mentioned only to such extent as it is related with the establishment of free market. Neither the Treaty of Maastricht, nor other amending Treaties seek to define this notion. However, with the Lisbon Treaty which came into force in 2009, the Charter of Fundamental Rights of the European Union obtained a legally binding power and the same legal value as the Treaties[33]. According to the Charter, the EU recognizes the right to respect the family life, as well. However, it is important to note that even though family rights and their special status within the society are recognized, the Charter, as well as the European Convention on Human Rights, do not set the definition of family, leaving the dilemma on who is entitled to this special protection. In Article 9 of the Charter, it is established that "The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of

[31] Ibid, § [105]
[32] Vallianatos and others v. Greece, ECHR 329, § 78 – 81 [2013]
[33] Treaty of Lisbon amending the Treaty on Europesn Union, Official Journal C 306, 2007

these rights"[34]. It seems that this provision distinguising 'marriage' and 'family' as a separate grounds emphasizes that family can be based not only on marriage and may be considered as neutral regarding the gender. However, analysing the case law of the European Court of Justice, which provides the interpretation of the EU law, there could be made a conclusion that, while developing family concept for the purpose of the Charter provisions, the ECJ gave its priority to the marital family of heterosexual partners[35]. Nonetheless, the provisions set in the Charter raise the considerations that it gives discretion for every Member State to establish its own family concept and decide on its content.

The secondary EU legislation is more detailed as regards the family definition. The scholar E, Buttigieg states: "It provides us the opportunity to understand how the political and judicial institutions of the European Union define a 'family' for the purposes of law"[36]. However, in case of the EU, the concept of family in seconadary legal acts is set mostly because of the economic purpose (free movement of persons) in order to avoid the confusions and to ensure that the person recognized as a family member in one country would be treated the same in another. For instance, Regulation 1612/68 on freedom of workers within Community (later amended by Directive 2004/38) for the purpose of the Reguation as a part of the worker family recognized: 1) Spouse, 2) Descendants under the age of 21 years or dependants over that age, 3) dependent relatives in the ascending line of the worker and his spouse[37]. The Regulation also recognized, although not identifying "other members of family who are dependant on the worker or were living under his roof in the country whence he comes"[38], however granting them lesser rights. Only the above mentioned members were entitled to be called family for the purpose of the Regulation. The ECJ in this case interpreted the notion of family strictly traditionally, linking it only with the marital status[39]. Interpreting the provisions of this Regulation in *Reed* case, the ECJ held that cohabitation, even if the relationship is stable but not based on marriage does not fall under the scope of family

[34] The Charter of Fundamental rights, Official journal C 364/1, 2000

[35]Case C-122/99 P and C-125/99 P, D. and the Kingdom of Sweden v. Council of the European Union, ECR II-1, [2001]

[36]Buttigieg, E., The definition of 'family' under EU law, p. 99, retrieved 20.10.2014 from: < http://www.um.edu.mt/europeanstudies/books/CD_CSP2/pdf/elatf-ebuttigieg.pdf >

[37]Council Regulation 1612/68 on Freedom of Movement for Workers within the Community, Article 10, Official Journal L 257 [1968]

[38] *Ibid.*

[39] Certain family notion aspects later were touched by the ECJ in regarding the surnames, e.g. *Carlos Garcia Avello v. Belgian State* Case C-148/02 [2003], *Stefan Grunkin and Dorothee Regina Paul* Case C-353/06 [2008], etc; citizenship, e.g. *Gerardo Ruiz Zambrano v Office national de l'emploi* Case C-34/09 [2011], *Shirley McCarthy v Secretary of State for the Home Department* Case C-434/09 [2011], non – discrimination in the field of employment, e.g. *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* Case C-267/06 [2008], *Jürgen Römer v Freie und Hansestadt Hamburg* Case C-147/08 [2011], etc.

definition[40]. In this case, the Court stated that a British woman, the partner of a British man whith whom she had been living together and who moved to work to the Netherlands, could not use this Regulation as a basis to claim the right to join her partner in the Netherlands[41]. So at that time the Court clearly refused to recognize cohabitation as the new form of family. The definition established in Regulation 1612/68 and the ECJ case - law shows that family concept was then linked only to the family based on the marriage of heterosexual partners.

However, the concept of family reacting to the social changes in the EU legal acts, as in the case of the European human rights protection law, evolved. The scholar E, Buttigieg noticed that the initiators of Directive 2004/38 on The Right of Union citizens and their Family Members to move and reside freely within the territory of the Member States, which replaced Regulation 1612/68 had the intention to extend the notion of family and its application, nevertheless, "<...> when faced with the opportunity to steer the Community law in a direction that would include in the family fold cohabitees and homosexual partners, the political institutions and the Member States were unable to agree on a clear-cut legislative change that woud embrace them in the 'model European family"[42]. Therefore, the definition of family laid down in the Directive only slightly differs from the one established by the previous Regulation. According to Article 2 of the Directive, the definition of the 'family member' includes not only the spouse, direct descendants who are under the age of 21 or are dependants, dependent direct relatives in the ascending line, but also "<...> the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State"[43]. So, from the family concept established by Directive 2004/38, it is obvious that it does not include cohabitation and includes registered partnership only to a limited extent – only if the legislation of the host Member State treats registered partnerships as equivalent to marriage. It means that the questions whether registered partners have to be treated the same as the spouses and recognized as a family for the purpose of the Directive; whether registered partnership can be established only between heterosexual or also between homosexual partners is left to decide for each Member State. This causes the divergence of

[40] Case 59/85, Netherlands v Reed , ECR 1283, [1986]
[41] Case 59/85, Netherlands v Reed , ECR 1283, [1986].
[42]Buttigieg, E., The definition of 'family' under EU law, p. 103, retrieved 20.10.2014 from: <http://www.um.edu.mt/europeanstudies/books/CD_CSP2/pdf/elatf-ebuttigieg.pdf>.
[43] Directive 2004/38/EC of the European Parliament and Council on the right of Union citizens and their family members to move and reside freely within the territory of the Member States, Article 2, Official Journal L 158/77, [2004] .

a legal family concept in Europe, since as the scholar A. M, Ardeleanu states "considering the various sociological, anthropological, historical and religious factors, the definition and the meaning attributed to this institution differs[44] from state to state"[45].

Similar concept of family is also set in Directive 2003/86 on The Right to Family Reunification. It recognizes as a family members the spouse and their natural or adopted minor children[46]. However, it might be considered that it expands the scope of the family notion as it recognizes that the family notion may include not only registered partnership, but also cohabitation[47]. It leaves the right for each Member State to decide whether to authorize or not the entry and the residence of unmarried partner, being a third country national, with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership[48]. As the EU does not have the competence to harmonise substantive family law, it chooses neutrality as regards the cohabitation and the civil unions. This may cause the diversity of concepts, as Member States have the freedom to establish their own concepts of family.

In conclusion, the concept of a family reacting to the social changes has gone through the transformation, and new forms of families are being accepted in Europe. However, even if the scope of the family notion has been extended, it did not lead to the establishment of a uniform family concept. The analysis shows that the content of the notion of family in different legal acts, depending on their purpose, varies. In this case the use of family notion is limited only to the scope of the application of the legal act in which it was established. The existing diversity of the family concepts within Europe allows making a conclusion that the substantial element which the family law is based on – the definition of a family - is not harmonised at the European level.

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[44] "Marriage is a legal institution recognised in all 28 EU countries; Registered partnership is recognised in 14 EU countries (Austria, Belgium, the Czech Republic, Denmark, Germany, Finland, France, Hungary, Ireland Luxembourg, Netherlands, Slovenia, Sweden and the UK); while all 14 countries allow same-sex couples to register partnerships, Belgium, France, Luxembourg and the Netherlands permit both same-sex and opposite-sex couples to register". Retrieved 20.10.2014 from European Commission website: <http://ec.europa.eu/justice/civil/family-matters/marriage/index_en.htm>

[45] Ardeleanu, A. M., Principles of European Family law regarding divorce – special view over the Romanian Civil law, Juridica, vol. 9(2), 2013, p. 51.

[46] Council Directive 2003/86 on The Right to Family Reunification, Article 4, Official Journal L251 [2003].

[47] *Ibid.*

[48] *Ibid.*

1.2. The concept of harmonisation of family law

Once the family notion at the European level was discussed, the other basic notions of the research – family law and the harmonisation need to be briefly presented.

Trying to find the definition of the family law it could be noticed that the definition of family law together with the fundamental notion of this area of law – the notion of family – has gone through the transformation. For instance, when most of the families were based on marriage, family law was defined as the field of law which includes "the laws focusing on matrimony, divorce, children, and the relationships between parents and children, and between the sexes"[49]. However, as the concept of family in most of the States has gone through the transformation, nowadays some scholars give a wider definition of family law, considering it as "the law governing the relationships between children and parents, and between adults in close emotional relationships"[50], emphasizing the importance of close emotional tie. On the other hand, no matter how wide the definition of family law based on the concept of family would be, family law covers certain areas which remained unchanged. These areas mainly include: divorce, legal separation, spousal maintenance, child support, custody, division of assets and liabilities due to divorce, adoption, termination of parental rights, paternity, child protection[51], etc. The reasearch will focus on some of the mentioned areas of family law which are intended to be harmonised at the European level.

Another notion which is also at the core of this reasearch is the notion of harmonisation. Discussing the process of harmonisation of substantive family law in Europe, in order to avoid irregularities, it is essential to clarify this term. According to the dictionary, the word "harmonization" is the derivative of the word "to harmonize" which means "to bring or to come into agreement or harmony"[52]. In the context of law, this term has a similar meaning, just it means the harmony of law which in case of the European law is ensured by bringing the legal systems of Member States closer to each other. In terms of law, harmonisation aims to reduce the gaps among different national legal systems in a certain field. However, it is emphasized by the scholars that "unlike unification which contemplates the substitution of two or more legal systems with one single system, <...>. Harmonisation seeks the effect of approximation or co-ordination of different legal provision or systems by eliminating major differences and creating minimum requirements or

[49] Krause, Harry, D. Family law in a nutshell, 3rd ed. Nutshell series, 1995, p. 7.
[50] Murphy, J., International dimensions in family law, Manchester University Press, 2005, p. 5.
[51] Family law, retrieved online 02.12.2014 from: < https://students.ucsd.edu/_files/sls/handbook/SLSHandbook-Family_Law.pdf>
[52] Oxford English dictionary online, retrieved 30.09.2014 from: <http://www.thefreedictionary.com/harmonization>

standards"[53]. It is stated that the unification of the law usually results in the application of identical rules, while harmonization, in contrast, just reduces the differences to the minimum in order to reconcile the interests of the various systems so as to avoid conflicts[54]. Harmonization of law can be classified into top-down harmonization and bottom-up harmonization[55]. The scholar M. Antokolskaia emphasizes that "<…> top-down harmonisation is always a result of deliberate efforts by a central authority. <...> In contrast to top-down harmonisation, bottom-up harmonisation can be both deliberate, stemming from purposeful human efforts, and spontaneous, resulting from a spontaneous evolutional approximation of legal systems"[56]. In both cases, it could be stated that harmonisation is the process of establishing common standards in a certain field of law, that States undertake to achieve, which leads to the reduced gap between the national legal systems.

Connecting the two above discussed notions it could be stated that harmonisation of family law is the approximation of national family laws of the European countries reducing the differences in certain selected family law fields. The legal research will concentrate on harmonisation of certain aspects of substantive family law mainly focusing on the bottom - up harmonisation undertaken by the Commission on European family law.

1.3. The need to harmonize substantive family law in Europe.

After the basic notions of the legal research were discussed, the attention can be shifted to the main subject – harmonization of the substantive family law in Europe. The analysis of family definition has shown that, due to diversity of legal acts in Europe, which not always define family notion in the same way, and a wide discretion of the Member States to preserve their own family concept, there is no common definition of a family at the European level. The fact that the only one, nevertheless the basic notion of family law is so diverse raises the question whether harmonization in the field of substantive family law is necessary in general under such circumstances. It might raise considerations that the diversity in this field of law in Europe should be rather preserved instead. Therefore, the need to harmonize substantive family law in Europe shall be considered.

[53] Kamba 23 ICLQ 485, 1974, p. 501, De Cruz, P., Comparative Law in a Changing World, 2nd ed., London, Cavendish Publishing Ltd., 1999,p. 53.
[54] Meulders – Klein, M.T., Towards a European Civil code on family law? Ends and Means. In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003, p. 106.
[55] Smits, J., The Making of European Private Law. Towards a lus Commune Europaeum as a Mixed Legal System, Intersentia, 2002, p.6.
[56] Antokolskaia, M., Harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 400.

Family law is characterized by the diversity and is considered "very heavily influenced by the culture and the tradition of national legal systems"[57], deeply rooted in the history and the system of values of each State. Therefore, the scholars discuss that "<…> discussions concerning the need for and the feasibility of the harmonization of family law is far from having reached its conclusion"[58]. As the scholar M. Antokolskaia analyzing the process of family law harmonization in Europe states, "the disagreement on this matter is grounded in the alleged unsuitability of family law for harmonization due to strong cultural and historical constraints resulting in the lack of shared values and objectives"[59]. However, this is one of the basic challenges being faced during the process of harmonization of substantive family law in Europe, which will be thoroughly discussed in the following paragraphs.

Nevertheless, despite the expressed argument against harmonization of family law in Europe, it is assumed that this challenging endeavor is desirable[60]. The scholar K.B.Woelki emphasizes that "<…> binding uniform family law for the whole EU is much too far-reaching and is neither considered to be feasible nor desirable at the present time"[61], however the factual situation and the legal problems which may arise in response to it, proves the necessity *to harmonize* substantive family law in Europe. The need to harmonize law in this field is mostly related to the conflict of law which occurs when the different regulation of the Member States on family matters collides[62]. "In a Europe that is growing together, family ties increasingly cross one or more national boundaries"[63], - states N, Dethloff. It is assumed that there are currently around 16 million international couples in the EU[64]. Increasing number of cross – border families and their situation invites to consider the need to harmonize substantive family law in Europe. It could be well illustrated analyzing the trends

[57] Council Report on the need to approximate member states` legislation in civil matters of 16th November 2001; 13017/01 justciv 129, p. 114

[58] Antokolskaia, M., Objectives and values of substantive family law, In: Objectives and Values of (Private) International Law in Family Law, edited by Martiny, D., Intersentia, 2007, p. 50.

[59] *Ibid*.

[60] Most of the scholars analyzing harmonization of substantive family law have positive attitude, see Antokolskaia.M., Would the harmonization of family law enlarge the gap between the law in the books and the law in action, 2002. Woelki.K.B. The Road towards a European family law, Electronic Journal of Comparative law, 1997., Dethloff, N., Arguments for the unification and harmonization of family law in Europe, In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003.

[61] Woelki, K.B., Comparative Research-based Drafting of Principles of European Family Law, In: Towards a European lus Commune in Legal Education and Research, edited by Faure, M., Smits, J., Shneider, H., Intersentia, 2002, p. 179.

[62] This opinion is expressed by the scholar Dethloff, N., Arguments for the unification and harmonization of family law in Europe, In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003.

[63] *Ibid*, p. 37.

[64] Family matters and successions, retrieved 21.10.2014 from European Commission website: <http://ec.europa.eu/justice/civil/family-matters/index_en.htm>

within the EU. For instance, EU allows free movement of persons within the territory of Member States. Established freedom gives the opportunity to work and study in other Member States, which causes that families are being formed between the persons from different Member States, or couples from the same country move to work in another Member State. The scholar N. Dethloff states that individual cases show that substantive differences between the national legislations within Europe may have serious negative consequences on cross – border families resulting in the breach of fundamental human rights, or in the case of EU may even form the obstacle for free movement of persons[65]. Therefore, as the mobility of the persons is increasing, "the special circumstances of these people call for special attention to ensure clarity and coherence about the nature of family law regulations such as divorce agreements, child custody dealings, inheritance, etc."[66]

The regulation of family matters are diverse in Europe. For instance, according to the European Commission report, marriage and registered partnerships have different rules in each EU country[67]. Marriage is a legal institution recognised in all 28 EU countries; in six countries, it is open to both opposite-sex and same-sex couples (the Netherlands; Belgium; Spain; Sweden, Norway and Portugal)[68]. Registered partnership is recognised in 14 EU countries (Austria, Belgium, the Czech Republic, Denmark, Germany, Finland, France, Hungary, Ireland Luxembourg, Netherlands, Slovenia, Sweden and the UK)[69]. All 14 countries allow same-sex couples to register partnerships, while Belgium, France, Luxembourg and the Netherlands permit both same-sex and opposite-sex couples to register[70]. The scholar N. Dethloff considers that diverging regulation on family matters in different Member States can have severe disadvantages, stating that "As the provisions of the conflict-of-law rules are in many areas tied to the actual domicile or habitual residence, diverging national family law can bring the change in the rights and obligations in cases where a change of residence to another state leads to the applicability of the different laws"[71]. Then, in the opinion of the scholar, if the couple move their domicile or the residence to another Member State, this may result in the change of jurisdiction and applicable law, which may affect their rights

[65] Dethloff, N., Arguments for the unification and harmonization of family law in Europe, In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003, p. 37 – 40.
[66] EUROBAROMETER, Family law Analitical report 2006, retrieved 21.10.2014 from: < http://ec.europa.eu/public_opinion/flash/fl188b_en.pdf >
[67] Property effects of marriage and registered partnership, retrieved 21.10.2014 from European Commission website: <http://ec.europa.eu/justice/civil/family-matters/marriage/index_en.htm>
[68] *Ibid.*
[69] *Ibid.*
[70] *Ibid.*
[71] Dethloff, N., Arguments for the unification and harmonization of family law in Europe, In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003, p. 46.

negatively[72]. The scholar H. Toner states that problem concerned may arise even considering the recognition of marriage when different cultural and legal concepts of marriage as regards age, divorce, recognition of sex changes and same sex-sex marriages clash[73], as well as the recognition of registered partnerships or de facto relationships. This can cause, for example, that registered partners or cohabitants who are recognized as a family in one Member State may loose their status in another Member State where such a form of relationship is not recognized as constituting family life. For instance, the scholar M.R.Marella states: "Dutch law recognizes same-sex marriage, while the Italian system refuses to regulate unmarried couples: thus, what happens if a same-sex married Dutch couple moves to Italy; and what happens if a same sex Italian couple gets married in the Netherlands and makes a claim for recognition as a family in Italy. <...> Heterogenity in family regulations produces dramatic inconsistencies in individuals' legal status from country to country"[74]. The existence of the legal status, however, is considered as having particular importance, as it is a decisive factor granting the rights in the receiving State, as where a specific status is not recognized, no rights can be derived from it[75]. "Whether a marriage, registered partnership or parent-child – relationship exists or not, can be of relevance from the perspective of the law of the residence permits, the law of nationality and citizenship, the social law and the tax law"[76], - states N. Dethloff. In this case non - recognition of certain legal status in the receiving country may also affect property rights of the couple, when the receiving Member State applies different legal regime on the property than the State of origin. For example, N. Dethloff considers that if a registered partnership or de facto relationship is given the same status as marriage in one State and marital property regime is applied to the couple, these effects may cease when the couple takes up residence in another state which does not recognise such automatic legal consiquences of living together[77]. In case of married couples, differences of property regime regulation may negatively affect the rights of the persons when they decide to divorce[78]. M. Antokolskaia emphasizes that three matrimonial property regimes can be distinquished in Europe: Limited community of property exists in Belgium, Italy and Eastern European countries; Deferred

[72] *Ibid*, p. 40 – 46.

[73] Toner, H., Partnership rights, free movement, and EU law, Hart Publishing , 2004, p. 39
[74] Marella, M. R.,The non-subversive function of European Private law: the case of harmonization of family law, European Law Journal, Vol. 12, No. 1, 2006, p. 87
[75] Dethloff, N., Arguments for the unification and harmonization of family law in Europe, In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003, p. 46.
[76] *Ibid*, p. 46.
[77] *Ibid*, p. 46.
[78] *Ibid*.

community of property exists in, for example, Scandinavian countries, Germany, Austria, Greece and Switzerland; Separate property with judicial adjudication exists in England and Wales and other common law countries[79]. Under such circumstances, the persons who established the family relationships in one country, moved to another country and later decided to divorce, may lose their rights to claim a certain property, if the receiveing State has different regulation concerning the matrimonial property regime, therefore the examples show how the lack of a harmonised certain aspects of family matters can be the source of severe discrimination among European citizens considers M. Marella[80]. It proves that diverging substantial law on the family matters in Europe may affect legal status of persons and cause the loss of certain rights.

Nonetheless, some scholars consider that despite negative effect on the exercise of the rights of certain couples which may be caused by different regulation of the family maters in Europe, it may also very often bring complications to the procedure of the application of law[81]. The scholar A.M. Ardeleanu states that when a couple change the place of residence and the issue arises which needs to be resolved at court or another administrative institution, the divergence of family matters regulation may bring the confusion, as every time when the family relationship crosses the national borders, it needs to be determined which family law will be applicable in this particular case[82]. This in the opinion of the scholar implies a substantial challenge to lawyers who give advice concerning for example likely outcome of legal disputes involving cross-border family situations, the Courts if they have to decide such lawsuits and administrative bodies whose task it is to apply the law[83]. It is obvious that national differences in substantive family law may complicate the procedure when certain family legal issues having cross - border element are considered.

Moreover, while focusing on the need to harmonise substantive family law in Europe, the effect of diverging family law in different Member States of the EU on the free movement of persons shall also be taken into account. The scholar M.R. Marella emphasizes that the harmonisation of family law is necessary step towards European integration, as market integration cannot futher develop and coexist with a non-harmonised family law, since market and the family

[79] Antokolskaia, M., harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 402.
[80] Marella, M. R.,The non-subversive function of European Private law: the case of harmonization of family law, European Law Journal, Vol. 12, No. 1, 2006, p. 87.
[81] Ardeleanu, A.M., Principles of European family law regarding divorce – Special view over the Romanian Civil code, Juridica, 2013, p. 54.
[82] *Ibid*,p.54.
[83] *Ibid*, p.54.

law are interdependant[84]. Therefore, it may be stated that different substantive rules applicable in the Member States can cause the restriction to the free movement of persons. This again is closely related to the legal status of the couple and the possibility to retain it while changing the place of residence. N. Dethloff consideres that "if the legal differences between states lead to a loss of status, this definitely impairs the freedom of movement"[85]. However, there shall be made a distinction - in the case of a EU citizen, even if the person is not recognized as a family member according to the law of the receiving Member State, he/she still has the right to reside in the territory of the Member State if other criteria set by Directive 2004/38 on The Right to Move and Reside Freely within the Territory of the Member States[86] are satisfied. However, in case of non—EU citizens the loss of the status, can lead to a refusal to grant the right of residence in the receiving Member State. Some scholars argue that this can cause serious psychological problems and in some cases may even lead to a family breakdown, as prolonged separation and isolation lead to hardships and stress affecting both the migrants and the families left behind, preventing them from leading normal life[87]. However, there is an opinion that in such a case not only family life for the person concerned is jeopardized, but the exercise of free movement is also impeded[88]. The scholar N. Dethloff expressed the opinion that the question of status in the receiving Member State is very important in making the decision whether to move to another Member State and pursue a working position or not, stating that "<...> the fact that a transfer fee needs to be paid if a football player transfers to another club – as in the European Court of Justice *Bosman ruling* – is likely to restrict his access to the receiving state just as much as does the fact that the same football player following his divorce is required – as it would not be the case in his home state – to make a large compensation payment"[89]. This might have negative effect on the exercise of the free movement of persons, as citizens may refrain to move from one Member State to another if there is a fear that this might

[84] Marella, M. R.,The non-subversive function of European Private law: the case of harmonization of family law, European Law Journal, Vol. 12, No. 1, 2006, p. 87.
[85] Dethloff, N., Arguments for the unification and harmonization of family law in Europe, In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003, p. 57.
[86] According to the Directive 2004/38 on The Right to Move and Reside Freely within the Territory of the Member States all Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they: are workers, self – employed persons or the students in the host Member State; have sufficient resources not to become a burden on social assistance system of the host Member State; have comprehensive sickness insurance in the host Member State. Directive 2004/38/EC of the European Parliament and Council on the right of Union citizens and their family members to move and reside freely within the territory of the Member States, Article 2, Official Journal L 158/77, [2004].
[87]Cholewinski, R., Migrant workers in international human rights law: Their protection in Countries of Employment, Clarendon press, 1997, p. 122.
[88]Stalford, H., The Citizenship Status of Children in the European Union, The International Journal of Children's Rights, 2000, p. 101.
[89]Dethloff, N., Arguments for the unification and harmonization of family law in Europe, In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003, p. 57.

affect their family status and rights[90]. And the other way around, even if the partner, for instance, in case of de facto relationship decides to move to the Member State, which according to its law does not grant the status of family member to a cohabitee, the receiving Member State would refuse to confer the right of residence to this person. Therefore, it could be stated that differences of the substantive law between the Member States can form an obstacle for access to the markets of Member States which have different regulations on certain issues than the State of origin. The scholar K. B. Woelki believes that this might impede the creation of a truly European identity and an integrated legal space in Europe[91].

In conclusion, the short analysis with the presented examples reveals that diverging national legal systems in family matters may negatively affect cross border movement of families. The conflict of laws which may arise changing the place of residence, which usually results in the change of the applicable law, may have various effects on the status of cross – border families. This can lead to the loss of certain family rights, may complicate the procedure when a certain issue arises and the dispute is being heard before the court; and in the case of the EU may imply the restriction on the free movement of persons. The considered negative consequences prove the need to look for the ways to harmonise substantive family law in Europe.

[90] Baarsma, N.A., The Europeanisation of international family law, T.M.C. Asser Press, 2011, p. 3.
[91] Woelki K.B., The Principles of European Family law: its aims and prospects, Igitur, volume 1(2), 2005, p. 161.

2. THE EFFORTS TO HARMONISE SUBSTANTIVE FAMILY LAW IN EUROPE

Once the necessity to harmonise substantive family law in Europe and its reasons were discussed, the attention shall be drawn to the current state of harmonisation with a particular focus on the organizations and bodies acting at the European level which have the competence in harmonising family law in Europe. Due to the limited volume of the Master thesis and seeking that the analysis in the selected field would be thorough, the scope of the research is being narrowed to the analysis of the harmonisation of substantive family law[92]. The following Chapter will discuss the competence of European organizations and bodies to harmonise substantive family law in Europe.

2. 1. The role of the Council of Europe

The analysis on the need to harmonise family law in Europe has shown the necessity to look for the ways to harmonise substantive family law in Europe. Reacting to the increasing need, European organizations - having the competence to act in the field - got involved and took the deliberate actions. This Chapter will focus on the competence of European organizations to iniate the process of harmonization of substantial family law and the means used to achieve the aim in the field. Taking into account the historical perspective and the time of establishment, the role of the Council of Europe in harmonising substantive family law will be discussed firstly.

2.1.1. The means fostering the harmonisation

The Council of Europe - an international organization established in 1949 - has the intention to promote the cooperation of its Member States in order to reinforce human rights protection, the rule of law and democratic development[93]. As the Statute of Council of Europe emphasizes: "The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and

[92] Substantive law is defined as body of statutory or written law which governs the rights and obligations of those who are subject to it. Woelki, K. B., Unifing and Harmonizing substantive law and the role of conflict of laws, Hague Academy of International law, 2010, p. 32.
[93] Statute of the Council of Europe, Article 1, 1949, retrieved 22.10.2014 from: <http://conventions.coe.int/Treaty/en/Treaties/html/001.htm>

facilitating their economic and social progress"[94]. Examining Council's of Europe activities in the field of family law, it could be stated that the Council of Europe is trying to implement the estabished aim also in the field of family law. As regards the family matters the Council of Europe has drawn up a large number of important legal acts which have the aim of harmonising certain aspects of family law. However, as the scholar Killerby correctly notices, rather than fostering the unification of law by international Conventions, the Council of Europe seeks to stimmulate the harmonisation of substantive family law through recommendations of the Consultative Assembly and resolutions of the European Ministers of Justice as well as through scientific meetings[95]. The Council of Europe adopted recommendations on important issues such as the equality of spouses, the rights of spouses concerning the family home, payment by the State of advances on child maintenance, parental responsibilities, foster families, validity of contracts and testamentary dispositions of unmarried couples, contributions following divorce, emergency measures in family matters, family mediation, legal protection of incapable adults[96], etc. The established recommendations contain the standards which Member States are recommended to follow. Moreover, the Council of Europe also organizes European conferrences on family law where important issues on family matters are discussed: children rights, duties of parents towards their children, grounds for and consequences of divorce, legal provisions to prevent and reduce disputes in divorce cases, alternative methods of solving family disputes, family mediation, civil law aspects of emerging forms of registered partnerships, the legal protection of the family in matters of succession, etc[97]. More than several European conferences have been organized in the field of family law: Vienna (1977), Budapest (1992), Cadiz (1995), Strasbourg (1998), Hague (1999), Strasbourg (2002), Vienna (2009). Since 1969 the Council of Europe also holds colloquia on European family law which investigates specific questions – for example, "Legal problems concerning unmarried couples" held in Messina (1981), "Legal problems relating to parentage" in Malta (1997), etc[98]. Nevertheless, even if sharing the approaches and information at the European level, conducting investigations in certain fields of family law may contribute to the development of

[94] Statute of the Council of Europe, Article 1, 1949, retrieved 22.10.2014 from: <http://conventions.coe.int/Treaty/en/Treaties/html/001.htm>
[95] Killerby, J., Family law in Europe. Standards set by the Members of the Council of Europe, Liber Amicorum Meulders – Klein, 1998, p. 351.
[96] Council of Europe Achievements in the field of law. Family law and protection of children, 2008, p. 11, retrieved 22.10.2014 from: <http://www.coe.int/t/DGHL/STANDARDSETTING/FAMILY/Achievements%2008_08.pdf>
[97] *Ibid*, p. 11.
[98] *Ibid*.

family law in each Member State, it might be considered that it has more of a scientific value than legal effect and cannot be expected to make major work in the process of harmonisation.

As regards recommendations, it shall be noted that it is the most frequent instrument used by the Council of Europe seeking to harmonise family law in Europe. The scholars Florence Benoît-Rohmer and Heinrich Klebes, analyzing the status of the Council of Europe, state that "<...> in general the Committee of Ministers' recommendations are not binding, but they do have "moral" authority, since they reflect the collective position of European governments on the subjects they cover"[99]. It might be considered as being reasonable as according to the Statute of the Council of Europe, each Member State has representative in Committee of Ministers[100]. It means that, theoretically, the recommendation drawn up in a certain field should reflect the common interest of Member States established on a certain matter. This should foster smoother implementation of the recommendations in each Member State after they have been adopted. However, recommendations in certain fields of family law are not based on thorough examination of regulation of each Member State on the matter and comparative analysis, therefore could be considered being more as a sum of political decisions of individual Member States. This means that not always the common core of the Member States on a certain question can be found and reflected by the recommendations. It might complicate the implementation of this instrument in legal systems of Member States, if the recommendation does not reflect the interests of the Member States, as they may be rejected to be pursued. Even if the process of following the recommendations can be monitored (according to the Article 15 of the Statute of the Council of Europe, the Committee of Ministers may ask governments to inform about the action they take on its recommendations[101]), there are no instruments to enforce the following of recommendations in Member States. Being non-binding soft law, recommendations do not make pressure on the Member States to ensure its following. If common core on a certain matter shared by the Member States is not detected and recommendation on a certain matter is not in a line with the interests of individual Member States, non-binding recommendation cannot be expected to be pursued in the national systems. It is argued that even if individual Member State expressed the will to take the recommended action, as the following of the

[99] Benoit – Rohmer, F., Klebes, H., Council of Europe law: Towards a Pan-European legal area, Council of Europe publishing, 2005, p. 108.
[100] Statute of the council of Europe, Article 14, 1949, retrieved 22.10.2014 from: <http://conventions.coe.int/Treaty/en/Treaties/html/001.htm>
[101] *Ibid*, Article 15.

recommendations, is wholly a matter of the states - it can be modified rapidly[102]. This hinders the process of harmonisation and may lead to 'multi speed', incoherent process.

Notwithstanding, recommendations is not the only instrument of the Council of Europe used to build European family law. In the report of the Council's achievements it is emphasized that the Council has contributed in a decisive manner strengthening the legal protection of family, in particular the interests of children, by drawing up the Conventions[103]. During the time of its existence, the Council adopted significant number of Conventions dealing with family matters: The European Convention on the adoption of children (1967), The European Convention on the legal status of children born out of wedlock (1975), The European Convention on recognition and enforcement of decisions concerning custody of children and on restoration of custody of children (1980), The European Convention on the exercise of children's rights (1996), European Social Charter (Revised) (1996), The Convention on contact concerning children (2003), etc[104]. The Conventions are legally binding for Member States which acceded to the Conventions. However, the Conventions could be considered as an instrument of unification of family law in Europe as they set the standards which in some cases are directly applicable[105] in the European countries and do not require futher implementation. Taking this approach, as unification of family law does not fall within the scope of our research, while analysing the harmonisation of family law in Europe, the effect of Council of Europe's Conventions on family matters and its contribution to the process of building European family law will not be discussed in depth.

2.1.2. The impact of the European Court of Human Rights case law

Nonetheless, the European Convention for the Protection of Human Rights and Fundamental Freedoms requires particular focus. This Convention may be considered to be an important

[102] Benoit – Rohmer, F., Klebes, H., Council of Europe law: Towards a Pan-European legal area, Council of Europe publishing, 2005, p. 107.
[103] Council of Europe Achievements in the field of law. Family law and protection of children, 2008, p. 11, retrieved 22.10.2014 from: < http://www.coe.int/t/DGHL/STANDARDSETTING/FAMILY/Achievements%2008_08.pdf>
[104] *Ibid*.
[105] "Treaty provisions are *directly applicable* in national law when, according to the constitutional law of the State party concerned, they can be invoked before the national judicial organs as soon as the international (in most cases ratification and entry into force) and the national (generally parliamentary approval and publication) conditions of validity are fulfilled. Not all provisions of a Treaty incorporated in national law can be applied by a judge. The formulation of the provision has to be sufficiently clear and complete". Bossuyt, M.J., The direct applicability of international instruments on human rights (with special reference to Belgian and U.S. law), p. 318, retrieved 22.10.2014 from: < http://rbdi.bruylant.be/public/modele/rbdi/content/files/RBDI%201980/RBDI%201980-2/Etudes/RBDI%201980.2%20-%20pp.%20317%20%C3%A0%20344%20-%20Marc%20Bossuyt.pdf>

instrument, not only because of the provisions which aim to reinforce the protection of children and family rights, but also because it sets up ECtHR which plays an important role in fostering the harmonisation of substantive family law in Europe[106]. It is recognized that the Convention is a living instrument which needs to be interpreted in the light of present-day conditions[107]. This competence is conferred to the ECtHR. Interpreting the provisions of the Convention (particulary Article 8 on the right to respect for private and family life and Article 12 on the right to marry) the Court developed a large number of important standards having harmonising effect. Considering its role in the process of harmonisation of family law, the scholar W. Pintens emphasizes that "ECtHR has served as a catalyst for harmonisation through its decisions and judgments, which have given a rough sketch of European Family Law"[108]. Analysisng the ECtHR case-law, it could be made a conclusion that ECtHR set important principles in the field of family law which Member States, parties of the Convention are obliged to follow. ECtHR held a large number of decisions adopting the principle of non-discrimination and equality in certain family matters. For instance, in *Marckx* case the Court established the principle of equal treatment of children born in and out of the wedlock[109]. In *Johnston* case it set a positive obligation to Member States to ensure that all children (no matter born in or out of the wedlock) enjoy the same legal status, stating that the State has to place a child born out of wedlock, "legally and socially, in a position akin to that of a legitimate child"[110]. The same principle was set up also when the legal status of adopted children was considered. The Court emphasized: "where a child is adopted (under the full adoption procedure moreover) the child is in the same legal position as a biological child of his or her parents in all respects: relations and consequences connected with his family life and the resulting property rights"[111]. The Court stated that "very weighty reasons need to be put forward before a difference in treatment on the ground of birth out of wedlock can be regarded as compatible with the Convention"[112]. In addition, some other significant principles on family matters were found. As regards mono-parental families the Court held that the best interest of the child still requires the bi-parentage[113]. Nevertheless, once a mono-parental family is found, it shall be considered as a family

[106] Convention for the Protection of Human Rights and Fundamental freedoms, Rome, 4.XI.1950.
[107] Pla and Puncernau v. Andorra, App. No.69498/01 § 62 [2004]
[108] Pintens, W., Family Law. A Challenge for Europe?, retrieved 22.10.2014 from: <http://civil.udg.es/tossa/2004/textos/pon/1/wp.htm>
[109] Marckx v. Belgium, 31 Eur. Ct. H.R. § 40 [1979].
[110] Johnston and Others v. Ireland, 112 Eur. Ct. H.R. § 74 [1986]
[111] Pla and Puncernau v. Andorra, App. No.69498/01 § 61 [2004]
[112] *Ibid*.
[113] Marckx v. Belgium, 31 Eur. Ct. H.R. [1979]

entitled to the protection granted by the Convention[114]. As regards the right to adopt a child, the Court set the principle that the right to found a family under Article 12 presupposes the existence of a couple, therefore the provision of the Convention should not be interpreted as safeguarding the right of a single person to adopt[115]. Moreover, ECtHR held a set of principles regarding affiliation. For instance, as regards to maternal affiliation the Court held that it is a fundamental right of a mother and the child to have their link of affiliation established from the moment of the birth and with the full juridical recognition of the maxim *mater semper certa est*[116]. Some scholars state that there is no doubt that most of the successfully adopted principles are focused on the interests of the child. As decisions of ECtHR are binding for Member States, parties of the Convention, the established principles might serve as the example of top down, spontaneous[117] harmonisation of family law.

However, as the scholar M. Antokolskaia considers, "in general, child and parent-child law are the only areas of family law for which the Court has actually designed a 'whole Code of European Family Law'"[118]. The scholar states that even if ECtHR was granted the right to use dynamic interpretation of provisions of the Convention, "<...> since the Court's political mandate was indubitable only within the margins of the Convention, it needed an additional source of authorisation every time it employed an extensive or even contra-legal interpretation of the original provisions"[119]. Seeking such an authorisation, in the opinion of the scholar the ECtHR has tried and still makes the efforts to find the common standard of Member States[120]. However, the scholar makes the conclusion that taking into account that Member States may support different concepts on certain matters, such a standard common to the Member States might be hardly definable, therefore, it could be stated that the attempt to find a common European standard became limitation to the dynamic interpretation and in some cases hindered the process of harmonisation performed by ECtHR[121]. The case–law in the opinion of the scholar shows that in case when important rules on family matters needed to be adopted in the absence of common European consensus, ECtHR tried

[114] *Ibid*.
[115] Di Lazzaro v. Italy, App. No. 31924/96 [1997].
[116] Marckx v. Belgium, 31 Eur. Ct. H.R. § 31, 41 [1979].
[117] The scholar M. Antokolskaia the principles of family law set by ECtHR considers as spontaneous top-down harmonization. Top - down harmonization the scholar defines as the result from the purposeful efforts of competent authorities. Spontaneous harmonization - as a result from not systematic evolutional approximation of legal systems. Antokolskaia, M., harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 400.
[118] *Ibid*, p. 414.
[119] *Ibid*, p 410.
[120] *Ibid*, p 410.
[121] *Ibid*, p 410.

to stay neutral and developed the so called doctrine of 'margin of appreciation' (e.g. the question of the right to marry for homosexuals) leaving discretion to decide for Member States[122]. The Court acknowledged "major social changes in the institution of marriage since the adoption of the Convention"[123], however it emphasized that even if "the Court had often underlined that the Convention was a living instrument which had to be interpreted in the light of present-day conditions, it had only used that approach to develop its jurisprudence where it had perceived a convergence of standards among Member States"[124]. Considering that "the issue of same-sex marriage concerned a sensitive area of social, political and religious controversy"[125], the Court held that "In the absence of consensus [the convergence of standards as regards same-sex marriage, explained by the author A.R.], the State enjoyed a particularly wide margin of appreciation"[126]as far as the issue of same – sex marriage is considered. The discussed example leaves the impression that in the case of controversial issue, when common standard cannot be determined because of diverging regulation of certain matter in different Member States, ECtHR gives up on its leading role in the process of harmonisation of family law and rather grants a wide margin of appreciation for Member States to decide on the matter[127]. Some scholars state that this doctrine is used by ECtHR to circumvent controversial political dilemmas[128]. It raises the doubts whether the fostering of harmonisation in field of family law can be left only in the hands of ECtHR expecting progressive continuation of developing the rules with harmonising effect to family law in Europe. The scholar W. Pintens states that it is disputable whether the Court will be able to maintain the pioneering role, as the major discriminations in family law have already been eliminated and diverging opinions of the Member States regarding human rights will limit the progress only to the maintainance of minimum standards[129]. In addition, another fact should be taken into account - all the important rules of the family law established by ECtHR were developed spontaneously, when a certain dispute was brought before the Court. It leads to the conclusion that the process of harmonisation undertaken by ECtHR is not systematic. This may endanger its consistency in the future and may even cause the situation when the established common principles collide. Taking

[122] *Ibid*, p 410.
[123] Schalk and Kopf v Austria, 995 Eur. Ct. H.R. § 43 [2010]
[124]*Ibid*,. § 46
[125] *Ibid.*
[126] *Ibid*.
[127] *Ibid*.
[128] Mahoney, P., Marvellous Richness of Diversity or Invidious Cultural Relativism?, Human Rights Law Journal 1, 1998, p. 2.
[129] Pintens, W., Europeanisation of family law, In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003, p. 18.

into consideration the examined, it could be stated that despite the important contribution to the development of European family law brought by ECtHR, the role of the Court in the process of harmonisation of family law may become less prominent in the future.

In conclusion, the analysis has shown that despite the aim to achieve greater convergence of the legal systems of Member States, set by the Council of Europe, in case of family law it is hardly achievable only using the means of the Council of Europe. Due to their non-binding nature, recommendations may not be followed. The decisions of ECtHR have played a significant role in harmonising substantive family law, setting important principles on particular family matters, however it may not be expected they maintain the leading role in the process. The above discussed reveals that having the competence to take actions, nevertheless, Council of Europe does not hold the appropriate system of tools necessary to ensure a gradual and consistent harmonisation of substantive family law in Europe.

2.2. The role of the EU in harmonisation of substantive family law

Analysing the competence in harmonisation of substantive family law of the organizations acting at the European level, the role of the EU in the process undoubtedly needs to be discussed. Therefore, continuing the analysis on the matter, the competence of EU will be considered, seeking to answer the question whether EU has the authority to take the initiative in the process of harmonisation of substantive family law in Europe.

2.2.1. The competence in harmonisation of family law

The primary aim of founding EU was the desire to regulate economic relationships between its Member States, establishing "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured"[130]. Therefore, due to its purely economic nature it did not contain the provisions regulating family matters. However, the scholar I. Sammut states that law, even economic, is about regulating any possible relations between people and it cannot exist

[130] Treaty Establishing the European Economic Community, retrieved 22.11.2014 from: <http://www.ab.gov.tr/files/ardb/evt/1_avrupa_birligi/1_3_antlasmalar/1_3_1_kurucu_antlasmalar/1957_treaty_establishing_eec.pdf>

without the link to the social dimension[131]. Economic integration caused the need to cooperate in other fields (the so called spillover effect[132]). EU seeks to ensure free movement of persons. Through the link with the established freedom, seeking to eliminate the obstacles hindering the exercise of free movement of persons, family as the basic institution of the society received the attention. In *Rutili* [1975] case, the European Court of Justice (hereinafter – ECJ) acknowledged the importance of family by emphasizing that respect for family life is one of the fundamental rights[133]. The emphasis giving importance to the institution of family was also transposed to the legal acts of the EU. The significant shift from purely economic nature of EU was the establishment of the Charter of Fundamental rights of EU which came into force in 2009 together with the Treaty of Lisbon. Considering the effect of the Charter, the scholar McGlynn states that the adoption of the Charter has a particular significance as from the moment of the adoption of the Charter, "the citizens of the EU are no longer considered as consumers, but as persons with their own rights"[134]. The Charter - as well as the European Convention on Human Rights acknowledged the importance of family, stating that "everyone has the right to respect for his or her private and family life <...>"[135]. Some other important rights were conferred: the right to marry and to found a family (Art. 9), the rights of the child (Art. 24) and the rights of the elderly (Art. 25)[136].

However, even if the Charter is significant in the field, since the importance of family is recognized, it is considered that the fundamental rights set in the Charter are merely declaratory[137], as they are binding for the institutions of the EU and Member States only when they are implementing Union law[138]. In addition, considering the importance of the Charter from the perspective of harmonisation of substantive family law, another particularity of the Charter shall be noticed – being the only legal act of the EU which emphasizes the importance of family matters *per se,* the Charter, however, does not seek to harmonise family policies within the EU, a wide

[131] Sammut, I., Family law in EU's acquis communautaire: where is it going?, p. 107, retrieved 22.10.2014 from: < http://www.um.edu.mt/europeanstudies/books/CD_CSP2/pdf/elatf-isammut.pdf >

[132] It is considered that the development of integration between the Member States of EU is based on *Spillover effect:* integration between States in one economic sector creates strong incentives for integration in further sectors, in order to fully capture the integration in the sector in which it started. Haas,E.B., The Uniting of Europe: Political, Social, and Economic Forces, 1950-1957 (Contemporary European Politics and Society*)*, University of Notre Dame Press, 2004, p. 45.

[133] Case 36/75, Roland Rutili v Ministre de l'intérieur, § 32 ECR [1975]

[134] McGlynn, Challenging the European harmonisation of family law: perspectives of the "Family", In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003, p. 228.

[135] The Charter of Fundamental rights, Official Journal C 364/1, 2000.

[136] *Ibid*.

[137] Pintens, W., Europeanisation of family law, In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003, p. 23.

[138] The Charter of Fundamental rights, Official Journal C 364/1, 2000.

discretion to regulate family matters leaving for the Member States[139]. This raises the question whether this strategy is chosen intentionally because of the wide diversity in this field and lack of the common consensus between Member States on the matter or whether the roots are more far reaching and is related to the division of competences between the EU and the Member States and the absence of EU competence to act in the field of the family law?

Seeking the answer to the question, the competence of the EU in family matters shall be discussed. The considerations on the matter shall be started from the beginning, in other words, from the division of competences between the EU and its Member States. Article 3 paragraph 5 of the Treaty on the Functioning of the European Union (hereinafter – TFEU) sets: "the Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties"[140]. According to the Treaty "The limits of Union competences are governed by the principle of conferral"[141]. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon the EU by its Member States[142]. The Treaty sets that the competences which are not conferred to the EU in the treaties, remain the competences of the Member States[143]. The provisions of the Treaty prove that the EU is entitled to act only in such fields which according to the Treaty are conferred to its competence. The principle of subsidiarity established by the Treaty does not allow to go beyond the limits of competences and interpret them extensively. As Member States were reluctant to loose the discretion in the field highly embedded into the national cultures, family matters do not fall neither within exclusive or shared competence, nor within the supporting competence of EU. As a result, the regulation of family matters is solely the competence of individual Member States.

Despite the fact that family law does not fall within the competence of EU, it is important to note that the Treaty sets the posibility to harmonise substantial law of the Member States in certain cases (Article 114 of TFEU). However, the possibility is limited – only when it is necessary "for the functioning of the internal market"[144]. Considering the possibilty to use this legal basis for harmonisation of substantive family law, the scholar W.Pintens defends the position that this is not applicable in case of purely family law, stating: "Even when using a broad interpretation of the goals of the European Community, there are only a few rules of family and especially succession

[139] For instance, the Article 9 of the Charter on the right to marry and found the family emphasizes that "The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights". The Charter of Fundamental rights, Article 9, Official Journal C 364/1, 2000.
[140] Treaty of Lisbon amending the Treaty on European Union, Article 3 paragraph 5, Official Journal C 306, 2007
[141] *Ibid*, Article 5 paragraph 1.
[142] *Ibid*, Article 5 paragraph 2.
[143] *Ibid*, Article 5 paragraph 2.
[144] Treaty of Lisbon amending the Treaty on European Union, Article 114, Official Journal C 306, 2007.

law that directly affect the functioning of the common market, despite the fact that succession law has some economic relevance"[145]. Therefore, only few measures related to family matters were adopted. Nonetheless, the scholar I. Sammut states that they do not have the intention to regulate family law *per se*, but have been auxiliary to the successful completion of Common market, mostly concerning the areas of free movement of people, equal treatment between man and women at work, social security, etc[146]. It leads to the considerations that they are "a mere bundle of ad hoc measures which do not support a coherent approach towards harmonisation of substantive family law"[147].

Article 81 of TFEU is considered to be the above mentioned article's lex specialis[148]. According to this article, "The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States". The transfer of the third Pillar (Justice and home affairs) from the intergovernmental cooperation to the integrated EU by the Treaty of Amsterdam gave more power for EU to act in the field. According to the TFEU the renamed area of freedom, security and justice belongs to the shared competence, what means that Member States shall exercise their competence in this field only to the extent that the Union has not exercised its competence or decided to cease exercising its competence[149]. It may be considered that this Article is not of merely economic nature. It has the aim to facilitate the civil process, by strengthening cooperation in certain fields. Nonetheless, it is clear that in order to remove the obstacles in the civil matters, the provision is oriented more to the harmonisation of the procedural law, aiming at ensuring the mutual recognition and enforcement of judgments and of decisions in extrajudicial cases between Mamber States; the cross-border service of judicial and extrajudicial documents; cooperation in the taking of evidence[150]; etc, than to the substantial family law. Moreover, it is important to note that even if the adopted measure under this legal basis could have harmonising effect, the aim of it is not to harmonise the main concepts of family law, as regards e.g. terms of divorce, marital regime, etc. *per se*, but to make the civil process smoother when cross – border cases arise. In addition, it is important to note, that it is also hardly achievable. According to

[145] Pintens, W., Europeanisation of family law, In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003, p. 23.
[146] Sammut, I., Family law in EU's acquis communautaire: where is it going?, p. 109, retrieved 22.10.2014 from: <http://www.um.edu.mt/europeanstudies/books/CD_CSP2/pdf/elatf-isammut.pdf>
[147] *Ibid*, p.109.
[148] Meeusen, J., Sender, M.P., Straetmans, G., International law for European Union, Intersentia, 2006, p. 50.
[149] Treaty of Lisbon amending the Treaty on European Union, Article 3 paragraph 5, Official Journal C 306, 2007.
[150] *Ibid*, Article 81.

the same Article, measures of family law having cross-border implications shall be adopted by the Council in accordance with a special legislative procedure[151]. It means that the unanimity of the Council after consulting the European Parliament is required. It complicates the procedure, since reaching a consensus between the Member States having diverging interests and varying opinions on the matter may be difficult or sometimes even impossible. The scholar N.A.Baarsma emphasizes that the Article 81 of TFEU cannot serve as a legal basis for the measures which regulate purely internal situations[152]. That means that the provision has the external dimension and is more directed to the harmonisation of family law at the international level, than to the reduction of the gap between the legal systems of Member States, eliminating the basic differences of the substantive family law within the EU. So the considerations trying to find the legal basis which would enable EU to adopt the harmonising substantive family law measure, lead to the conclusion which was reached also by other scholars – EU has no competence of harmonisation as far as substantive family law is concerned[153]. As a result, an individual Member States has the sole competence to set their own rules on divorce, separation, maintenance of children and spouses, custody and other matters of substantive family law.

2.2.2. The impact of European Court of Justice case law

Notwitstanding the fact that EU does not have the direct competence to harmonise substantive family law deliberately, it could be considered that the process has been undertaken, though, just incidentally. European Court of Justice has the task to ensure that EU law is interpreted and applied in the same way in all the Member States of the EU[154]. It is considered that by developing case-law, the ECJ "<...> has served as an impetus of harmonisation of family law <...>"[155]. However, it shall be noted that certain rules on family matters with harmonising effect have been provided not interpreting merely family law provisions[156], but arose from the interpretation of other provisions of EU law, usually related to the free movement of persons. Even if the provisions of the Charter of

[151] *Ibid*.
[152] Baarsma, N.A., Europeanisation of international family law, T.M.C. Asser Press, 2011, p. 11.
[153]This opinion is expressed e.g. by the scholars Martiny, D., Is Unification of Family Law Feasible or Even Desirable?; Antokolskaia, M., Harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 404; Pintens, W., Europeanisation of family law, In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003, p. 23.
[154] Treaty of Lisbon amending the Treaty on European Union, Article 19, Official Journal C 306, 2007.
[155] Pintens, W., Europeanisation of family law, In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003, p. 20.
[156] The analysis has shown that merely family law provisions in the absence of EU competence to regulate family matters, do not exist.

Fundamental Rights of the EU give the focus on family matters *per se*, the Charter can be invoked before the Court only when EU institutions or Member States of the EU implementing EU law breach it. This causes that even if certain aspects of the family law from time to time in certain cases are being touched, it is done only if the link to the area which belongs to the EU competence is found. Usually, this link has been discovered with the EU law provisions on free movement of persons. For instance, in *Garcia Avello* case considering name-changes the Court held that the Member State is prohibited to dismiss applications regarding name-changes in cases where children are living in one Member State with double citizenship, if the purpose of the application is to allow those children to be named as they are entitled to according to the law and tradition of the second Member State, as a discrepancy in surnames is liable to cause serious inconvenience for those concerned at both professional and private levels[157]. In *Zambrano* case which includes third country nationals family members the Court ruled, considering family reunification, that "the Member State is precluded to refuse a work permit and the right of residence within its territory to a third-country national upon whom his minor children, who are nationals and residents of that Member State, are dependent, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of citizen of the Union"[158]. Both cases consider the citizenship of the EU and are related to the free movement of persons. They touch certain aspects of family law, however only to a certain extent - as much it is necessary to the interpretation of the provisions of the free movement in order to eliminate the impediments to the free movement of persons. This demonstrates that family law is still subsidiary to the 'freedoms' of the EU. Member States are bound by the interpretation of EU law provided by the ECJ[159], so the rules established by the Court undoubtedly have harmonising effect within the EU. Nonetheless, as the scholar W.Pintens states, it "<...> cannot be expected that the Court will greatly contribute to a real breakthrough in the field of harmonisation of substantive family law"[160]. Spontaneous harmonisation, subordinated to economic aims can not be considered to be an efficient and comprehensive way, capable of reducing the gap between the diverging substantive family law systems of Member States.

In conclusion, the analysis revealed that EU lacks the competence in harmonisation of substantive family law. The Treaty on the Functioning of European Union does not confer the

[157] Case C-148/02, Carlos Garcia Avello v Belgian State, § 45 ECR [2003]
[158] Case C-34/09, Gerardo Ruiz Zambrano v Office national de l'emploi, § 42 ECR [2011]
[159] Treaty of Lisbon amending the Treaty on European Union, Article 3 paragraph 5, Official Journal C 306, 2007.
[160] Pintens, W., Europeanisation of family law, In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003, p. 21.

authority to the EU to act in the field of family law. Indirect effect of EU on substantive family law can be felt through private international law. However, the succeess of Europeanisation of private international law and its effect on substantive family law of Member States, because of the established adoption procedure to a large extent still depends on Member States will to foster the process. The harmonisation which has occured due to several adopted directives and case-law developed by the ECJ on certain aspects of family matters is spontaneous and subsidiary to the 'freedoms' established by the EU, therefore may not be considered as a sufficient way, capable to harmonise substantive family law in Europe alone. The discussed shows the need for a more coherent and comprehensive aproach on the matter at a European level.

2.3. The progressiveness of the Commission on the European family law

In response to the absence of coherent approach towards harmonisation of substantive family law in Europe, the need for a body which would take the initiative to undertake the process at the European level arose. This resulted in the establishment of the new body – the Commission on the European family law (hereinafter – CEFL). Seeking to evaluate whether this organisation has the necessary tools enabling it to foster harmonisation of substantive family law in Europe, its particularities and achievements in the field shall be discussed.

CEFL was established in 2001 as a response to the unsystematic patchwork of the existing substantive European family law and the growing number of cross-border family relationships, which inspired the academics search to develop a more coherent and systematic body dealing with selected fields of family law[161]. The need for a deliberate action in the field brought together the academic society having the will to foster the process. The scholar K.B. Woelki emphasizes that CEFL is a unique organization in Europe, as "<...> never before any organization in Europe consisting of such a large group of scholars has investigated the possibilities for and contributed to the harmonization of substantive family law in Europe"[162]. The uniqueness of CEFL can be revealed through its main features specific only to it, which distincts the Commission from other organizations (the Council of Europe, the EU) to some extent dealing with family matters at the European level.

Features attributable to CEFL may be distinguished as follows:

[161]Antokolskaia, M., Harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 417.
[162] Woelki K.B., The Principles of European Family law: its aims and prospects, *Igitur*, volume 1(2), 2005, p. 168.

Politically independent. CEFL is a purely academic organisation, which at the moment,[163] consists of 30 family law experts from various European states[164]. The member of the Commission K. B. Woelki emphasizes that Commission is a scientific initiative absolutely independent on any organization or institution[165]. This means that in making decisions, the Commission does not rely on political authorisation. It has its own institutional framework, which creates the material precondition to exercise its activities independently. The institutional framework of CEFL consists of two main organs: the *Organizing Committee* and the *Expert Group*. The Organizing Committee[166] sets up the Expert Group and co-ordinates the work of the Commission as a whole, while the expert group, comprising of specialists in the field of family and comparative law, is responsible for conducting the research on certain field of family law in the countries which they are representing[167]. The Expert Group comprises academics from most of the EU Member States and several European countries outside the EU – Switzerland, Norway, Russia. This structure allows to reflect and take into consideration, in the process of harmonisation of substantive family law, the interests of a larger number of European countries, which increases the scope of harmonisation process and leads to the possibility to tackle the problems related to the cross border families in the larger area of Europe. It is important to emphasize that despite the fact that the members of Expert Group represent their countries, being academics specialysing in family and comparative law, its members are not bound by the political will. Unlike, the members of the Committee of Ministers of the Council of Europe which adopt the recommendations on family matters or the ministers of the Council of EU who negotiate the adoption of certain measures related to the family matters within the EU, the members of CEFL do not hold a political mandate. In the case closely related to sensitive national interests, neutrality can be considered of particular importance, as it lets to base the research of certain fields of family law on scientific methods. According to K. B. Woelki the involvement of experienced and politically neutral family law experts from as many European jurisdictions as possible guarantees highly qualified and, therefore,

[163]The time of making research October of 2014.
[164]The CEFL consists of experts from England and Wales (2), Netherlands, Germany (2), Malta, France, Spain, Slovakia, Switzerland (2), Czech Republic, Sweden, Greece, Finland, Denmark, Poland, Scotland, Catalonia, Lithuania, Portugal, Italy, Belgium, Austria, Ireland, Norway, Hungary (2), Bulgaria, Russia. Retrieved 23.10.2014 from CEFL's website: <http://ceflonline.net/experts/>
[165] Woelki K.B., The Principles of European Family law: its aims and prospects, *Igitur*, volume 1(2), 2005, p. 160.
[166] The members of the Organizing Committee at the same time are the members of the Expert Group. Retrieved 23.10.2014 from CEFL's website: < http://ceflonline.net/organisation/>
[167] Woelki K.B., The Principles of European Family law: its aims and prospects, *Igitur*, volume 1(2), 2005, p. 163.

reliable result of the research[168], which is the main instrument of CEFL used in the process of harmonisation of substantive family law.

Concentrated purely on family matters. The objective of the foundation and the activities carried out by CEFL is the creation of the Principles of European Family Law which aim to establish the most suitable means for the harmonization of family law within Europe[169]. The aim of the Commission and even its title reveals that the scope of the work and the concentration of the Commission is purely on family matters, mainly harmonisation of substantive family law. This is particularity which distinguishes the work of CEFL from organizations trying to foster the harmonisation of substantive family law at the European level. The Committee of Ministers of the Council of Europe deals with the family matters, however it is not the only area of its interests. The EU does not have direct competence to harmonise substantive family law and takes into consideration certain family aspects only when they are closely related to the established 'freedoms' of the EU. This results in the lack of comprehensive approach towards the harmonisation of substantive family law and the absence of consistent action at the European level. CEFL is established to deal with the harmonisation of family law *per se* and deliberately. The Family law is the only area of Commission's concern. According to M. Antokolskaia the concentration on one field with clearly expressed goal may be considered as a precondition for the development of a more coherent body of the European family law[170].

Research based and oriented to comparative analysis. The Commission has put "considerable efforts to give family law an appropriate place on the scene of harmonization"[171]. This has been done using methodological approach to the process. CEFL has a specific working method whose application allows to conduct a thorough analysis on the aspects which are intended to be harmonised. As the members of CEFL presents, the work of CEFL is aimed at drafting the principles on certain matters of family law which are being discovered as the most suitable for the harmonisation[172]. The member of the Organizing Committee K.B.Woelki clarifies that this process consists of 6 main steps: 1) selection of the field of family law which is the most suitable for

[168] *Ibid*, p. 160.
[169] *Ibid*, p. 160.
[170] Antokolskaia, M., Harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 400.
[171] Ibid, p.399.
[172] Woelki K.B., The Principles of European Family law: its aims and prospects, Igitur, volume 1(2), 2005, p. 165.

harmonisation, 2) drafting of questionnaire[173], 3) drawing up national reports based on questionnaire which are later being published on the CEFL website, 4) the collection and dissemination of the comparative material - an integrated and printed version laid out according to the numbers of the questions is being published, providing a rapid overview and a straightforward simultaneous comparison of the different solutions within the national systems, 5) drafting the Principles of European Family Law - proposals are made by the members of the Organizing Committee which are discussed with the authors of the national reports (the Expert Group), trying to choose between 'common core'[174] and 'better law'[175], 6) publication of Principles[176]. The Principles are given the form of the provisions, however they have to be read together with the Comments, which explain the principles giving comparative information[177]. This structure of the Principles may be considered as having practical usfulness, since as K.B.Woelki states, in-depth and comprehensive comparative analysis is easily accessible, most of the rules have been drafted in the same way as that which the legislator normally consider to be appropriate, therefore, the principles is considered could serve as recommendations to the legislators or could be used as a model for the applicable law[178]. While the publication of the national reports in English language, in the opinion of the scholar, may be beneficial for practising lawyers[179]. Specific information about, for instance, the divorce grounds in Greece, or the position of the new partner of the parent who holds parental responsibilities in respect of the child under the Hungarian law which is accessible on the CEFL website may help in the cases where lawyers seek information regarding the precise content of the foreign family law[180]. Apart from drafting the Principles, CEFL uses other tools for fostering harmonisation. In order to promote the idea of harmonisation of substantive family law and detect the fields of family law which could be the object of harmonisation, CEFL organizes

[173]According functional approach questions are posed in purely functional terms without any reference to the concepts of a specific legal system, thus asking what is the underlying problem that a certain legal provision aims to redress. Woelki K.B., The Principles of European Family law: its aims and prospects, Igitur, volume 1(2), 2005, p. 165.

[174]When using the 'common core' method the drafters use a rule that is
common to all or most of the relevant jurisdictions. Antokolskaia, M., Harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 418.

[175]When using 'better law'method the drafters try to select the 'better' rule among the diverging rules in the national jurisdictions. Antokolskaia, M., Harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 418.

[176] Woelki K.B., The Principles of European Family law: its aims and prospects, *Igitur*, volume 1(2), 2005, p. 165.

[177] The Comments are considered to be constituent part of the Principles. Retrieved 23.10.2014 from CEFL's website: <http://ceflonline.net/principles/>

[178]Woelki, K.B., Pintens, W., Ferrand, F., Beilfuss, C, G., Jareborg, M, J., Lowe, N., Martiny, D., Principles of European family law regarding divorce aand maintenance between former spouses, Intersentia, volume 7, 2013, p. 3.

[179] Woelki K.B., The Principles of European Family law: its aims and prospects, *Igitur*, volume 1(2), 2005, p. 167.

[180] Ibid.

academic conferences[181]. In addition, the Organizing Committee of CEFL publishes books dedicated to the harmonisation of substative family law, which focus on comperative studies of the family law and the interpretation of the established Principles[182]. The described working method of CEFL reveals that the work of the Commission is based on comparative analysis of the national legal systems and thorough scientific research. This is the novelty in the field, as it is the first time the harmonisation of substantive family law has received such a comprehensive focus and a coherent approach at the European level.

The described specialities prove the uniqueness of the organization: CEFL is the first body established deliberately to concentrate on family matters which uses a scientific comparative analysis method to foster the harmonisation of substantive family law in Europe.

2.3.1. European Principles on Family Law

From its establishment CEFL has successfully completed 3 sets of principles (Principles on Divorce and Maintenance between Former Spouses (2004); Principles on Parental Responsibilities (2007) and Principles on Property Relationship Between Spouse (2013). The choice of the fields for harmonisation was conditioned by the need to react to the social changes and existing situation regarding the development of family law at the time[183]. K.B. Woelki states that the adoption of the European legislation on procedural matters (Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility (2003)) may be considered as having particular importance, as the unification of certain procedural aspects regarding cross border cases fostered the considerations about the possibility to launch the

[181] From the establishment of CEFL (2001) 5 academic Conferences were held: "Perspectives for the unification and harmonisation of family law in Europe"(2002), "Principles of European Family Law. Divorce, Maintenance between Former Spouses and Parental Responsibilities"(2004), " European Challenges in Contemporary Family Law" (2007), "The Future of Family Property in Europe" (2010), " Family Law in Europe: New Developments, Challenges and Opportunities" (2013). Retrieved 14.10.2014 from CEFL's website: <http://ceflonline.net/conferences/>

[182] Recently published Woelki, K, B., Dethloff.N & Gephart, W., Family Law and Culture in Europe: Developments, Challenges and Opportunities (2014), Beuermann.P., Der nacheheliche Unterhalt (2013), Woelki, K, B., Ferrand, F., Beilfuss, C, G., Jareborg, M, J., Lowe,N., Martini, D., Pintens, W., Principles of European Family Law Regarding Property Relations Between Spouses (2013), Retrieved 14.10.2014 from CEFL's website: <http://ceflonline.net/conferences/>.

[183] Woelki K.B., The Principles of European Family law: its aims and prospects, *Igitur*, volume 1(2), 2005, p. 163.

[183] The information retrieved from the official CEFL's website: <http://ceflonline.net/principles/>.

process of harmonisation[184] of substantive family law in Europe. "*CEFL* considered a number of areas, but concentrated first on divorce and maintenance between former spouses, as there was a growing convergence in Europe, therefore the time for drafting the European Principles regarding substantive divorce law and spousal maintenance seemed ripe"[185], - states K. B. Woelki. The existence of international instruments regarding children status caused the need to concentrate on the parental responsibilities at the European level. This led to the establishment of the European Principles regarding Parental Responsibilities next. Finally, the changing social reality, the increasing number of cross border families living outside the marriage, and the neccessity to protect property rights of individuals in case of break – up of relationships brought the need to concentrate on the property relations between the partners. This resulted in the creation of the European Principles on Property Relations between Spouses.

2.3.1.1. European Principles regarding Divorce and Maintenance between Former Spouses

The first set of the European Principles on Divorce and Maintenance between former Spouses was published in 2004. The Principles are based on 22 comprehensive national reports prepared by the members of the Expert Group who completed a detailed questionnaire comprising of 105 questions[186]. Such a specified questionnaire enabled to get comprehensive information about the legal system of each participating European country. The national reports based on the relevant legal provisions on a matter can be reached on the CEFL website. In order to provide an overview and a straightforward simultaneous comparison of different solutions in national systems, all the given answers were integrated into two publications: Volume I - Grounds for Divorce, Volume II: Maintenance between Former Spouses[187]. This comparative material was the basis for the formulation of Principles. It led to the establishment of ten European Principles regarding Divorce and ten Principles concerning the Maintenance between Former Spouses.

Principles regarding Divorce consist of 18 provisions. However, the scholar M. Antokolskaia does not consider it as the weakness of the principles, since this rather illustrates that the Principles on Divorce are not aimed at providing detailed and precise regulation for every aspect of divorce

[184] The unification was considered as too far-reaching and not feasible at that time. Woelki, K.B., Comparative Research-based Drafting of Principles of European Family Law, In: Towards a European lus Commune in Legal Education and Research, edited by Faure, M., Smits, J., Shneider, H., Intersentia, 2002, p. 179.
[185] Woelki K.B., The Principles of European Family law: its aims and prospects, *Igitur*, volume 1(2), 2005, p. 163.
[186] The information retrieved from the official CEFL's website: <http://ceflonline.net/principles/>
[187] Woelki K.B., The Principles of European Family law: its aims and prospects, *Igitur*, volume 1(2), 2005, p. 164.

law[188]. Analysing the provisions of the Principles, it becomes obvious that they are concentrated only on two relevant matters - the grounds for the divorce and the settlement of ancillary matters which follow the procedure of divorce. This shows that the principles do not intend to harmonise all the matters related to the divorce law, but rather seek to eliminate the main differences which cause the most problems in practice. Therefore, the principles may be considered as not posing the risk for the national identity of each participating European country as regards divorce law.

The provisions of the Principles on Divorce, in the opinion of K. B.Woelki, reveal that the Principles are aimed at dedramatising divorce, without neglecting the interests of the weaker spouse and the children[189]. This can be noticed analysing the content of the Principles. The Principles set two choices as regards the grounds for divorce: consensual divorce and unilateral divorce. However, as the member of Organizing Committe of CEFL K.B. Woelki emphasized the preference is given to consensual divorce[190]. Consensual divorce is explicitly distinguished as a separate ground for divorce of spouses who reach mutual agreement to dissolve their marriage[191]. The member of CEFL M. Antokolskaia reveals that the choice of the consensual divorce is based on the common core found among the jusrisdictions of European countries, stating that even if the consent is a formal ground for divorce only in the minority of the countries in Europe, the vast majority of jurisdictions provide for divorce by mutual agreement under various headings[192]. The consensual divorce does not require any period of reflection and can be granted immediately, if the spouses do not have minor children and the agreement on ancillary matters was reached[193]. It is obvious that the Principles encourage the spouses to dissolve the marriage in a consensual way.

The Principles also provide other ground for divorce – unilateral divorce. In case of this non-consensual divorce, in order for the divorce to be permitted without the consent of one of the spouses, one year of factual separation is required[194]. According to the scholar M. Antokolskaia, the

[188] Antokolskaia, M., Harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 418.
[189] Woelki K.B., The Principles of European Family law: its aims and prospects, *Igitur*, volume 1(2), 2005, p. 164.
[190] *Ibid*.
[191] Principles of European Family Law regarding Divorce and Maintenance between Former Spouses, Principle 1:4(2), retrieved 23.10.2014 from CEFL's website: <http://ceflonline.net/principles/>
[192] Antokolskaia, M., Harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 419.
[193] Principles of European Family Law regarding Divorce and Maintenance between Former Spouses, Principle 1:5(2), retrieved 23.10.2014 from CEFL's website: <http://ceflonline.net/principles/>
[194] *Ibid*, Principle 1:8.

advantage of the chosen solution is that it provides for a simple objective test, without the inquiry into matrimonial fault or breakdown of the marriage[195].

The Principles on divorce also regulates the settlement of ancillary matters. Nonetheless, the members of CEFL emphasize that "<...> CEFL has opted for a limited link between the divorce and the resolution of ancillary matters"[196]. In case of consensual divorce, as well as of non-consensual divorce, the competent authority which grants the divorce has the obligation to decide only on ancillary matters related to minor children (e.g. parental responsibility, child maintenance), seeking to guarantee the best interests of the child[197].

The Principles regarding Divorce were drafted and incorporated into one document together with the Principles regarding Maintenance between Former Spouses. This structure was chosen because of the close connection between the two matters, as post-divorce spousal maintenance by the members of CEFL is considered as an economic consequence of divorce[198]. This is the link which connects the fields. Maintenance is aimed at providing an economic support for the former spouse who is dependent after divorce. CEFL members emphasize that analysing the provisions of the Principles regarding Maintenance between former Spouses, it can be noticed that maintenance after divorce is more an exceptional case, than a rule[199]. The Principles set the rule of self – sufficiency in the relationship between the Former Spouses after divorce: "<...> each spouse should provide for his or her own support after divorce"[200]. Nevertheless, the Principles provide an exception to the main rule. Maintenance after divorce is attributed when the creditor spouse has insufficient resources to meet his or her needs and the debtor spouse's is able to satisfy those needs[201]. Apart from determined relationship between maintenance and divorce (Principle 2:1) and the rule of self – sufficiency (Principle 2:2), the Principles also set the conditions for the attribution of maintenance (Principle 2:3), determining claims for the maintenance (Principle 2:4), method of maintenance provision (Principle 2:5), limitation in maintenance period (Principle 2:8), cases of

[195] Antokolskaia, M., Harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 420.
[196] *Ibid*.
[197] Principles of European Family Law regarding Divorce and Maintenance between Former Spouses, Principle 1:7, 1:10 retrieved 23.10.2014 from CEFL's website: <http://ceflonline.net/principles/>
[198] Woelki, K.B., Pintens, W., Ferrand, F., Beilfuss, C, G., Jareborg, M, J., Lowe, N., Martiny, D., Principles of European family law regarding divorce and maintenance between former spouses, Intersentia, volume 7, 2013, p. 8.
[199] *Ibid*, p. 69.
[200] Principles of European Family Law regarding Divorce and Maintenance between Former Spouses, Principle 2:2, retrieved 23.10.2014 from CEFL's website: <http://ceflonline.net/principles/>
[201] Principles of European Family Law regarding Divorce and Maintenance between Former Spouses, Principle 2:2, retrieved 23.10.2014 from CEFL's website: <http://ceflonline.net/principles/>

termination of the maintenance obligation (Principle 2:9), the conditions for the maintenance agreement (Principle 2:10)[202], etc.

2.3.1.2. European Principles regarding Parental Responsibilities

The Principles of the European family law regarding Parental Responsibilities were drafted using the same working method as in drafting the Principles on Divorce and Maintenance between Former Spouses. The Principles are based on 22 comprehensive national reports prepared by the experts who completed a detailed questionnaire comprising of 62 questions[203]. On the basis of national reports, which were integrated into one document, 39 European Principles were established.

Analysing the provisions of the Principles it may be noticed that the structure of the Principles differs from the first set of Principles regarding Divorce and Maintenance between Former Spouses drafted by CEFL. It is considered that this difference might have been caused by the existing international and European instruments concerning parental responsibilities[204]. Since harmonisation of family law concerning parental responsibilities has gradually evolved within Europe through various international as well as European instruments[205].

The Principles regarding Parental Responsibilities start with the Preambule (this is not the case in the first set of Principles) which reveal the objective of establishment of the Principles. According to the Recitals the Principles are aimed at contributing to the harmonisation of family law in Europe regarding the child's rights and welfare[206]. The provisions of the Principles are aimed at providing the legal framework for harmonising legal systems of European countries as regards parental responsibilities. Seeking to reduce the gap between diverging regulation on parental responsibilities in different countries of Europe, the Principles set the guidelines regarding: the main rights of the child (Principles 3:3 – 3:7), parental responsibilities of parents and third persons

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[202] *Ibid*.

[203] The questionnaire and national reports can be retrieved on the website of CEFL: <http://ceflonline.net/country-reports-by-subject/>

[204] Woelki, K. B., Martiny, D., The Commission on European Family Law (CEFL) and its Principles of European Family Law Regarding Parental Responsibilities,Springer, 2007, p. 127.

[205] See e.g. Regulation 2201/2003 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility (Brussels II bis), The European Convention on the adoption of children (1967), The European Convention on the legal status of children born out of wedlock (1975), The European Convention on recognition and enforcement of decisions concerning custody of children and on restoration of custody of children (1980), The European Convention on the exercise of children's rights (1996), The Convention on contact concerning children (2003).

[206] Principles of European family law regarding Parental Responsibilities, Preamble, retrieved 23.10.2014 from CEFL's website: <http://ceflonline.net/principles/>

(Principles 3:8 – 3:10), exercise of parental responsibilities (Principles 3:11 – 3:18), content of parental responsibilities (the child's person and property; maintenance of personal relationships) (Principles 3:19 – 3:29), termination of parental responsibilities (Principles 3:30 – 3:31), discharge and restoration of parental responsibilities (Principles 3:32 – 3:34), and the procedural matters (Principles 3:35 – 3:39)[207].

2.3.1.3. European Principles regarding Property Relations between Spouses

In 2013, the third set of Principles was drafted which concentrate on property relations between spouses. K.B.Woelki states that elaboration of the Principles regarding Property Relations between Spouses took more than six years and required intensive work, as this complicated area of law is regulated differently in the European jurisdictions, therefore, not being under pressure from any organisation, CEFL took the necessary time to consider every single detail at great length, organising the meetings of the Organising Committee (17 meetings organized for this purpose) and the CEFL experts who produced national reports[208]. The efforts of CEFL resulted in the establishment of 58 Principles on Property Relations between Spouses.

As in the case of previously drafted sets of Principles, each Principle has a specific stucture. The members of CEFL emphasize that it consists of four elements: the text of the Principle (Principle); an overview of the international and the European instruments which concentrate on the same matter as the Principle; comprehensive comparative overviews of the 26 European countries; explanations of the content of each Principle (comment)[209]. The chosen structure guarantees a coherent approach to the matter and may therefore serve as a comprehensive instrument for national legislators adopting legal acts related to the aspects as regulated by the Principles.

According to the Preambule, the objective of the Principles is to contribute to the harmonisation of the family law in Europe as regards property relations between spouses, with the aim to ensure the equality of spouses; to strike a balance between the spouses' private autonomy and their solidarity; to ensure the welfare of the family; to secure the protection of the family home, and to guarantee each spouse a fair share in the property acquired during the marriage[210]. To reach

[207] *Ibid*.
[208] Woelki, K.B., General rights and duties in the CEFL Principles on Property relations between spouses, In: Family law and culture in Europe. Developments, challenges and opportunities, edited by Woelki, K. B., Dethloff, N., Gephart, Intersentia, 2014, p. 3.
[209] *Ibid*, p. 4.
[210] Principles of European family law regarding property relations between spouses, Principles on Property Relations, Preamble, retrieved 23.10.2014 from CEFL's website: <http://ceflonline.net/principles/>

the objectives set in the Preambule the legal provisions are provided, which regulate certain aspects of property relations between the spouses. The Principles regarding Property Relations between Spouses consist of three Chapters: General Rights and Duties of the Spouses (Chapter I), Marital Property Agreements (Chapter II), Matrimonial Property Regimes (Chapter III). The Chapters discuss all the issues which CEFL considered as necessary to be regulated at the European level in the field of property relations between the spouses.

Chapter I is considered as a general part of all the Principles which regulates the basic aspects: Equality of spouses (Principle 4:2), Legal capacity of the spouses (Principle 4:3), Contribution to the needs of the family (Principle 4:4), Protection of the family home and the household goods (Principle 4:5),[211] etc. Chapter II deals with the marital property agreements made before or during the marriage which determine the property relations between the spouses[212]. As the scholar N. Lowe states, "By accepting the basic freedom of spouses and potential spouses to make binding matrimonial property agreements, subject to being fully informed as to their partner's assets and debts and after receiving impartial legal advice, the Principles attempt to bridge the remaining gaps between the legal systems of European countries, providing a common way for all European systems"[213]. Finally, Chapter III sets the rules regulating the matters related to matrimonial property regimes[214].

In conclusion, the above discussed elements confirm that CEFL is the organization established to foster the process of harmonisation of substantive family law in Europe. The chosen working method, the means which CEFL uses to reach the goal, and its achievements in the field, lead to the conclusion that CEFL is the principal organization, which holds systematic approach to the harmonisation of substantive family law taking a deliberate and coherent action in the neccessary fields of family law at the European level.

[211] *Ibid*.
[212] *Ibid*.
[213] Lowe, N., Marital property agreements, In: Family law and culture in Europe. Developments, challenges and opportunities, edited by Woelki, K. B., Dethloff, N., Gephart, Intersentia, 2014, p. 23.
[214] Principles of European family law regarding property relations between spouses, Principles on Property Relations, Preamble, retrieved 23.10.2014 from CEFL's website: <http://ceflonline.net/principles/>

3. THE CHALENGES FACED BY THE COMMISSION ON THE EUROPEAN FAMILY LAW TRYING TO FOSTER THE HARMONISATION OF THE SUBSTANTIVE FAMILY LAW IN EUROPE

The analysis of particularities atributtable to the CEFL and its achievements in certain fields of family law has shown that CEFL is a unique organization established to foster harmonisation of substantive family law in Europe, which makes deliberate, coherent steps in the field, demonstrating comprehensive approach to the matter. Nonetheless, despite the established means suitable for harmonisation, the efforts and activities which CEFL carries out in order to foster the harmonisation of substantive family law in Europe, the harmonisation of family law remains a highly controversial issue, and discussions as to whether it is possible are far from over[215]. The doubt about feasibility of harmonisation of substantive family law arises due to the obstacles which CEFL is facing while trying to foster the process. These obstacles which constitute the challenge in CEFL's work could be distinquished into two main groups: challenges arising while trying to establish the means capable to gain harmonising effect in Europe, and challenges faced after the establishment of these means related to their use in the national legal systems. The following Chapters concentrate on the main challenges dealed by the CEFL in these two stages.

3.1. Challenges faced in drafting European Principles on Family Law

The discussion about the challenges faced in the process shall be started from the challenge which is met in the stage of creating the means which would be able to gain harmonising effect on the matter. In case of CEFL's work it is the stage of drafting the Principles. As it was found in the previous Chapter, the work of CEFL is based on the comparative analysis of regulation of certain matters in individual Member States. When the national reports on the matter are received, the main task of CEFL is to decide which method, taking into acount the situation in the field in variuos European countries shall be used to draft the Principles. Two main methods are used in the process – "common core" method and "better law" method[216]. The "common core" method is used when drafting the Principles the common rule which represents the majority of jurisdictions is chosen as a

[215] Antokolskaia, M., Harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 399.
[216] Woelki, K. B, The working method of the Commission on European family law, In: European family law in action. Volume III: Parental responsibilities, edited by Woelki, K. B., Braat, B., Summer, C.I., Intersentia, 2005, p. 31.

model while the "better rule" method is applied when the minority rule is chosen or the new rule is established in a certain field[217]. However, already in the beginning of its work the CEFL drew attention to the challenge to choosing the method for drafting European Principles: at the inaugural conference of CEFL in December 2002 extensive discussions took place about the most effective method for harmonising family law in Europe, considering whether harmonisation should only be common core-based or whether the use of the better law approach is indispensable in order to achieve positive results that represent the highest standard of the modernity[218]. Trying to find the solution, the Organizing Committee of CEFL decided that: „<...> the main goal of CEFL should be to distil common rules. However, there will be the cases where the CEFL will have to propose the alternative solutions and will decide to elaborate innovative "better law"[219]. The consideration about the choise of the method has arisen and still is discussed every time when CEFL takes the initiative on the new matter due to the specifity of family law and the difficulties to apply certain method to a particular field of family law. The Paragraph discusses the challenges which CEFL is facing when applying the "common core" and "better rule" methods while drafting the European Principles on family law.

3.1.1. Selection of Common core

The considerations of CEFL raised in the beginning of its functioning shows that the preference of CEFL is still given to the "common core" method when drafting the Principles. "It is the goal of the CEFL to choose common rules, while the "better rule" will be used only where CEFL "will have to propose the alternative solutions"[220]. The wording "will have to" supposes that the "better rule" shall be chosen as a model only when there is a clear necessity for this choise, giving the priority to the "common rule". This is comprehensible since the "common core" method seems easiest to use[221]. It makes justification of the choice of certain rule more simple, as the rule is chosen because it is common - represents the majority of European countries[222]. As the scholar M. Antokolskaia states, it leads to the practice that "<...> all drafters try to "restate", as far as possible,

[217] Antokolskaia, M., The "Better law" approach and the harmonization of family law, In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003, p. 160.
[218] Woelki K. B., The Principles of European Family law: its aims and prospects, Igitur, volume 1(2), 2005, p. 165.
[219] Woelki, K. B., Comparative research based – drafting the principles of European family law, In: Towards a European Ius Commune in Legal Education and Research., edited by Faure. M., 40 Intersentia, 2002, p. 180.
[220] *Ibid*, p. 180.
[221] Antokolskaia, M., The "Better law" approach and the harmonization of family law, In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003, p. 160.
[222] *Ibid*, p. 160.

the already existing common core of the legal solutions to a particular problem"[223]. However, it is considered that despite the fact that the choice of common rule can be justified easier, the application of this method is complicated[224]. The obstacles faced when trying to apply the "common core" method constitute the challenge to the process of harmonisation of substantive family law, therefore they require proper attention.

3.1.1.1. Cultural/Political constraint

The difficulty to apply common core method on a particular matter of family law mostly comes from the wide diversity in regulation of family matters within the Europe, which constitutes the challenge to find the common rule in diverging legal systems. Every matter has its own roots and divergence in regulation of family matters is not an exception. In order to understand the challenge to find the common rule within a diverse Europe on certain matter of family law, the roots of this divergence need to be briefly considered.

The considerations shall be started from the existing opinion[225] that the divergence in the regulation of family matters is caused by the cultural differences between the European countries, which is believed to form a challenge for harmonisation of substantive family law in Europe. For instance, in 1968 the scholar Wolfram Müller-Freienfels emphasized that: "family law concepts are especially open to influence by moral, religious, political and psychological factors; family law tends to become introverted because historical, racial, social and religious considerations differ according to country and produce different family law systems"[226]. Even if the social realities - while moving towards modernity - are always changing, the link between the divergence in regulation of family matters and diversity of cultures within Europe, as between the consequence and the reason is still being emphasized when the harmonisation of family law is at the core of the discussions. For example, not so long ago the Council of Europe considering the possibility to harmonise family law in Europe stated that "family law is very heavily influenced by the culture

[223] Antokolskaia, M., The "Better law" approach and the harmonization of family law, In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003, p. 161.
[224] This approach is expressed by the scholars Antokolskaia, M., The "Better law" approach and the harmonization of family law, In: Perspectives for the unification and harmonization of family law in Europe, Schwenzer, I., Methodological aspects of harmonization of family law, Bradley,D., A family for Europe? Sovereignty, Political economy and legitimation, In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003.
[225] The argument was raised by Moller-Freienfels, W., The Unification of Family Law, 16 The American Journal of Comparative Law, 1968, p. 175.
[226] Moller-Freienfels, W., The Unification of Family Law, 16 The American Journal of Comparative Law, 1968, p. 175.

and tradition of national (or even religious) legal systems, which could create a number of difficulties in the context of harmonisation"[227]. From the raised considerations it is obvious that the embeddement of family law in national culture is perceived as an obstacle for harmonisation, which may hinder the process. This is because it is believed that each country has its own particular culture, formed by the customs, traditions, religion, historical experience, etc., which inflences the law of each country, therefore the cultures within Europe vary and this cultural diversity leads to the different regulation of certain matter in different European countries with the absence of possibility to find something common when the certain matter of family law is discussed. This is the core of the so-called cultural constraint argument, which is based on the perception that "<...> the differences between national family laws are embedded in unique and cherished national cultural heritages, that this cultural and historical diversity is unbridgeable and that, therefore, family laws do not converge spontaneously and cannot be harmonised deliberately"[228]. Therefore, it may be considered that due to the embeddiment of family law in the national culture the approach to the particular matters of European Countries (e.g. recognition of same-sex marriages) is so different (e.g. in Netherlands marriage is open to same-sex couples, in Poland only to the opposite sex couples[229]) and the common core on some matters may not be expected to be found.

Nonetheless, despite its justifications the cultural constraint argument is being criticized. For instance, the scholar M. Antokolskaia argues the cultural constraint argument trying to deny that national family laws are embedded in unique national cultures[230]. The scholar states that the diversity of national family laws is not caused by the national cultures and its diversity, as family law is not so much embedded in unique national culture, which are diverse within Europe, but rather in pan-European culture[231]. The scholar bases this consideration on the common history of European countries[232]. The same opinion is expressed also by the scholar L. Vaigė who states that "the medieval (ecclesiastic) law on family and sex dominated and possibly still claims a large share

[227] Council report on the need to approximate Member States' legislation in civil matters of 16 November 2001, 13017/01 justciv 129, p. 114

[228] The argument is expressed by G. de Oliveira, 'A European Family Law? Play it again, and again … Europe!' (2000), retrieved from Antokolskaia, M., Harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 399.

[229] Property effects of marriage and registered partnership, retrieved 29.10.2014 from European Commission website: http://ec.europa.eu/justice/civil/family-matters/marriage/index_en.htm.

[230] Antokolskaia, M., Family law and national culture: Arguing against cultural constraint argument, Volume 4, Issue 2 2008, p. 27.

[231] Antokolskaia, M., Harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 408.

[232] *Ibid,* p. 408.

of influence in formation of laws in European states‘‘[233]. According to the scholar M. Antokolskaia in contrast to other fields of private law, the *ius commune* of family law was not Roman law, which was rediscovered in the Middle Ages and developed in the European universities from the twelfth century onwards, but the uniform medieval canon family law, which was shared until the Reformation, by the Western European civil and common law countries, as well as by the Scandinavian region and the Eastern European countries with a Catholic tradition[234]. However, in the opinion of the scholar the Enlightment brought the division in Europe: the gradual decline of the transpersonalistic[235] approach in family law in Europe after the Reformation in favour of a more personalistic[236] approach was the progressive development, but was met with controversy[237]. M. Antokolskaia states that the progressive modernisation was severely opposed by the advocates of traditional, restrictive family law[238]. Since then, as the scholar emphasizes, Europe has been split by the ideological discord between the 'progressive' camp (which seeks the modernisation of family law under the influence of the ideas of the Enlightenment) and the 'conservative' camp (which opposes this modernisation defending traditional' family values)[239]. Therefore, the M.Antokolskaia argues that the national cultures are not so unique, but is rather a mixture of conservative and progressive cultures, which “<...> both are clearly of a pan-European nature, as both have their own rank and file in each European country‘‘[240]. National cultures, as the scholar states are not internally homogenous, as every population, in the opinion of the scholar, in each European country is split into various different cultures that are affiliated to the certain ideology (conservative or progresive), which does not coincide with State boundaries[241]. The countries with progressive approach towards family matters also have population groups with a conservative family ‘culture’ and the countries

[233] Vaigė, L., The harmonisation of family law in Europe: the place of Lithuania?, AVADA 2014: Drivers for progress in the global society, Proceedings of a European Interdisciplinary forum, 2014, p. 46.
[234] Antokolskaia, M., Harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 404.
[235] Transpersonalistic approach is described as old way of thinking, when the individual is seen as subservient to the family, and the family in turn subservient to society at large. Antokolskaia, M., Harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 406.
[236] Personalistic approach is described as a modern way of thinking based on believing that “family is made for man, not man for the family“. “In the personalistic family ideology, the concrete interests, feelings and aspirations of the individual family members are given priority above abstract, general values such as 'stability of the family' or 'indissolubility of marriage'“, Antokolskaia, M., Harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 406.
[237] *Ibid*, p. 406.
[238] *Ibid*, p. 406.
[239] Antokolskaia, M., Family law and national culture: Arguing against cultural constraint argument, Volume 4, Issue 2 2008, p. 29.
[240] *Ibid*, p. 29.
[241] Antokolskaia, M., Harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 407.

with conservative approach always have population groups that represent the most progressive views on family matters and these populations despite physically being in different countries are connected through ideological affiliation[242]. However, as the scholar underlines at the end each country, nevertheless, has a predominant ideology regarding family law matters, which is either a reflection of the predominant values of the majority, or a compromise between the values of the various groups[243]. Therefore, as the predominant ideology vary, the national family laws are diverging[244]. So M. Antokolskaia comes to the conclusion that "<...> there are the differences in the balance of political power between 'progressive' and 'conservative' forces, rather than national culture that determines the pertinent family laws"[245]. Therefore, the development of national family law and the current diversity in regulation is influenced by the diverging politics, rather than by diverging national cultures[246].

The approach expressed by the scholar may be critized stating that the culture influences the national family law not less than the political power. For instance, religious affiliation of each European country may play very important role determining the main concepts of family law. The system of values within the country to the large extent depends on predominant religion. Predominant religion after Reformation in European countries differs. For instance, the teaching of one of the groups of Christianity, Roman Catholic identifies the family as the social and moral centre of the community[247]. The guiding principle of church teaching is the stability of the family[248]. Therefore Roman Catholic church is not in favour of non-marital relationships, same-sex marriage, dissolution of marriage. How the church reacts to the prevalence of civil marriage, cohabitation, the possibility to divorce, legal separation, relationships of same-sex, nonetheless, may have a particular importance and it may influence the regulation of family matters if the church is an important authority within a certain country[249]. Therefore, talking about the influence of the religion to the regulation of family matters, it may be stated that national law is embedded in religion, which is one of the most important element of culture of each European country. This could explain, for example, why some Roman Catholic countries which are defending traditional

[242] *Ibid*, p. 407.
[243] Antokolskaia, M., Family law and national culture: Arguing against cultural constraint argument, Volume 4, Issue 2 2008, p. 28.
[244] *Ibid*.
[245] *Ibid*, p. 34.
[246] *Ibid*, p. 34.
[247] Knowles, M. B., Roman Catholicism, retrieved 29.10.2014 from: <http://www.britannica.com/EBchecked/topic/507284/Roman-Catholicism/43707/Economic-views-and-practice>
[248] *Ibid*.
[249] Gephart, W., Family law as culture, In: Family law and culture in Europe. Developments, challenges and opportunities, edited by Woelki, K, B, Dethloff, N, Gephart, W, Intersentia, 2014, p. 356.

values are against modern types of family – cohabitation, same – sex marriage (e.g. Ireland (84,2% of population Roman Catholic[250]), Poland (89,9 % of population Roman Catholic[251]) do not recognize neither the right to marry for same-sex couples, nor their registered partnership, while non-catholic countries are more progressive in accepting the modern approach (e.g. Sweden (73 % Lutheran[252]) allows the marriage of same-sex couples)[253]. However, if we take closer look to the regulation of European countries on the same matter and predominant religion in these countries, it becomes obvious that it is not the axiom that religion, as a part of the culture determines the regulation of certain family matters. For instance, in Belgium (~ 75% of population Roman Catholic[254]) and Spain (76% of population Roman Catholic[255]) Roman Catholic is predominant religion, however, the countries allow marriage, as well as registered partnership of same-sex couples)[256]. All the European Roman Catholic countries (the last ones – Ireland (1995) and Malta (2011) despite the fact that the Church does not support it, recognize the right to divorce. So it is clear that national family law is not influenced merely by the predominant religion. This may be considered as self-evident, since the religion is not able to affect the regulation by itself, only by its existence. The value, no matter its nature and religious affliation in order to become the law requires political decision. Political will is the essential element giving the body to the predominant value in law. Therefore, even if try to deny that culture influences the regulation of certain matter no less than the politics does, we come back to the same argument that the most important denominator in determining the law is politics and the ideological affiliation of those who make the political decision on a particular matter in a certain moment. It is not arguable that the religion may have the influence if the ideological values of those who are in power are in accordance with the ones shared by the Church. In this case, even if the country is secular and not dependant on the Church, and the law is not based on the religion, the Church may have indirect effect considering important issues of family law, as every time when deciding important matter the values shared by

250 Profile 7 Religion, Ethnicity and Irish Travellers - Ethnic and cultural background in Ireland, retrieved 29.10.2014 from Central Statistics Office**:** <http://www.cso.ie/en/census/latestnews/>

251 Demographip Yearbook of Poland 2014, retrieved 29.10.2014 from Central Statistical office of Poland: <http://stat.gov.pl/en/search/search.html>

252 Jareborg, M. J., Religion and the Secular State in Sweden, retrieved 29.10.2014 from: <http://www.crs.uu.se/digitalAssets/125/125656_3religion_in_the_secular_state.pdf>

253 Property effects of marriage and registered partnership, retrieved 30.10.2014 from European Commission website: <http://ec.europa.eu/justice/civil/family-matters/marriage/index_en.htm>

254 Demographics of Belgium, retrieved 30.10. 2014 from: <https://www.princeton.edu/~achaney/tmve/wiki100k/docs/Demographics_of_Belgium.html>

255 Demographics of Spain, retrieved 30.10. 2014 from: <https://www.princeton.edu/~achaney/tmve/wiki100k/docs/Demographics_of_Spain.html>

256 Property effects of marriage and registered partnership, retrieved 30.10.2014 from European Commission website: <http://ec.europa.eu/justice/civil/family-matters/marriage/index_en.htm>

the religion appeal to those who believe in these values and base their decisions on them. The most notable example could be the predominant religion of Christianity (Roman Catholic) combined with the conservative parties in power. However, the case may be opposite as well. If the parties in power have a progressive approach, which is not always in line with the values emphasized by the church, since in most of the cases the state and the church are separate and are not obliged to follow the approach of each other on a certain matter, the religion loses its power to influence the national laws. This is the case, e.g. with Spain. Being predominantly Christian state, after the electoral victory of the Social Democrats under Rodriguez Zapatero, Spain introduced same-sex marriage[257]. Example of Italy also justifies the statement. After being under constant pressure by the Holy See during the *Democrazia Chistiana*, Italy was the third country which adopted the act on transsexualism[258] which gives transsexuals the right to marry (heterosexual partners) and adopt children (when married to a person of the opposite sex)[259]. The examples demonstrates that even if the culture, in this case its important element – religion, has the possibility to influence national family laws, its effect on decision making may be chanelled only through politics. Therefore we can agree with the opinion of the scholar W. Gephart that the national culture by itself is not a constraint for harmonisation of family law, but matters as a condition in regulation of family matters in each European country[260], which may influence the national family laws only under particular circumstances and only to a certain extent.

The discussed leads to the conclusion that ideological affiliation, rather than pecularities of the national cultures influences national family laws. The national culture of each European country may have impact on the regulation of family matters within the country to a certain extent, but in order for the values formed by the national culture of the state to become the law, a political decision, which is based on ideological affiliation, is essential. As the balance of ideological affiliation in each country differs, the decisions made on family matters are diverging in each European country. This causes the diversity in regulation of the same matter of family law, which forms the obstacle to find a common core when drafting European Principles on family law.

[257] Antokolskaia, M., Harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 408.
[258] Pintens, W., Europeanisation of family law, In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003, p. 9.
[259]Marella, M. R.,The non-subversive function of European Private law: the case of harmonization of family law, European Law Journal, Vol. 12, No. 1, 2006, p. 88.
[260]Gephart, W., Family law as culture, In: Family law and culture in Europe. Developments, challenges and opportunities, edited by Woelki, K, B, Dethloff, N, Gephart, W, Intersentia, 2014, p. 348.

3.1.1.2. Diverging regulation in family matters in Europe

The previous paragraph discussed the roots of diverging regulation on family matters, which are considered to have a paramount importance, since they cannot be easily reconciled[261]. However, the question how to bring the systems of European countries closer to each other, reducing the gap between the ideological approach on particular family matters of different European countries is usually faced in the conferences organized by CEFL and discussed in the EFL series by providing possible solutions to the situation, as the system of shared values on the matter cannot be created superficially. It requires long term investment of thorough analysis, academic efforts and continous exchange. Nonetheless, while taking a deliberate action in drafting the European Principles on certain family matter, when the national reports on the regulation on particular family matters are collected, the members of CEFL are expected to set aside the roots for a moment and deal with the outcomes – diverging rules of European countries on a certain matter, trying to find common core of the regulation. This constitutes the major challenge drafting the European Principles on family law, therefore it requires proper attention.

Even if the development of family law in Europe can be depicted as progressive evolution [262] and the convergence of family law is far-reaching, it is widely acknowledged that the differences between various European countries with respect to family law are still very significant and therefore the common core is difficult to find on some of the specific matters of family law[263]. One of the examples of the challenge to find common core on the matter could be non-marital and same - sex relationships. Due to social changes the relationships are evolving. Nowadays, not all relationships are based on marriage. Some people live in cohabitation a part of which is established between same-sex partners. However, not all European countries accept these changes in family matters. The approach towards non-marital ties and same-sex relationships varies. For instance, marriage is a legal institution recognised in all 28 EU countries, however only in five countries, it is

[261] The differences on the deep moral and ideological level are of paramount importance. technical aspects of the differences in legal cultures are relatively easy to reconcile, while overcoming differences, based on dissimilar moral values encounter[s] a general tension between the project of harmonisation and respect for cultural diversity in Europe.' H. Collins, 'European Private Law and the Cultural Identity of States', 1995 *European Review of Private Law*, p. 363, In: Antokolskaia, M., Family law and national culture: Arguing against cultural constraint argument, Volume 4, Issue 2 2008, p. 30 – 31.

[262] Antokolskaia, M., Harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 405.

[263] The best examples of common core of European countries are the rules on the equality of spouses and of children born in and outside of marriage. However, it is clear that on many other issues such common consensus does not exist. Antokolskaia, M., The "Better law" approach and the harmonization of family law, In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003, p. 167.

open to both opposite-sex and same-sex couples (the Netherlands; Belgium; Spain; Sweden and Portugal)[264]. Registered partnership is recognised in 14 EU countries (Austria, Belgium, the Czech Republic, Denmark, Germany, Finland, France, Hungary, Ireland, Luxembourg, Netherlands, Slovenia, Sweden and the UK), nontheless, only Belgium, France, Luxembourg and the Netherlands permit both same-sex and opposite-sex couples to register[265], while some countries only allow the registration of same-sex couples, e.g. Slovenia[266]. Some countries provide an automatic extension of marital regime to stable unions - cohabitation (e.g. Sweden, Hungary[267], etc.)[268]. The situation proves that the approach of European countries towards non-traditional types of families are diverging and that the common core can hardly be found on the matter. This was emphasized also by the ECtHR in the Schalk and Kopf (2010) case, where the Court held that the issue is sensitive and no consensus on the matter exists, therefore, "<...> the States must enjoy a margin of appreciation <...>" regarding the question. It is obvious that the possibility to find the common core on this question would be of paramount importance, since it would increase the effectiveness of the European Principles in national legal systems after their establishment. However, the question of how to crystallize the common core in as much diverging conceptions remains a challenge for CEFL while drafting the European Principles.

Divorce law also forms a challenge in trying to find common core, as it appears equally diverse from a formal perspective (the grounds for divorce) as from a functional perspective (the "costs" of divorce in terms of time, money and infringement of private life)[269]. Grounds of divorce vary in European countries. For instance, in Netherlands, Sweden, England Wales and Ireland, the legal ground for divorce is solely an irretrivable breakdown of marriage, while Belgium, France, Austria, Poland have multiple grounds for divorce (divorce by consent, divorce on the ground of fault/matrimonial offence, divorce on the ground of irretrievable breakdown of the marriage and/or separation)[270]. Therefore, the dilemma on how to find the common ground in this diversity arises. It

[264] Property effects of marriage and registered partnership, retrieved 01.11.2014 from European Commission website: <http://ec.europa.eu/justice/civil/family-matters/marriage/index_en.htm>
[265] *Ibid*.
[266] Slovenian Law on Registration on Same – Sex Partnership, retrieved 13.11.2014 from: <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO4335>
[267] In an analogy to marriage, Hungarian law recognizes many rights of unmarried cohabitants (such as a pension for the widow or the widower, and preferential rates in acquisition of dwellings), but this does not structure any type of registered partnership, for same sex partners or for heterosexual couples. Marella, M. R.,The non-subversive function of European Private law: the case of harmonization of family law, European Law Journal, Vol. 12, No. 1, 2006, p. 86 – 87.
[268] *Ibid*, p. 86 - 87.
[269] Antokolskaia, M., Harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 402.
[270] Antokolskaia, M., The "Better law" approach and the harmonization of family law, In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003, p. 166-167; national

is discussed that even if the grounds for divorce are homogenous in some European countries, the concept of the exact ground for divorce varies from country to country[271]. For instance, in Sweden, Netherlands, Ireland and England and Wales, the legal ground for divorce is the irretrievable breakdown of marriage, however the concept of this ground in these countries differs[272]. In Sweden and Netherlands, the irretrievable breakdown of marriage in some instances no longer needs to be proved: if the spouses state that their marriage has broken down, the competent state officials are obliged to take this for granted, therefore in these countries divorce on the ground of irretrivable breakdown has basically de facto became divorce "on demand"[273]. For instance, "in Sweden, a couple without children can obtain a divorce immediately, without going to court in person, with no enquiry into the grounds for divorce and no need to settle ancillary matters"[274]. While in Ireland, England and Wales, the irretrivable breakdown needs to be proved - otherwise the court is entitled to dismiss the divorce application: (the conditions: separation for a certain period of time, a conviction for certain crimes, etc.)[275]. In Ireland, for instance, the couple is oblidged to wait at least 4 years for a divorce, while convincing the judge that the marriage has irretrievably broken down and settling financial matters[276]. In as much diverging rules common core seems impossible to be found. Therefore, common core broadly describing as a solution which is shared by all jurisdictions covered, only two Principles regarding divorce would actually be based on common core: Principle 1:1 (1), which establishes the permissibility of divorce, and Principle 1:2 (1), which states that divorce requires a competent legal authority, which may be an administrative or judicial body[277]. Regarding the grounds for divorce, no common core shared by all European jurisdictions can be found[278]. Even defining the common core more narrowly as a solution shared by a significant majority of European countries, the application of the common core method is limited - as the scholar M. Antokolskaia notes, even if the common core does exist in some cases, common

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reports on divorce/maintenance, retrieved 29.10.2014 from: <http://ceflonline.net/divorce-maintenance-reports-by-jurisdiction/>

[271] Antokolskaia, M., The "Better law" approach and the harmonization of family law, In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003, p. 166-167.

[272] National reports on divorce/maintenance, retrieved 29.10.2014 from: <http://ceflonline.net/divorce-maintenance-reports-by-jurisdiction/>

[273] Antokolskaia, M., The "Better law" approach and the harmonization of family law, In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003, p. 166 - 167.

[274] Antokolskaia, M., Harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 403.

[275] Antokolskaia, M., The "Better law" approach and the harmonization of family law, In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003, p. 167.

[276] Antokolskaia, M., Harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 403.

[277] *Ibid*, p. 418.

[278] *Ibid*, p. 418.

denominator lies below the requirements of the drafters for the quality and modernity of the law they wish to make or common core cannot be extracted due to the diversity of national laws which is too great[279]. So the pecularities of divorce law in different European countries also prove that the application of common core method in diverse regulation is a complicated challenge for CEFL while drafting the Principles.

Not less diverging rules, according to the member of CEFL M. Antokolskaia, can be found in regulation of matrimonial property in European countries: as even if matrimonial property law displays far reaching commonality in Europe with the common functional objectives to ensure the equality of spouses and achieve a proper balance between the principles of solidarity and autonomy, the diferences between the various regimes in different European countries, nonetheless, remain significant[280]. The matrimonial property law is not homogenous in Europe. Three main regimes of matrimonial property can be distinguished in different European countries: limited community of property (France, Belgium, Italy and Eastern European countries), deferred community of property (Scandinavian countries, Germany, Austria, Greece and Switzerland), separate property with judicial adjudication (England and Wales)[281]. The diferencees between these legal regimes can not be easily overcome, as they demonstrate extremely diverging position on matrimonial property. For instance, limited community of property means that the property owned by each spouse before the marriage, together with the property acquired during the marriage by gift or inheritance as well as assets for purely personal use, constitutes the separate funds of the spouses, while the rest falls into the common fund, which at the end of the marriage is divided equally between the husband and wife (or the heirs of deceased spouses)[282]. Meanwhile, deferred community of property is of different nature. In contrast to the limited community of the property, in deferred community of property regime the forming of the community is postponed until termination of the marriage, which means that property of the spouses remains separate for as long as the marriage lasts, but the spouses are entitled to share in each other's wealth if the marriage is terminated[283]. Separate property with judicial adjudication also has its pecularities. For example, under English law, marriage has no impact on the property of the spouses[284]. As a reaction to the controversial case law of House of Lords which denied a married woman a possibility of acquiring property rights in the

[279] *Ibid*, p. 419.
[280] Antokolskaia, M., Harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 404.
[281] *Ibid*, p. 403.
[282] *Ibid*, p. 403.
[283] *Ibid*, p. 403
[284] Pintens, W., Europeanisation of family law, In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003, p. 11.

family home where she did not invest in the home directly, but financed other expenses, the legislation from 1970 gives the judge the authority to achieve the reallocation by issuing property adjustments orders upon divorce, in this way granting a spouse part of the other‘s spouse property[285]. W. Pintens states: “This did not mean that the spouse had to share the assets equally with the other one, but that the distribution was limited to the such extent to allow the other spouse to maintain the previous standard of living“[286]. However, by the revolutionery White v. White decisision the principle of equal division was introduced, which means that “<...> there should be no bias in favour of the money – earner and against the homemaker and the child – carer“[287]. These developments allowed to suggest that English case law came close to de facto establishment of a deferred community of property[288]. On the other hand as scholars emphasize even if the same matrimonial regime is established in several countries, it does not mean that they are homogenous, as it has its own pecularities in different European countries: both France and Italy have limited community of property regime, however there are some differences between the regulation, as under the French law, all income, including of the personal property, belongs to the community, while in contrast, according Italian law only the income of community property belongs to the community, while the income of personal property remains separate until dissolution of the community[289]. The above considered demonstrates that the core of the matrimonial law - matrimonial property regimes in different European countries vary, which lets to presume that the rules applicable on matrimonial property within the Europe are diverging.

In conclusion, several examples discusssed above prove that the same family matters in different European countries may be regulated differently. When the rules on the same matter are so diverging, even if desirable, the common core may be not possible to be found. The issue whether the common core method can be applied on a certain aspect is challenging every time when the new set of European Principles are being drafted.

[285] *Ibid*, p. 11.
[286] Pintens, W., Europeanisation of family law, In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003, p. 11.
[287] *Ibid*, p. 11.
[288] Antokolskaia, M., Harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 404.
[289] Pintens, W., Europeanisation of family law, In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003, p. 10.

3.2. The Application of Better law method

When the common core cannot be found due to the wide diversity in the field or is found but cannot be applied since is not in accordance with modernity, another solution may be offered – the application of better law method for drafting European Principles. However, it is considered that the process of the application of better rule is not less challenging than trying to find common core in diverse regulation.

It is important to emphasize that "the very need for harmonisation of substantive family law already indicates that not all rules in the field which is considered are common, otherwise the whole harmonisation exercise would be superfluous"[290]. Therefore, even if common core is desirable, as the choice made while drafting the Principles based on existence of common rule can be easily justified, seeking progression in certain fields of family law, the process of drafting the Principles can not be solely based on the common core method. When the common core method cannot be applied the CEFL moves towards the better law method and "<...> select the "better" rule among the diverging rules existing in national jurisdictions, or engineer a better rule if no existing solution seems satisfactory"[291]. However, even if by the choice of better rule on a certain matter the progression is sought, the process of the application of this method is complicated and raises intense considerations. For instance, as it was already emphasized, the common core on the ground for divorce does not exist in the diverse regulation of European countries. In such a case the CEFL is expected to find the better law. For the experts on family law it is not hard to ascertain that consensual divorce in terms of time, costs of divorce and interference to the private life of the spouses is a more progressive ground for divorce than irretrievable breakdown of marriage. However, how to justify this choice making the countries which do not base their divorce law on the latter one to follow the new concept - the question arises. Therefore, the problem of justification in the application process of the better law method for drafting the Principles is the most challenging. The scholar M. Antokolskaia notices that the application of the better law method for drafting the Principles is much more complicated than the application of the common core method: "Even if it leaves more room for more creative drafting, it invokes a troublesome problem of justifying the choises made"[292]. The scholar D. Bradley also agrees that the 'better law' method is much more demanding than the 'common core' method as the choices represented in various national solutions

[290] Antokolskaia, M., The "Better law" approach and the harmonization of family law, In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003, p. 161.
[291] *Ibid*, p. 162.
[292] *Ibid*, p. 162.

reflect different political compromises, reached on the regional level[293]. Therefore to persuade a certain European country that the rule of the other European country is more progressive than adopted at its national level, when it does not float from its ideology and is not in accordance with its values may be a hard task or even mission impossible. "<...> A great deal of consideration has been given to the explanation as to why a certain Principle has been adopted"[294] in order to tackle this challenge. The justification of the choice made is provided in the commentaries which are a constituent part of the Principles. They give a guide to the policy considerations behind the choices and are like considered to be the dominant features of the drafters, suggesting which is "the best", the more "functional" or the more "efficient" rule[295]. However, despite the considerable efforts to justify the choice purely on scientific arguments, the element of subjectivity while making a choice should also not be forgotten and completely ignored,as by preferring one of the national solutions, drafters implicitly take sides in the political debate and express value judgements[296]. As the scholar K.B.Woelki notes, apparently there is no universally acepted hierarchy of values, and thus no objective standard for the evaluation of the choices, therefore evaluating the solutions and taking the positions can never be made without any subjectivity[297]. Despite the absence of the direct link to the national political power, the members of CEFL are representing their countries, which to a certain extent may put at risk the ability of the members of CEFL to maintain neutrality in the process, as making a choice on the better rule, the conflict between national and European identity may arise every time.

The choice of the better rule and the justification of the choice is based on the personal evaluation of the members of CEFL. Being the experts on family law, the members of the CEFL are expected to base their choices solely on scientific arguments. However, even if in the absence of the political mandate, the members of CEFL are the representatives of their national systems, what raises the doubts whether the necessary level of neutrality while making decisions is always being maintained. The absence of extensive justification why the choice made is the better law may lead to the rejection of the choice of the European countries with different ideology on the matter. Therefore, being a challenge itself, the application of the better law method for drafting European

[293] Bradley, D., Family Law For Europe? Sovereignty, Political Economy and Legitimation', In: Perspectives for the Unification and Harmonisation of Family Law in Europe,edited by Woelki, K. B., Intersentia, 2003, p. 81.
[294] Woelki,K. B., Martiny, D., The Commission on European family law and its Principles of European Family Law regarding Parental Responsibilities, Springer, 2007, p. 126.
[295] *Ibid*, p. 126.
[296] Antokolskaia, M., Harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 419.
[297] Woelki, K. B., The working method of the Commission on the European Family Law, In: Common Core and Better Law in European Family Law, edited by Woelki, K, B, Intersentia, 2005, p. 32.

Principles if it is not justified properly in the application process leads to another challenge for harmonisation – the reluctance to follow the models embodied in Principles in the national legal systems. Since the arising challenge belongs to another – use of the European Principles – stage, it will be considered in the following Chapter.

4. THE INFLUENCE OF THE EUROPEAN PRINCIPLES ON FAMILY LAW IN NATIONAL LEGAL SYSTEMS

The process of harmonisation with the drafting the European Principles is not over. In order that the Principles would gain the harmonising effect within Europe, the models embodied in the Principles have to be followed in the national legal systems while undertaking the reforms in a certain field of family law. However, due to the nature of the Principles, reluctance of the Member States to loose the sovereignty in the family matters and the absence of the control/monitoring mechanism how the Principles are followed in the national systems, the success of the harmonisation of substantive family laws using bottom – up approach is disputable. The following Chapter discussess the challenges arising after the establishment of the Principles in the stage of their use in the national legal systems of the European countries.

4.1. The use of the models established by European Principles on the Family law in the national legal systems

The sought results can be achieved only if the Principles established by the CEFL gain the harmonising effect through the use of them in the national legal systems. However, the question whether the European countries use the European Principles as a source of inspiration while reforming certain fields of family law arises. The last set of European Principles regarding Property Relations between Spouses was established in 2013, therefore, it may be too early to consider the effect which the Principles have gained in the national legal systems. However, the first set of European Principles regarding Divorce and Maintenance between the Former Spouses was established in 2004, the second set of European Principles regarding Parental Responsibilities – established in 2007. So, it has passed enough time since the establishment of the Principles that the results of their effect in the national legal systems would be visible. Though, how many countries have used the Principles as a model while reforming their national family laws until now?

Trying to identify how many countries have followed the Principles etablished by CEFL as a model while reforming their national family laws or amending certain regulation, the difficulty was faced. The drafting of the Principles takes intense preparations – the detailed questionnaire on the certain matter is prepaired, thorough national reports are concluded. All the material is published on the website of CEFL, thus making it easily accessible. However, after the establishment of the Principles and their publication, it seems that the work is over. The website of CEFL does not contain any information about the effect which the Principles receive in the European countries after their establishment, and there is no thorough analysis of the cases where the Principles have been followed. This may be considered as a weakness of the working system chosen by CEFL. The Commission emphasizes that CEFL is merely an academic initiative, whose aim is just "<...> to bestow the most suitable means for the harmonisation of family law within Europe"[298]. It is obvious that CEFL does not seek to monitor how the Principles are used in the national legal systems after their establishment. However, it could be stated that this approach also forms the challenge for the desirable harmonisation of substantive family law in Europe, as in the absence of evaluation system there is no possibilities to identify whether the harmonisation is ongoing in the fields regulated by the Principles established by CEFL. In order to evaluate whether the established means were effective, and any progress in the fields in which the Principles were drafted after their establishment was reached reducing the gap between the diverging regulation of family law of European countries the monitoring mechanism and evaluation system is of paramount importance. It is considered as an essential element completing the complex system, ensuring coherent and comprehensive approach to the matter.

Nonetheless, despite the lack of comprehensive information and thorough analysis of the achievements in the fields, the major reforms inspired by the Principles of CEFL can be discovered through the various ancilliary sources (media publications, articles/comments of the scholars, etc.) then taking a closer look to the legal sources of the national reforms. Seeking to find the answer whether the Principles have been ever used as an inspiration for the refors of national family laws, it was discovered, that since the establishment of the first sets of European Principles (2004; 2007) few countries based their national reforms on the Principles established by CEFL referring to them directly. These countries are Portugal and Croatia. Portugal relied on the Principles established by CEFL when reforming its divorce law[299]. Croatia most recently reformed its family law entirely.

[298] Woelki, K. B., Ferrand, F., Beilfuss, C. G., Jareborg, M. J., Lowe, N., Martiny, D., Pintens, W., Principles of European Family Law regarding Divorce and Maintenance between Former Spouses, Intersentia, 2004, p. 3.
[299] Antokolskaia, M., Harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 420.

The reform also included the new regulation on divorce law and parental responsibilities (2014)[300]. The new regulation in these fields of family law was based on the Principles regarding Divorce and maintenance between the Former Spouses, particularly 1:6 (content and the form of the agreement of the consiquences of divorce), 2:4 (factors taken into account in determining the claims for maintenance), 2:5 (method of maintenance provision), 2:8 (limitation of the maintenance in time), 2:10 (permissibility of the maintenance agreement) and the Principles regarding Parental Responsibilities, particularly 3:1 (concept of Parental Responsibilities), 3:20(1) (the residence of the child), 3:12 (the excercise of parental responsibilities on daily matters, important and urgent decisions), 3:14 (disagreement on the exercise of the parental responsibilities), 3:15 (sole exercise of parental responsibilities upon agreement or decision), 3:18 (the decisions of the third person concerning the child in daily matters), 3:22 (administration of the child's property). Some provisions of the European Principles regarding parental responsibilities were applied in the national systems of Estonia, Malta, Romania, Scotland, Denmark, England and Wales, and Turkey[301]. However, can the sufficiently low rate of the use of the Principles in the national systems be described as ongoing harmonisation in certain fields caused by the European Principles established by CEFL? It is obvious that not all European countries take into consideration the established European Principles while iniating national reforms or start the reforms of the family law in order to comply with the European Principles. For example, "<...>the tensions surrounding divorce reforms in England and Wales, Belgium and France leave little hope that national legislatures will readily abandon national compromises, reached with such difficulty, for the sake of harmonisation"[302].

Despite the fact that European Principles on some aspects are considered as more progressive than the national law and are recommended by the academics to be taken as a model for the national family law, amending the national legislation, they do not receive enough desirable effect within the national legal systems, becoming the inspiration for national reforms. For instance, the scholar I.Kudinavičiūtė – Michailovienė while analysing whether the law on the family matters of the Republic of Lithuania is in line with the European Principles regarding the Divorce and Maintenance between the Former Spouses ephasized that European Principles are more progressive

[300] Final proposal on Family law of the Republic of Croatia, retrieved 04.11.2014 from: <http://www.sabor.hr/konacni-prijedlog-obiteljskog-zakona-drugo-citanje>

[301] J. Mair & E. Örücü (eds.), Juxtaposing Legal Systems and the Principles of European Family Law on Parental Responsibilities, 2010, retrieved from: Nikolina, N., The Influence of International Law on the Issue of Co-Parenting Emerging Trends in International and European Instruments, Utrecht Law Review, *Volume 8, Issue 1, 2012, p. 139.*

[302] Antokolskaia, M., Harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 421.

on certain matters and able to ensure the interests of the spouses exercising their right to divorce and fulfilling the obligation of the maintenance of the former spouse better than the national regulation and expressed the opinion that, therefore, certain rules are proposed to be amended[303]. The scholar concluded, for instance, that Lithuanian regulation requiring over a year elapsed from the commencement of the marriage in order to dissolve the marriage (Article 3.51 Paragraph 1 Subparagraph 1) or a contract in respect of the consequences of their divorce (property adjustment, maintenance payments for the children, etc.) (Article 3.51 Paragraph 1 Subparagraph 2); stipulating that the divorce under certain circumstances may be refused to grant by the court (Article 3.57 paragraph 3), setting the ground for divorse based on fault (Articles 3.60 – 3.65), etc., is not in accordance with the European Principles, particularly Principles 1:1 (permission of divorce), 1:3 (recommended types of divorce), 1:7(3) (determination of consiquences of divorce), 1:8 (admissibility of factual separation), 2:1 (relationship between maintenance and divorce), 2:9 (3) (the cases of the termination of the maintenance obligation) established by CEFL regarding Divorce and Maintenance between the Former Spouses[304]. Thus, the scholar proposed to repeal in the Civil Code of the Republic of Lithuania[305]: Article 3.51 Paragraph 1 subparagraph 1, Article 3.57 Paragraph 3, Articles 3.60 – 3.65, Article 3.72 Paragraph 12 and to amend: Article 3.51 Paragraph 1 Subparagraph 2 and Article 3.59 Paragraph 1 Subparagraph 1. However, has the family law of Lithuania been reformed in order to be in line with the European Principles regarding Divorce and Maintenance between the Former Spouses and if the family law has been reformed whether the reform was heavily based on these Principles? - the questions arise. In order to answer these questions all the amendments of the Civil Code of the Republic of Lithuania made by the national legislator in the field of family law have been examined. Nonetheless, it shall be noticed that none of the considered Articles have been found repealed or amended since the establishment of the first set of the European Principles (2004) until the writing of this academic work[306]. The considered example proves that the effect which the Principles will gain in Europe and their capability to foster harmonisation of substantive family law to a large extent depends on the wilingness of the European countries to follow them as a models in their national legal systems. The process cannot be pushed in artificial way. The reforms will be started and the Principles will be considered as a

[303] Kudinavičiūtė – Michailovienė, I., Ištuokos reglamentavimas: nuostatos, integraciniai procesai ir principai, Jurisprudencija 3(93), 2007, p. 35 – 36.
[304] *Ibid*, p. 35 – 36.
[305] Family law regulation is the part of the Civil Code of the Republic of Lithuania, *Valstybės žinios,* Nr. 74-2262, 2000.
[306] The information about the amendments of Civil Code of the Republic of Lithuania regarding family law retrieved 05.11.2014 from the official website of the Parliament of the Republic of Lithuania: <http://www3.lrs.lt/pls/inter3/dokpaieska.susije_l?p_id=107687&p_rys_id=1>

models for the national systems only when the need for the reforms will float from the will of the European countries. However, the fact that only few countries have used the Principles as a model for the national reforms of the family laws demonstrates that the Principles are not widely accepted by the European countries at the moment. This raises the doubts whether the influence of the Principles in the national legal systems is heavy enough so that the Principles could be expected capable of fostering the harmonisation of substantive family law in Europe. In this case bottom–up harmonisation risks failure due to the several foundations, which will be briefly considered as forming the challenge for the harmonisation of substantive family law in Europe.

4.1.1. The effect of the non – binding nature of the European Principles

Considering the influence which the Principles may receive in the national legal systems, it is important to identify the nature of the Principles, as it may be considered as one of the preconditions determining whether the principles will be followed in the national legal systems.

Analysing the provisions of the Principles, it could be noticed that the provisions are written using binding form "should": e.g. "The competent authority *should* grant maintenance for a limited period, but exceptionally may do so without time limit"[307], "The competent authority *should* discharge the holder of parental responsibilities, wholly or in part, where his or her behaviour or neglect causes a serious risk to the person or the property of the child[308]. This wording may lead to the conclusion that the European Principles established by the CEFL are binding for European countries. Nonetheless, this is just the general way to embody the rules, since as the Members of CEFL emphasize, **"**the Principles are not binding nor should be considered to be an entire model law which can be adopted by legislators"[309]. "Rather the Principles, while directed towards legislators, aim to bestow the most suitable means for the harmonisation of family law within Europe"[310]. Analysing the notion of the Principles, it could be noticed that the Principles established by CEFL satisfy most of the criteria attributable to the Principles of law. The notion of the Principles and their legal hierarchy in the system of the sources of international law was widely

[307] Principles of European family law regarding Divorce and Maintenance between Former Spouses, Principle 2:8 retrieved 05.11.2014 from CEFL's website: <http://ceflonline.net/principles/>
[308] Principles of European family law regarding Parental Responsibilities, Principle 3:32, retrieved 23.10.2014 from CEFL's website: <http://ceflonline.net/principles/>
[309] Woelki, K. B., Ferrand, F., Beilfuss, C. G., Jareborg, M. J., Lowe, N., Martiny, D., Pintens, W., Principles of European Family Law regarding Divorce and Maintenance between Former Spouses, Intersentia, 2004, p. 3.
[310] *Ibid*, p. 3.

discussed by the scholar S. Katuoka[311]. The scholar States that the Principle is one of the source of the law, which usually can be described as a higher legal rule, from which the other concrete rules of behaviour derive, which in order to achieve the objectives set require the use of not only legal, but also political measures and which can be used as a source of inspiration when the legal rules are being interpreted[312]. Principles established by CEFL are the higher rules, which require the adoption of the concrete rules at the national level, in order to achieve the objectives set in the Principles not only legal, but also political action is essential and the Principles can be used as a source of inspiration interpreting the regulation at the national level. The Principles adopted by CEFL also have some other pecularities which are attributable only to these Principles. The Principles are published with the comments which contain the comparative information. Therefore, it is considered, that being based on the in depth comparative analysis easily accessible Principles may serve as a frame of reference for national, European as well as international legislators, since the rules have been drafted in the same way which legislators normally consider being appropriate[313]. Thus, the Principles could serve two purposes: "First, they could be considered as recommendations to the legislators, and second, legislators could use them as the model for the applicable law"[314].

The method of drafting the Principles distinquishes the Principles from other means used to foster the harmonisation of family law in Europe. However, despite the uniqueness and the proclaimed usefulness of the Principles, it is important to note that the Principles are soft law[315]. This means that the normative provisions of the Principles are contained in non-binding text[316]. The scholar B. Weiss states that soft law is characterised by four criteria: "1) the instrument does not purport to be binding and could not qualify as binding under the rules of international law, including both the Vienna Convention on the Law of Treaties or the rules of customary international law; 2) the instrument has legitimacy in the international Community; 3) there is a common intent or element of commitment attached to the instrument, <...>; 4) conduct that respects the soft law instrument cannot be deemed invalid"[317]. If we would look at the Principles adopted by CEFL, we would see that the Principles satisfy these crireria. Principles do not intend to be binding,

[311] Katuoka, S., Tarptautiniai teisės šaltiniai, Registrų centras, Vilnius, 2013, p. 61 – 65.
[312] *Ibid*, p. 61 – 65.
[313] Woelki, K. B., Ferrand, F., Beilfuss, C. G., Jareborg, M. J., Lowe, N., Martiny, D., Pintens, W., Principles of European Family Law regarding Divorce and Maintenance between Former Spouses, Intersentia, 2004, p. 3.
[314] *Ibid*, p. 3.
[315] Sammut, I., Family law in the EU's acquis communautaire: where is it going?, retrieved 16.11.2014 from: <http://www.um.edu.mt/europeanstudies/books/CD_CSP2/pdf/elatf-isammut.pdf>
[316] Briefly, it can be defined as "normative provisions contained in non-binding texts". Shelton, D., *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System*. Oxford: Oxford University Press, 2000, p. 292.
[317] Weiss, B., International compliance with nonbinding accords, American society of international law, 1997, p. 4.

are legitimate as are adopted by non-governmental international organisation, have common intent that the European countries will commit to them using the Principles as a models in the national systems and following the Principles cannot be deemed invalid, as they have legitimate aim – to foster harmonisation of the substantive family law in Europe. Such a non-binding soft law is considered to have many advantages: "soft-law instruments are easier and less costly to negotiate, impose lower "sovereignty costs" on states in sensitive areas, provide greater flexibility for states to cope with uncertainty and learn over time, allow states to be more ambitious and engage in "deeper" cooperation than they would if they had to worry about enforcement, generate information leading to common understandings in situations of uncertainty" [318], etc. However, on the contrary to hard law (e.g. Hague conventions on family law) the soft law, including the Principles established by CEFL have also some weaknesses. Soft law does not ensure credibility of commitments, as there is no costs of reneging, whether on account of legal sanctions or on account of the costs to a state's reputation where it is found to have violated its legal commitments[319]. Therefore the Principles established by CEFL being soft law may be considered as being less credible. They cannot have direct effect in national jurisdictions ("self – executing") or require domestic legal enactment[320] or be enforced through the national as well as international dispute-settlement bodies such as courts [321]. European Principles on family law do not originate from an official European (or international) legislative organization, therefore cannot be enforceable[322]. As there is no control or enforcement mechanism which would let to handle the process of harmonisation, ensuring that the models embodied in the Principles are followed in the national legal systems, European countries are not legally bound by the Principles and oblidged to take them into consideration while undertaking reforms in their national systems. Thus, some scholars discuss that the harmonisation fostered by the means of the Principles established by the CEFL may be called voluntary, bottom-up harmonisation[323]. Therefore, it is considered by the scholar M. Antokoklskaia that non-binding

[318]Shaffer, G, C., Pollack, M, A., Hard vs. Soft law: Alternatives, Complements, and Antagonists in International Governance, Minnesota law review, 2010, p. 719.
[319]*Ibid*, p. 717 – 719.
[320]Shaffer, G, C., Pollack, M, A., Hard vs. Soft law: Alternatives, Complements, and Antagonists in International Governance, Minnesota law review, 2010, p. 718.
[321]Abbott, K,W., Snidal, D., Hard and Soft Law in International Governance, International Organization, *Vol. 54*, 2000, p. 47.
[322] K. Boele-Woelki et al., Principles of European Family Law Regarding Parental Responsibilities, 2007, retrieved from: Nikolina, N., The Influence of International Law on the Issue of Co-Parenting Emerging Trends in International and European Instruments, Utrecht Law Review, *Volume 8, Issue 1, 2012, p. 139.*.
[323] Antokolskaia, M., Harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 400.

model Principles itself are of no more threat to the European countries than a book on comparative law[324].

The doctrine puts sometimes such soft law documents like the proclamation[325]. The scholar Shaw even indicates that the instrument or provision of soft law "<...>is not itself 'law', but its importance within the general framework of international legal development is such that particular attention requires to be paid to it"[326]. Some scholars agree that being the part of soft law means from the one hand a deprivation from the legal binding force, from the formal point of view, and therefore no possibility to raise "hard" legal obligations[327]. However, from the other hand, it is discussed there is an obligation, but of political nature[328]. For instance, the scholar R. Andorno states that soft law has the potential to become binding[329]. The scholar notes that if the soft law would not have the potential to become binding, it could not be called "the law", because "<...> one of the main distinctions between "ethics" and "law" is precisely that law is made up of enforceable norms while ethics is not enforceable"[330]. Thus, according to R. Andorno "soft law is conceived as the beginning of a gradual process in which further steps are needed to make sure that the rules established by soft law would become binding for the states"[331]. We can agree with the opinion that the soft law, in this case European Principles on family law has the potential to become binding law within the national systems. However, it is obvious that the success of the process in this case depends on the will of the States. In order for the European Principles on family law to gain binding effect within the country taking them as a model for the national family laws which are being drafted, the political decision of the national legislator is necessary. Whereas B. Weiss states that the choice to comply with the soft law in the national systems is determined by domestic interests who anticipate material gain from compliance[332]. Therefore, this decision can be in favour, against the Principles or neutral – not taking the Principles into account while drafting national laws. For instance, as M. Marella notices the Germans and the Dutch are in a position which supports the importance and urgency of family law harmonisation, the British resist, while scholars from other

[324] Ibid, p. 420.
[325] Kornobis – Romanovska, D., The Charter of Fundamental Rights within the framework of the European legal system, Jurisprudencija, 2003, t. 44(36), p. 19.
[326] Shaw, M., International Law, Cambridge: Cambridge University Press, 2003, 5th ed, p. 154.
[327] Kornobis – Romanovska, D., The Charter of Fundamental Rights within the framework of the European legal system, Jurisprudencija, 2003, t. 44(36), p. 19.
[328] *Ibid*, p. 19.
[329] Andomo, R., The Invaluable Role of Soft Law in the Development of Universal Norms in Bioethics, retrieved 07.11.2014: < http://www.unesco.de/1507.html>
[330] *Ibid*.
[331] *Ibid*.
[332] Weiss, B., International compliance with nonbinding accords, American society of international law, 1997, p. 10.

European countries, such as Italy and Spain, advocate the harmonisation, although playing an ancillary role[333]. Therefore, it could be stated that the Principles in each European country receive the effect, only as much as each European country (national legislators and judiciaries) is willing to grant them. The example of the countries which based the national family law reforms on the Principles established by CEFL (e.g. Portugal, Croatia) proves that even non-binding means can be efficient and can foster the change, however, only if it is in line with the national interests of the country and its ideology (conservative, progressive) on the matter and the certain matter of family law is ripe for the reforms or amendments within the country. Nonetheless, when the more progressive ("better rule") which is not in accordance with the ideology of the country on the matter is selected from the existing in European countries or the new rule is constructed while drafting the Principles, which does not comply with the interests of the certain European countries without the binding effect and the enforcement measures for not following the instrument in national legal systems, the Principles can hardly be expected to be followed. In such a situation as M. Antokolskaia states it would be "<...> laughable to suggest trying to convince Ireland instantly to introduce immediate divorce on demand, using as an argument that due to ongoing modernisation, Ireland would at some time come to this point anyhow, so let's do it now and save time and effort"[334] and expect that the country will amend its national family law in order to comply with the European Principles. If the established Principles are in line with the interests of individual European countries, it is likely that the Principles will receive the desirable effect becoming binding model through the national law. In this case, it may be considered that the fact that the Principles are of non - binding nature does not influence the behaviour of a certain country. However, in case when there is a conflict between the national regulation and the regulation established by the European Principles, it is clear that the Principles would prevail and could be expected to be taken into consideration while reforming the national family law certainly only if they would be binding hard law. "The common assumption is that countries comply much better and more fully with binding international agreements than with non-binding legal instruments"[335], - states B.Weiss. For instance, Hague conference on Private international law (hereinafter – HCCH), which at the moment has 77 Members, those aim is to seek for the progressive unification of the rules of private international law by the means of multilateral conventions also promote the harmonisation of

[333] Marella, M. R.,The non-subversive function of European Private law: the case of harmonization of family law, European Law Journal, Vol. 12, No. 1, 2006, p. 84.
[334] Antokolskaia, M., Harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 420.
[335] Weiss, B., International compliance with nonbinding accords, American society of international law, 1997, p. 1.

conflict of laws principles in diverging matters within private international law[336]. It adopted significant number of Conventions on family matters: e.g. 1956 Convention on the law applicable to maintenance obligations towards children, 1970 Convention on the Recognition of Divorces and Legal Separations, Convention on the Law Applicable to Maintenance Obligations, 1978 Convention on the Law Applicable to Matrimonial Property Regimes, 2007 Convention on the Law Applicable to Maintenance Obligations, etc[337]. The rules of the Conventions once the Conventions are ratified by the States are of the binding nature and the States are bound to apply and not to breach them in the national legal systems[338]. For instance, in the Republic of Lithuania, the national courts and all the institutions have the obligation to set aside national legal act which is not in accordance with the Convention if the rules established in the national legal act and the Convention collide[339]. Thus, the binding Conventions of HCCH have the authority. This could be noticed also analyzing the comments of the Principles established by CEFL, where CEFL uses the Conventions of HCCH as a source of inspiration and refer to them while drafting the Principles[340]. However, even if, for instance, Hague Convention on the law applicable on maintenance obligations (2007) was adopted after the Principles of CEFL regarding Divorce and Maintenance between Former Spouses (2004), no reference in the preparatory documents of the Convention was found to the Principles established by CEFL[341]. So, it is clear that when the instrument is binding there is a higher probability that the instrument will receive the desirable effect. However, when the Principles are non – binding if they will receive the effect of binding model is not predictable. Therefore, it may be considered that when the national interests are not in the line with the models established by the non-binding mean, the nature of the mean can be important, as it can influence the behaviour of each European country.

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[336] Statute of the Hague Conference on private international law, 15-VII-1955; Except all 28 Member States of the EU being the members of the HCCH, the EU is itself also a member, making a total of 78 members. Lithuania became the Member of HCCH in 23 October 2001. Retrieved 03.12.2014 from the official website of HCCH: <http://www.hcch.net/index_en.php?act=text.display&tid=10#family>

[337] Retrieved 03.12.2014 from the official website of HCCH: <http://www.hcch.net/index_en.php?act=text.display&tid=10#family>

[338] Vienna Convention on the Law of the Treaties, 1969, No. 18232.

[339] Ruling of the Constitutional Court of the Republic of Lithuania „Dėl Lietuvos Respublikos Lietuvos nacionalinio Radijo ir Televizijos įstatymo 5 straipsnio 5 dalies, 6 straipsnio 1, 3, 4 dalių, 10 straipsnio 1 dalies, 15 straipsnio 1, 2 dalių, Lietuvos Respublikos Visuomeės informavimo įstatymo 31 straipsnio 4 dalies atitikties Lietuvos Respublikos Konstitucijai, 2006, gruodžio 21, Nr. 30/03.

[340] For instance, Comments of the Principles regarding Parental Responsibilities, retrieved 06.12.2014 from official website of CEFL: < http://ceflonline.net/principles/>

[341] Preparatory documents of Hague Convention on law applicable on maintenance obligations 2007, retrieved 06.12.2014 from the official website of Hague Conference on Private international law: <http://www.hcch.net/index_en.php?act=conventions.publications&dtid=35&cid=133>

The considered above leads to the conclusion that the non-binding nature of the Principles is not the challenge for the harmonisation itself when the Principles are in line with the ideology and national interests of the European countries, as the Principles have the potential to become a binding model within European countries, reducing the gap between the legal systems of the European countries which decided to follow the Principles in their national legal systems. However, when the national family laws collide with the established European Principles, the non-binding effect of the Principles may become a challenge for harmonisation, as the soft law without the enforcement mechanism gives a chance for the states to avoid it. If this a predominant tendency, it may endanger the process of harmonisation. In both cases, whether non-binding Principles will receive the binding effect using them as models for the national family laws within European countries, achieving the harmony between the legal systems of those countries, depends on the will of the European countries (the national legislators and the judiciaries).

4.1.2. The reluctance of the European countries to follow the models embodied in the European Principles

It was concluded that the non-binding form of the Principles is not the major challenge to the harmonisation of substantive family law in Europe. It has the influence on the following of the Principles in the national systems, but it can not be considered as the main determinant whether the Principles will be followed as a models in national legal systems or not. The main factor determining whether the Principles will gain the effect of binding model within European countries is the will of the countries. The analysis on the following of the Principles as the models in the national legal systems let to assume that the Principles are not higly followed as models in Europe. It shows that European countries are reluctant to accept the Principles and comply with them. This forms the major challenge to the process of harmonisation of family law in Europe, therefore requires attention with consideration of its main reasons.

The unwilingness of the European countries to loose the sovereignty to regulate the family matters. One of the main reasons why European countries are reluctant to give the effect of the binding model for the Principles in their national systems is the importance which the family law has in the national system. Many of the sholars emphasize that family law is mainly a matter of

national concern[342]. For instance the scholar M.R.Marella even states that regulating family is rather public than a private affair[343]. It is presumed that it requires a strong, constant, state intervention, therefore, it accomplishes political goals[344]. The opinion can be considered as reasonable, because of the significance which family law as a field of law carries out within the state. M. R.Marella states that family law regimes show a strong inclination to engage in social engineering[345]. The scholar David Bradley emphasizes that the family law more than the other fields of law is important when the social organization of the state is considered, as it can be perceived as one of the instruments to reinforce a particular system of social organisation[346]. The scholar states that the principles of social order implicit in national family law tend to define the morality in terms of individual responsibility and traditional concept of the family, reflect the degree of commiment to religious values on the part of the state and the extent to which the state is prepared to intervene in family authonomy[347]. For instance, the Constitution of the Republic of Poland sets that "Family shall be placed under the protection and care of the Republic of Poland. The State, in its social and economic policy, shall take into account the good of the family"[348]. The family concept which the state supports is based on the marriage of heterosexuals, Poland does not allow the marriage of same-sex couples, does not recognize registered partnership or cohabitation neither of heterosexual nor of the homosexual couples[349]. It may be considered as contributing that the predominant type of the family is based on marriage in Poland[350]. Through the family law the state can form the system of the values of the country, demonstrating which behaviour of the society is desirable. Usually the status of the family is connected to the granting of social benefits, taxation; therefore through the regulation of family matters the state can encourage certain behaviour of the society and control the social organization of the country. Thus, family law may be considered as an important tool, which can be used to influence social process within the state. As a result, European countries are not

[342] For example, Marella, M. R., The non-subversive function of European Private law: the case of harmonization of family law, European Law Journal, Bradley, D., A Family law for Europe? Sovereignty, Political economy and Legitimation, In: Perspectives for the unification and harmonization of family law in Europe.
[343] Marella, M. R., The non-subversive function of European Private law: the case of harmonization of family law, European Law Journal, Vol. 12, No. 1, 2006, p. 79.
[344] *Ibid*, p. 79.
[345] Marella, M. R., The non-subversive function of European Private law: the case of harmonization of family law, European Law Journal, Vol. 12, No. 1, 2006, p. 79.
[346] Bradley, D., A Family law for Europe? Sovereignty, Political economy and Legitimation, In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003, p. 97.
[347] *Ibid*, p. 97.
[348] The Constitution of the Republic of Poland, 1997, retrieved 20.10.2014 from: <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>
[349] Property effects of marriage and registered partnership, retrieved 16.11.2014 from European Commission website: <http://ec.europa.eu/justice/civil/family-matters/marriage/index_en.htm>
[350] Marriage and divorce statistics, retrieved 16.11.2014 from European Commission, Eurostat: <http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Marriage_and_divorce_statistics>

willing to lose even a part of the sovereignty in the field, which allows controlling the social behaviour within the state.

The unwillingness for more political integration at the European level[351]. Another reason may be related to the effect which integrating the model of regulation offered by the European Principles into national legal systems may bring. European Principles of family law is the mean constructed by the CEFL to foster the harmonisation of substantive family law in Europe. D. Bradley states that harmonisation of family law is a political exercise which, when sucessfully exercised leads to even closer political union of the European countries, which would mark a significant step towards an ever closer political integration[352]. However, do European countries really want that? The fact that family law as the field of private law was not conferred neither to exclusive, nor to the shared or supporting competence of the EU[353] clearly shows the limits of political integration within EU and demonstrates that private law is the field in which Member States intend to keep the soveregnity, in order to preserve the national identity of each Member State. The spillover effect brings the necessity in order to ensure free movement of persons for futher integration in the private law fields. "European countries would probably welcome harmonisation of family law since it would facilitate the free movement of European citizens, but certainly not at any price", - states M. Antokolskaia[354]. More integration would mean less sovereignity in regulation of family matters. However, this is what satisfies not all the European countries. Thus, it could be noticed that countries which are in favour of more integrated EU, e.g. Germany, Netherlands support the importance and urgency of harmonisation of family law in Europe, while countries which are against more integration within EU, e.g. United Kingdom resists the process[355]. On the other hand, M. Antokolskaia considers that bottom – up voluntary harmonisation in the politically sensitive area such as family law where the countries do not want to lose the sovereignty may be the only solution[356]. "As the national family laws are based on national compromises reached at the national level between the adherents of 'progressive' and 'conservative' family ideologies, any form of top-down harmonisation of family law would involve overruling

[351] Bradley, D., A Family law for Europe? Sovereignty, Political economy and Legitimation, In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003, p. 97 – 103.
[352] Ibid, p. 103
[353] Treaty of Lisbon amending the Treaty on European Union, Articles 2, 3, 4, 5, 6, Official Journal C 306, 2007
[354] Antokolskaia, M., Harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 419.
[355] Marella, M. R.,The non-subversive function of European Private law: the case of harmonization of family law, European Law Journal, Vol. 12, No. 1, 2006, p. 84.
[356] Antokolskaia, M., Harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 409.

such national compromises and substituting them with compromises reached on a European level"[357]. Therefore according to the scholar top – down harmonisation by way of binding instruments is quite limited, as given the political sensitivity of the issue of national sovereignty, it is largely infeasible and undesirable and would go beyond the present political will of the Member States[358]. Moral and political reforms can be successful only initiated from within each culture and cannot be forced from inside, since in the opinion of the scholar "<…> any attempts to "emancipate" parts of European population through the enforcement of binding libertarian Principles could be condemned as being paternalistic, disrespectful and doomed to failure in any democratic society"[359]. While soft law in the opinion of B.Weiss when it would be difficult to reach agreement on precise, binding legal norms is useful, as "<...> non-binding accords are used to promote common aims or interests of states and to maintain the co-existence of sovereign states"[360]. Therefore only bottom – up harmonisation could be considered as the possible way to reduce the gap between the national regulation of the European countries on the certain family law matters.

The lack of legitimation of European Principles on family law[361]. However there is the weakness of the Principles established by the CEFL, which may reduce their effectiveness. It is the question of legitimation of European Principles, which shall not be forgotten analysing the reasons of the reluctance of European countries to follow the model of regulation offered by the European Principles in their national legal systems. In the previous paragraphs it was concluded that the diversity of national family laws in the European countries are caused by the political diversity. It was discussed that this forms the challenge when trying to find the common core on the certain family matter. However, it is important to note that diverse family law regimes caused by the political factors form the challenge not only when trying to find a common core to the different systems while drafting the Principles, but also in the case when the better rule method is applied on the matter - after the establishment of the Principles, trying to persuade European countries to follow them as model in the national legal systems. Applying the better law method, the better rule from the existing systems in Europe is selected or the new rule is created. This means that the

[357] Antokolskaia, M., Harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 409.
[358] *Ibid*, p. 409.
[359] Antokolskaia, M., Family values and the harmonisation of family law, in: Family law and family values, edited by Maclean, M., Hart publishing, 2005, p. 308.
[360] Weiss, B., International compliance with nonbinding accords, American society of international law, 1997, p. 12.
[361] This opinion is expressed by the scholar Bradley, D., A Family law for Europe? Sovereignty, Political economy and Legitimation, In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003.

selected rule as a model does not reflect the regulation of the majority of the European countries. Nonetheless, it is discussed that "the choices represented in various national solutions reflect different political compromises, reached at the national level against the background of the pan-European conservative/progressive discord"[362]. "By preferring one of those solutions above the other, drafters implicitly take sides in this political debate and express value judgements"[363]. However, on what legal basis can the Commission support the choices made, - considers D. Bradley, emphasizing that in proposing the model for harmonisation, CEFL has to take a political decision, without any apparent basis for its legitimation[364]. As it was noted while discussing the uniqueness of CEFL, the Commission is a politically independent academic initiative. The members of the Commission are self - appointed, neither represent their governments, nor have they been appointed by the supranational organization, therefore cannot rely on any political organization and the only source of authority that they can base the decisions on is their academic reputation[365]. This on one hand is considered as the strength of the Commission, as the fact that CEFL is purely an academic initiative not influenced by the politics gives the CEFL the freedom to base their choices solely on academic considerations. Nonetheless, the lack of authorisation can have a negative side as well. Even the members of CEFL consider that it makes the drafters susceptible when they try to choose the rule which is not common to the European countries[366]. The scholar D.Bradley considers that the objective standards to legitimate recommendations of the Commission are lacking, therefore, the "value judgements" are based on subjective and intuitive judgements of its members[367]. For example, European Principles on divorce contain 18 provisions. 9 of 18 established provisions have been drafted by applying the better law method, selecting or constructing the better rule[368]. Why should in such situation the countries which have different approach on the matter follow the models offered by the Principles setting aside not easy to achieve national compromises made drafting the national legislation? It is likely that in case where the selected rule does not reflect the attitude of the state on the matter and the established model is not in line with the

[362] Antokolskaia, M., Harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 419.
[363] *Ibid*, p. 419.
[364] Bradley, D., A Family law for Europe? Sovereignty, Political economy and Legitimation, In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003, p. 97
[365] Antokolskaia, M., The "Better law" approach and the harmonization of family law, In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003, p. 162.
[366] *Ibid*, p. 162.
[367] Bradley, D., A Family law for Europe? Sovereignty, Political economy and Legitimation, In: Perspectives for the unification and harmonization of family law in Europe, edited by Woelki, K.B., Intersentia, 2003, p. 90.
[368] Antokolskaia, M., Harmonisation of substantive family law in Europe: myths and reality, Child and Family Law Quarterly Vol 22, No 4, 2010, p. 418.

political compromise reached at the national level, in the absence of authorisation, the non-binding models are less likely to be followed.

The considered leads to the conclusion that the family law is the significant realm of national concern. Being unwilling to loose the national sovereignty in this important field, conferring even more povers to the supranational bodies, in the absence of legitimate grounds of the Principles established by CEFL, European countries are reluctant to grant the binding effect for the models embodied in the Principles within their national legal systems. This forms the major challenge for the harmonisation of substantive family law in Europe.

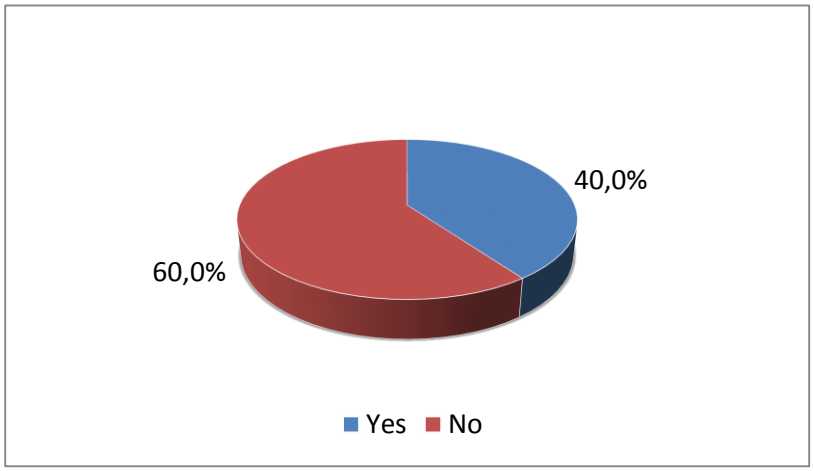
5. THE EMPIRICAL RESEARCH: THE INFLUENCE OF THE EUROPEAN PRINCIPLES ON THE FAMILY CASES WITHIN THE COURTS OF THE REPUBLIC OF LITHUANIA

In analysing the influence of the Principles established by CEFL in the Republic of Lithuania, it was determined that the Principles have not served as the inspiration for the national reforms of the family law aspects which are not in accordance with the established Principles, and have not been used as a models for changing certain norms of the national family law until now. However, it is important to note that the Principles in the national legal systems can gain effect not only through the national reforms becoming the binding model in the national legal systems, but also when the judiciaries rely on them in applying the national law. The harmonising effect of the Principles bringing the European systems closer to each other on certain family matters while applying the national family law can be achieved in several ways: interpreting the national law in such a way that it complies with the established Principles; in case of the collision of two legal norms, applying the norm to the case which is in accordance with the established Principles, or which complies with the established Principles better; applying the Principles in case of legal vacuum; or simply justifying the decisions of the court by the Principles in certain case where the national family law is in line with the Principles established by the CEFL[369]. In order to determine wheteher the Principles have the authority in the Lithuanian legal system in the application of family law by the courts, a little empirical research has been carried out. Empirical database gives an insight into the real-life legal questions of the persons and the families involved[370]. As at the end this is where the law starts, therefore, it should be more common practice in legal research to use – apart from the classic text analysis of the regulations and the study of jurisprudence – empirical methods for reasearch as well. Empirical research in this field may be considered as having significant value, as it allows to evaluate whether Principles receive the effect in practice. In carrying out the research, it was examined whether the models established by the Principles have the influence in applying the national law in the Republic of Lithuania. The aim of this empirical research was not to find out how many judges rely on the Principles while dealing with the family cases. In order to achieve this aim, all the judges working in this specific field would need to be interwieved. The objective of this empirical research, on the contrary, was to examine whether the Principles have any influence while

[369] These are the functions of the Principles distinguished by scholars Driukas Artūras, Valančius Virgilijus in publication „Civilinis procesas: teorija ir praktika“, I tomas, Vilnius, Teisinės informacijos centras, 2005, p. 189 – 198.
[370] Verhellen, J., Real-life international family law: Belgian empirical research on cross-border family law, in: Family Law and culture in Europe. Developments, challenges and opportunities, edited by Woelki, K, B., Dethloff, N., Gephart, W., Intersentia, 2014, p. 333.

applying the national family law. Seeking to ascertain this, short questionnaires containing 5 questions were sent to the judges dealing with family cases in different Lithuanian locations and courts (District, Appelate, Supreme court). 15 questionnaires were completed[371]. This part of the Master Thesis contains the questions and the summarized answers, which are presented in the form of charts.

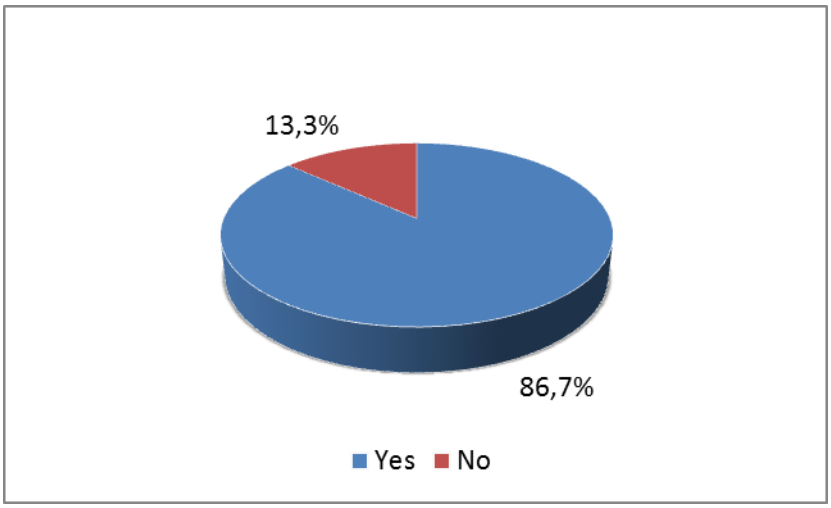
1) Do You rely on the European Principles on family law (Principles on Divorce and Maintenance between Former Spouses (2004); Principles on Parental Responsibilities (2007) and Principles on Property Relationship Between Spouse (2013)) while examining family cases and giving the court's decisions?



Answering to the first question even 60, 0 % of respondents noted that they do not rely on the Principles while examining the family cases and giving decisions. However, 40,0 % of respondents revealed that they take the Principles into consideration while dealing with family cases.

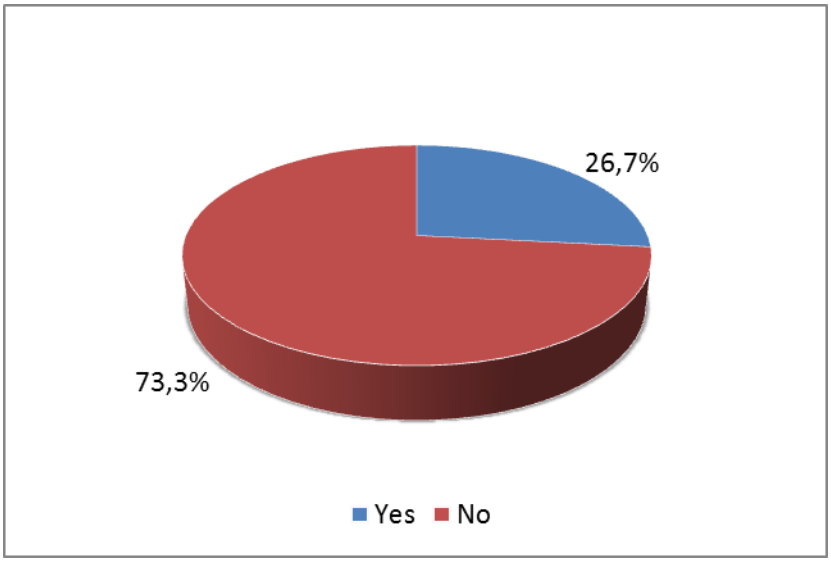
2) Do You rely on international Conventions and Regulations (e.g. International Hague's Conventions on family law) while examining family cases and giving the court's decisions?

[371] Online survey and the received answers may be reached: <https://fluidsurveys.com/account/surveys/673009/responses/>



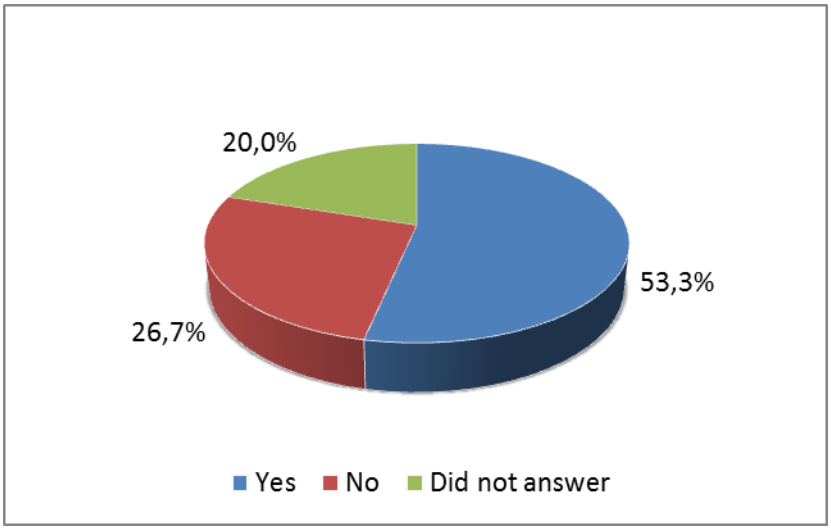
86, 7 % of respondents noted that they rely on the obligatory international Conventions and Regulations when dealing with family cases, when the cases have a cross border element, while 13, 3 % of respondents emphasized that the need to rely on these instruments still has not arisen during their work.

3) Do You have enough information about the activities carried out by the Commission on the European Family Law and the Principles established by this Commission?



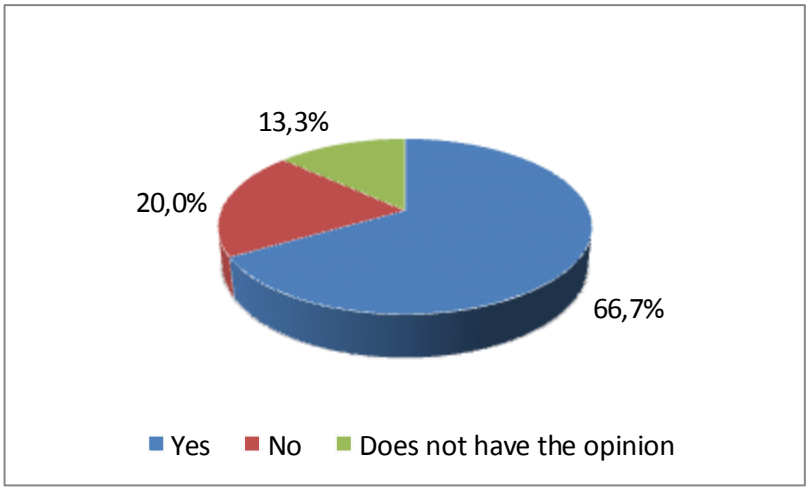
Even 73,3 % of respondents participating in the survey noticed that there is lack of information about the work of CEFL and the Principles which this Commission has established in order to foster the harmonisation of the substantive family law in Europe. Only 26, 7 % of respondents stated that they do not lack this information.

4) In Your opinion, is the harmonisation of substantive family law necessary in Europe? If yes, please specify the reasons.



Answering to the question, 53, 3 % of respondents stated that the harmonization of substantive family law in Europe is necessary due to the increasing number of cross border families and the need to ensure free movement of persons within the EU in order to protect the rights of these persons. However, 26,7 % of respondents noted that the harmonisation of substantive family law is not necessary and is not desirable due to the sensitivity of the family law as the part of the national identity, emphasizing that the sudden harmonisation of substantive family law could raise the risk to the national identity of the European countries. 20, 0 % of respondents did not answer this question.

5) Do the Principles established by the CEFL as non-binding (soft law), in Your opinion, have the potential to be capable to foster the harmonisation of substantive family law in Europe?



66,7 % of respondents, while answering the question, believed that the Principles established by the CEFL, even being non-binding (soft law), have the potential to become the mean able to foster the harmonisation of substantive family law in Europe. They based their opinion on the uniqueness of the Principles stating that the Principles are progressive and based on the thorough legal analysis. However, 20, 0 % of respondents had a negative opinion, stating that the Principles do not have the potential to be capable to foster the harmonisation of the substantive family law in Europe, as they are just non - binding recommendations and thus too weak to make any change in such a sensitive, nationally rooted field of law. 13, 3 % of respondents did not answer this question.

The results of the survey leads to certain conclusions: Even if the rate of relying on the Principles established by the CEFL while examining the family cases by the respondents is not very high (non – binding Principles established by CEFL are relied on by 40, 0 % of respondents while dealing with family cases, while binding International Conventions and Regulations are relied on more than 2 times more often (86, 7 %) by the same respondents), the fact that some of respondents rely on the Principles in family cases shows that the Principles, even being non – binding are not completely ignored during the process in court. In fact less than half of respondents rely on the Principles during the process. This leads us to believe in the perspective of the Principles to gain the harmonising effect within Europe (this is also believed by more than one half of the respondents (66, 7 %)), if they are being relied on by the courts in other countries as well. However, the challenges which were detected during the survey, demonstrate that certain steps need to be taken in order to foster the process. The survey has shown that only a little more than one half of

respondents (53, 3 %) think that the harmonisation of substantive family law is necessary in Europe. This may mean that the respondents who have the opposite opinion, or who failed to answer the question have doubts about the neccesity to harmonise the substantive family law in Europe, or do not see the meaning of that. As a result, this group of respondents may not consider non – binding Principles as an important instrument, which could result in their non reliance on these Principles in the family cases. This shows that there is the need of more discussions at the national level about the necessity to harmonise the substantive family law in Europe, ephasizing the negative consequences which the diverse family law on certain aspects may cause, and the benefits which the harmonisation of certain aspects of substantive family law would bring for each European country, the EU and its citizens as a whole. Moreover, as the answers revealed, the respondents emphasize that even if considered as an important body which seeks to establish the most suitable means for harmonisation, the CEFL is still not known widely enough. It was stated by 73, 3 % of respondents. This might also be the reason why the rate of relying on the Principles is not so high. The respondents do not rely on them, because they simply while being not obliged are not familiar with the activities of this academic initiatitive and the non-binding Principles which this Commission has established. This reveals that there is a desperate need for more public attention to the activities of the CEFL and it‘s established Principles at the European, as well as at the national level.

CONCLUSIONS AND SUGGESTIONS

1. Harmonisation of family law – the approximation of national family laws of the European countries reducing the differences in certain family law fields.
2. The concept of family reacting to the social changes has gone through the transformation, and new forms of families are being accepted in Europe. However, the existing diversity of the family concepts within Europe allows to make a conclusion that the substantial element on which the family law is based – the definition of family - has not been harmonised at the European level.
3. The conflict of law may have effect on the status of cross – border families. This can lead to the loss of certain family rights, may complicate the procedure when a certain issue arises and the dispute is being heard before the court, and in the case of the EU may constitute restriction on the free movement of persons. The negative consequences considered prove the need to look for the ways to harmonise the substantive family law in Europe.
4. Despite the aim to achieve greater convergence of the legal systems of Member States set by the Council of Europe, in case of the family law it is hardly achievable only using the instruments of the Council of Europe. Having the competence to take actions, nevertheless, the Council of Europe does not hold the appropriate system of instruments necessary to ensure a gradual and consistent harmonisation of substantive family law in Europe.
5. The analysis revealed that the EU lacks competence in the harmonisation of substantive family law. The Treaty on the Functioning of the European Union does not confer the authority for the EU to act in the field of substantive family law. The harmonisation which has occurred due to several adopted directives and case-law developed by the ECJ on certain aspects of family matters is spontaneous and subsidiary to the ‘freedoms‘ established by the EU, therefore may not be considered as a sufficient way, capable to harmonise substantive family law in Europe alone.
6. The specialities of CEFL prove that the Commision is the first body established deliberately to concentrate solely on family matters. Being politically independent, it uses a scientific comparative analysis method to foster the harmonisation of the substantive family law in Europe, which reveals the systematic Commission‘s approach to the matter. However, despite the established means suitable for harmonisation, the efforts and activities which the CEFL carries out in order to foster the harmonisation of substantive family law in Europe the doubt about the feasibility of harmonisation of the substantive family law arises due to

the obstacles which the CEFL is facing while trying to foster the process. These obstacles which constitute *the challenge in the CEFL work could be distinquished into two main groups: challenges arising while trying to establish the means capable to gain harmonising effect in Europe* and *the challenges faced after the establishment of these means related to their use in the national legal systems*.

7. The challenges faced drafting the European Principles on the family law are the difficuties to find the *common core* for the European jurisdictions and to apply the *better rule* method when the *common core* cannot be found.
8. The difficulties to find common core arises due to a wide political divergence and the diversity of national family regulations which the political divergence is causing.
9. Ideological affiliation, rather than pecularities of the national cultures, restrains the harmonisation of substantive family law in Europe. In order for the values formed by the national culture of the state to become the law, a political decision, which is based on ideological affiliation, is essential. However, the balance of ideological affiliation is diverse.
10. The diversity of ideological affiliation in Europe results in diverging decisions made on family matters in each European country. This causes diversity in the regulation of the same matter of family law, which forms the obstacle in finding a common core when drafting the European Principles on family law.
11. Another challenge arising in drafting the Principles is the application of *better law* method. The choice of the better rule and the justification of the choice is based on the personal evaluation of the CEFL members. Therefore, the difficulty to justify the choice and to persuade the European countries to follow the desirable models embodied in the European Principles arises.
12. Despite the progressive way of drafting the Principles, a rather low rate of following the Principles as a model for the national reforms of family law demonstrates that the Principles are not widely accepted by the European countries. This raises doubts whether the influence of the Principles in the national legal systems is heavy enough for the Principles to be expected capable to foster the harmonisation of substantive family law in Europe.
13. The non-binding nature of the Principles is not the challenge for the harmonisation of substantive family law itself when the Principles are in line with the ideology and the national interests of the European countries. However, when the national family laws collide with the established European Principles, the non-binding effect of the Principles may become the challenge, as the soft law without the enforcement mechanism gives a chance

for the states to avoid it. If this is a predominant tendency, it may endanger the process of harmonisation.

14. Family law is the significant realm of national concern. Being unwilling to lose the national sovereignty in this important field, conferring even more powers to the supranational bodies, in the absence of legitimate grounds of the Principles established by the CEFL, the European countries (national legislators and judiciaries) are reluctant to grant the binding effect for the models embodied in the Principles within their national legal systems.
15. The carried out empirical research on the influence of the CEFL‘s Principles on family law application within the courts of the Republic of Lithuania reveals that even if the rate is not very high, 40 % of the respondents acknowledged they take CEFL principles into consideration. However, certain challenges are faced which endanger the process of harmonisation of substantive family law: slightly less than one half (46, 7 %) of respondents have doubts if harmonisation of the substantive family law is necessary, while more than half of respondents (73, 3 %) emphasized lacking the information about the activities and the established Principles of the CEFL. This may be considered as the reasons why even 60,0 % of respondents stated not relying on the Principles while examining the family law cases. Therefore certain things in order to increase the effectiveness of the Principles in the national systems are recommended. At national level: the members of CEFL representing their countries in the Commission should take more action in order that the activities of the CEFL and the Principles which this Commission has established would become more visible at the national level: organising seminars, conferences, discussions about the need to harmonise the family law in Europe, the dangers which the wide diversity of family law in Europe may have, and the benefits which the harmonisation of certain aspects of substantive family law would bring, emphasizing the importance of the CEFL work, and the advantages of the Principles as the mean established to foster the harmonisation. At the European level: more focus on the organizational activities for CEFL in its work is also recommended. It was noted that since its establishment in 2001 until now, the CEFL organized 5 conferences. Taking into consideration the sensitivity of the field which is sought to be harmonized, this number is considered as too low. The coferrences, seminars, discussions, atracting not only academics, but also practitioners - lawyers, politicians from as many European jurisdictions as possible and getting more public attention should be organised more often, so that the work of the CEFL and the established Principles may become widely known in Europe.

16. The theoretical and the empirical analysis have shown that being based on thorough comparative legal analysis, the Principles established by the CEFL, even being non – binding, have the potential to become capable to foster the harmonisation of the substantive family law in Europe. However, whether the Principles will gain the harmonising effect and the perspectives of the process when bottom – up harmonisation is chosen, depends on the will of those who adopt and apply the law in each European country and the efforts of the CEFL to persuade the countries to follow these Principles. In order that to find the common core in the majority of the European jurisdictions or justify the better rule and and in this way persuade the European countries to take the Principles into account in their national legal systems would be less challenging, the *shared ideological values* on certain family matters which is sought to be harmonised need to be created. This could also be reached by organizing conferences, seminars, discussions, etc. on certain matters. However, this should receive enough attention and time, and a long term plan should be made. It is recommended to start the procedure long time before the national reports on matter which is sought to be harmonised are drafted, foreseeing concrete steps how the desirable results in certain matters are going to be achieved
17. In order to find out whether the Principles receive the desirable effect, and whether harmonisation is ongoing in the fields regulated by the Principles, it is recommended to provide enough information on the website of CEFL about the developments of regulation in certain family matters covered by the Principles in each European country not only before drafting the Principles when the national reports reflecting the regulation are concluded, but also after the establishment of Principles, emphasizing what has been achieved in certain fields in different European countries. This would let us observe the evolution of the process, evaluate its success, estimating whether the selected means for the harmonisation have been effective. It would let to notice whether additional means need to be introduced in order to foster or accelerate the process. Moreover, the disclosure of the European countries which have successfuly followed the models established by the CEFL Principles may be considered as motivating examples for other countries, as no state wants to lose its reputation when is compared with others.

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Key words: harmonisation, family law, Commission on European Family matters, challenges.

ANNOTATION

Master Thesis discusses the concept of family at European level and the need to harmonise substantive family law in Europe. It concentrates on current organizations, institutions, bodies having the competence in harmonisation of family law, the main focus giving to the Commission on European Family Law and its activities. Analysing the challenges which this Commission faces during the process it is sought to answer the question whether the Principles established by this Commission which aim to foster the harmonisation of substantive family law being non – binding mean are able to reach their aim reducing the gap between the divergent national family laws of the European countries.

Mots clés: l'harmonisation, droit de la famille, Commission de droit européen de la famille, défis.

ANNOTATION

La thèse de Master discute la notion de famille au niveau européen et la nécessité d'harmoniser le droit matériel de la famille en Europe. Elle se concentre sur les organisations actuelles, les institutions et les organismes compétents pour l'harmonisation du droit de la famille, avec l'accent principal sur la Commission de droit européen de la famille (la CEFL) et ses activités. En analysant les défis que la Commission confronte au cours de ce processus, on essaie de savoir si les principes non-contraignants établis par cette Commission - visant à promouvoir l'harmonisation du droit matériel de la famille - sont capables d'atteindre le but de réduire l'écart des divergences nationales du droit de la famille dans les divers pays d'Europe.

SUMMARY

Aistė Ramanauskaitė. The Perspectives of Harmonisation of Family Law in Europe: the Recent Challenges/ Master thesis

Supervisor Lecturer Laima Vaigė. – Vilnius: Mykolas Romeris University, Faculty of Law, 2014. - 99 p.

Family as a social institution performs important fuctions within society, therefore the regulation of family matters receives significant attention in national, as well as in International and European legal acts. Since the establishment of the freedom of movement within EU the number of cross border families is increasing. Often the relationships are being established between individuals from different Member States of the European Union, or couples from the same country move to work and live in another Member State. However, the anlysis shows that the regulation of certain family matters are divergent, which often cause the problems in ensuring the rights of family members and even might become a serious obstacle for the free movement of persons within the European Union. Therefore, the need to harmonise substantive family law in Europe arose. However is the harmonised family law achievable in such diverse regulation of family matters in Europe? – the question arises. In order to answer the question this Master Thesis concentrates on the organizations acting in Europe (the Council of Europe, the European Union), their competence and the means used to foster harmonisation of substantive family law, the main attention giving to the contribution of the Commission on Europen Family Law (CEFL) to the process. Set up in 2001 CEFL is considered as a unique body established deliberately to concentrate solely on family matters. It is politically independent body, which holding systematic approach to the matter uses scientific comparative analysis method in its work. The Master thesis discusses whether the mean – non - binding Principles – chosen by this Commission to foster the harmonisation of substantive family law in Europe is efficient and capable to bring the desirable effect – to reduce the gap between the national family laws on certain family matters of the European countries. The last part presents the summarized results of the conducted empirical research which partly confirms the conclusions reached in the theoretical part of this paper. Being based on thorough comparative legal analysis the Principles established by the CEFL even being non – binding despite the challenges which the CEFL faces while drafting the Principles and after their establishment have the potential to become the mean able to foster the harmonisation of substantive family law in Europe. However whether the Principles will gain the harmonising effect in the case of bottom - up harmonisation

depends on the will of those who adopt and apply the law in each European country and the efforts of the CEFL to persuade the countries to follow these Principles.

Aiste Ramanauskaite. Les perspectives de l'harmonisation du droit familial en Europe: les défis récents / Thèse pour l'obtention du grade de Master

Superviseur de conférences Laima Vaige. - Vilnius: Université Mykolas Romeris, Faculté de droit, 2014. - 99 p.

SOMMAIRE

Famille en tant qu'institution sociale effectue des fonctions importantes au sein de la société, donc le règlement des affaires de la famille reçoit une attention particulière au niveau national, ainsi que dans les actes juridiques internationaux et européens. Depuis l'établissement de la liberté de circulation au sein de l'UE, le nombre de familles transfrontalières est en augmentation. De plus en plus souvent, des individus d'un pays de l'Union européenne trouvent leur partenaire dans un autre État membre, ou les couples du même pays décident de vivre et travailler dans un autre État membre. Cependant, l'analyse montre que la régulation de certaines questions de la famille est divergente, ce qui cause souvent des problèmes de respect des droits des membres de la famille et peut même devenir un obstacle sérieux à la libre circulation des personnes dans l'Union européenne. Par conséquent, la nécessité d'harmoniser le droit matériel de la famille en Europe est née. La question se pose cependant si le droit harmonisé de la famille est possible dans le cadre d'un règlement diversifié de problèmes familiaux en Europe? - Afin de répondre à cette question, cette thèse de Master se concentre sur les organisations qui agissent en Europe (Conseil de l'Europe, Union européenne), sur leur compétence et sur les moyens utilisés pour promouvoir l'harmonisation du droit matériel de la famille en Europe. L'attention principale est mise à la contribution de la Commission de droit européen de la famille (CEFL) à ce processus. Mise en place en 2001, la CEFL est considérée comme un corps unique, établi avec le but de se concentrer uniquement sur les questions de famille. Elle est un organisme politiquement indépendant. Avec une approche systématique et à l'aide de la méthode scientifique, elle utilise une analyse comparative dans son travail. La thèse de Master examine si les principes non contraignants comme un moyen que la Commission a choisi pour promouvoir l'harmonisation du droit matériel de famille en Europe, est assez efficace et capable d'apporter un effet souhaitable, notamment de réduire l'écart entre les lois nationales de famille sur certaines questions de la famille dans les pays européens. La dernière partie présente une synthèse des résultats de la recherche empirique qui confirme en partie les

conclusions de la partie théorethique de cette thèse. Basés sur une analyse juridique comparative approfondie, les principes établis par la CEFL, même si non-contraignants, peuvent devenir un moyen efficace pour promouvoir l'harmonisation du droit matériel de famille en Europe, malgré les défis que la CEFL a confronté lors de l'élaboration de ces principes et après leur mise en place. Cependant, on peut conclure que l'effet des principes sur l'harmonisation de base en haut dépend de la volonté de ceux qui adoptent et appliquent la loi dans chaque pays européen, et les efforts de la CEFL pour persuader les pays à les suivre.