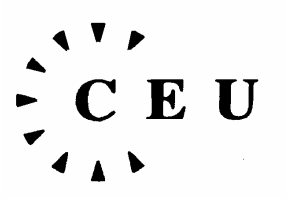

Protection of Rights of Children in the EU: Cross-Border Divorces and Separation of Parents

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Abstract

This thesis focuses on the protection of rights of children in the EU in cases of cross-border divorces and separation of parents. The aim of the thesis is to analyze the three levels of regulation of rights of children in cross-border family disputes in the EU. By comparison of the protection of fundamental rights of children in two systems, in the system of Council of Europe and in the system of EU law, the minimum standard of protection of fundamental rights of children in Europe is shown. Another comparison is carried out in order to assess the necessity of EU action in the field of private international family law. Thus the regulation through the Hague Conference and the EU measures are compared. The development of EU law in the past is traced and the inevitability of further action on the EU level is discussed. The relations of family law cannot be analyzed purely from the legal point of view, the relevant law must be seen and analyzed in a wider context, in the context of the 'law and society'.

The thesis shows the scope of protection of fundamental rights of children in Europe in cases of cross-border family disputes, discusses the necessity of the autonomous rights of children and the inevitability of further action of the EU in the field of family law. It also discusses the possible future harmonization of national family laws. Alternative proposals for harmonized family law are presented.

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Introduction

The practical exercise of the free movement of persons in the European Union ('EU') and the existence of the European Communities introduced many questions concerning human rights. The opportunity to move within the area of EU leads to increasing numbers of cross-border marriages and creation of families. If such families break up, complicated questions of applicable law and possible systems of protection of rights of children arise. The EU set an objective to create an area of justice in which decisions in family matters taken in one Member State are recognized and can be enforced in the other Member States.

The regulation of the protection of the rights of children in the case of cross-border divorces or separation of parents is complicated because it has several levels. The first level of the protection is the protection of fundamental rights of children. Here the protection can be seen as twofold. The fundamental rights of children are protected through the right to respect for family life but increasingly also as autonomous rights of children. The right to respect for family life is protected on the international, supranational and national level. In Europe, the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR', 'European Convention of Human Rights') establishes that "[e]veryone has the right to respect for his private and family life,…"[1] A similar provision is contained in Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter'). This approach to the protection of rights of children is criticized by many authors. Clare McGlynn points out that in this case children are treated as a part of the family rather than autonomous persons with their own interests and autonomous rights.[2] Also Michael Freeman "resists the idea that children's rights

[1] Article 8 of the ECHR
[2] Clare McGlynn, *Families and the European Union: Law, Politics and Pluralism*, (Cambridge University Press 2006), p. 42-46

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are not necessary because adults have their best interest at heart." [3] The rights of children are protected as autonomous rights in the United Nations Convention on Rights of the Child ('UNCRC') which became the base for Article 24 of the Charter. Thus, in the EU the Charter provides for the protection of autonomous rights of children. The question is whether the fundamental rights protection is enough for the protection of children in cross-border family disputes, or whether more is necessary in order to solve these problematic issues.

The second level of protection of rights of children in cases of cross-border divorces and separation of parents is the protection through private international family law. Cross-border divorces and separations are necessarily connected with the conflict-of-laws. This conflict-of-laws is regulated on the international level through the Hague Conference on Private International Law ('Hague Conference') and also on the supranational level through the measures adopted by the EU. The question is whether the protection on the supranational level was necessary and why and whether further development is expected.

The third level is the protection on the level of the family laws of Member States of the EU. Here a very much discussed question arises whether, and to what extent, the harmonization or unification is necessary or desirable in order to secure the proper protection of rights of children in the above mentioned cases and how such harmonized family law could possibly look like.

To my knowledge, the field of the rights of children in cases of cross-border divorces and separation of parents is under-researched. A great number of texts deal with the question of rights of children in general ranging from books[4] to texts issued by international organizations

[3] Michael Freeman, 'Taking Children's Rights More Seriously' (1992) 6 *International Journal of Law and the Family* 52- 71 in supra n. 2, p. 44

[4] For example: Michael Freeman, *Children's Rights: A Comparative Perspective*, (Brookfield, Vt: Darthmouth, 1996)

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for protection of the rights of children. Many texts deal with the mutual recognition of judicial decisions in general and there are also texts on recognition of judicial decisions in the EU[5]. In addition, certain texts deal with specific issues such as child maintenance.[6] Clare McGlynn in her recent research deals with the whole range of issues regarding family law and rights of children in the EU, but she does not focus on the protection through the Council of Europe.[7] To my knowledge there are no specific texts focused on levels of protection of rights of children from the perspective of the cross-border divorces and separation of parents. Thus such a perspective can bring a specific point of view of the protection of rights of children in cross-border family disputes.

This thesis does not have the aim to be a comprehensive analysis of the rights of children. Rather, it focuses specifically on the cross-border divorces and separation of parents in order to discuss the regulation of rights of children on each level of protection. By comparison of the protection of fundamental rights of children in two systems, in the system of ECHR and in the system of EU law, the scope of protection will be shown which represents the minimum standard in Europe. The future possible development and advantages of the systems will be shown. This is aimed at discussing the future possible development of the EU law. Another comparison will be carried out in order to assess the necessity of EU action in the field of private international family law. Here the regulation through the Hague Conference and EU measures will be compared. In order to show the inevitability of further action on the EU level, the development of EU law in the past will be discussed, thus apart from a comparative analysis, tracing the historical development will be carried out.

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[5] Jan Ondřej, *Mezinárodní právo veřejné, soukromé, obchodní . (Public, Private, Business International Law – my translation),*(Plzeň, Vydavatelství a nakladatelství Aleš Čeněk, 2004)
[6] For example: http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_ec_en.htm

[7] Supra n.2

The relations under examination are relations of family life and the relations of the society towards children. Both of these relations create a part of society. The legal aspects of these relations are determined by the developments in society, by the changes in understanding of a family and by the developments in the understanding of fundamental rights. These relations cannot be analyzed purely from the legal point of view, the relevant law must be seen and analyzed in a wider context, in the context of the 'law and society'.

The thesis has three main parts. The first part deals with the protection of fundamental rights of children. More precisely, it deals with the nature of the fundamental rights of children, their twofold nature, protection through two organizations (Council of Europe and the EU) and the possibilities and advantages of them. It shows that the protection through the Council of Europe by the European Court of Human Rights was extended to all children without exception and that this system became able to protect rights of children through the right to respect for family life. The positives of the protection of autonomous rights of children will be discussed.

The second part is focused on the EU action in family law through private international family law. It analyzes the necessity of this action in the case of parallel existence of the regulation of private international family law through the Hague Conference. It shows the inevitability of further action by analyzing questions of parental responsibility: custody of the child, visiting rights, child abduction and child maintenance.

The third part focuses on the third level of protection of rights of children – protection through national family laws, questions of necessity of harmonization or unification and at future prospects as they arise from the wide discussion of authorities in this field in recent years.

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1. Protection of fundamental rights of children in Europe: twofold nature of the rights of children

The basis for the protection of rights of children in cross-border disputes is provided through fundamental rights protection, which establishes the minimum protection guaranteed in Europe. In order to examine the fundamental rights of children in the EU it is necessary to look at the method of their regulation by the European Convention of Human Rights and by the European Union Law.

This chapter aims to show the level of protection of fundamental rights of children in general in the EU through the comparison of the case law of the European Court of Human Rights ('ECtHR') and the case law of the European Court of Justice ('ECJ'). It will be explained how the protection of rights of children through the right to family life is now being supplemented by the emerging autonomous rights of children.

1.1 Right to respect for family life: development of the protection of all children without discrimination

Clare McGlynn in her recent research pointed out that European Union law for a long time used to grant more protection to children from ideal nuclear families and that such a protection was afforded through the right to family life rather than through autonomous rights of children[8]. In this connection she argues that "[c]hildren are…seen as synonymous with families, not independent beings who happen also to be part of families. This is the 'familialisation' of childhood where children are presumed to 'belong to' their parents."[9] In this regard she refers to

[8] Supra n. 2, p. 42-56
[9] Supra n. 2, p. 42

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Carol Smart et al's research according to which children become "fused with their parents into an idealized, inseparable family unit and the diverse identities and interests of individual family members are concealed."[10]

The claim that the legal concern was directed towards an ideal family - that consisting of married heterosexual parents and their biological children might be true with regard to European Union law in an earlier period. The situation was, however, different in those times based on ECHR and gradually evolved through the case law of the ECtHR as a reflection of social changes. The comparison of the case law of the ECtHR and the ECJ will show how the term 'family' was interpreted in various time periods and to whom then the relevant rights belonged.

1.1.1 ECHR and the case law of the ECtHR: impact on the fundamental rights of children

The right to respect for family life is a fundamental right protected in the geographical area of the European Union on the national, supranational and international level. Nowadays, the ECJ gives specific importance to the ECHR and the decisions of ECtHR. Thus the ECHR is the base not only for human rights protection through the Council of Europe, but it is also a reference point in the case law of the ECJ.

Article 8 (1) of the ECHR establishes that "[e]veryone has the right to respect for his private and family life, his home and his correspondence." According to Article 8 (2) of the ECHR

> [t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[10] Carol Smart, Bren Neale and Amanda Wade, *The Changing Experience of Childhood – Families and Divorce*, (Cambridge: Polity Press, 2001) p. 8, as in supra n. 2, p. 42

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The problem of the protection of fundamental rights of children through the right to respect for family life can be seen in the absence of the express legal definition of 'family'. However, as mentioned above, the current case law of the ECtHR differs substantially from the early decisions of the ECJ in the question 'who belongs to the family'. It is obvious that the protection afforded by the ECtHR since the late 1970s is not only the protection of the traditional family established by marriage and the protection of biological children, but it is also afforded to other relationships which can be defined as 'family units' and 'adequate family ties'.

As early as 1979 in the case of *Marckx v. Belgium*, the ECtHR stated, that

> …Article 8 [of the ECHR] makes no distinction between the 'legitimate' and the 'illegitimate' family. Such a distinction would not be consonant with the word 'everyone', and this is confirmed by Article 14 with its prohibition, in the enjoyment of the rights and freedoms enshrined in the Convention, of discrimination grounded on 'birth'.[11]

Thus the ECtHR established that through the right to family life also children born out of wedlock are protected.

The ECtHR approved and even broadened its approach in the later case of *Keegan v. Ireland* (1994) in which it established that

> …the notion of the 'family'…[in Article 8 of the ECHR] is not confined solely to marriage-based relationships and may encompass other *de facto* 'family' ties where the parties are living together outside of marriage… A child born out of such a relationship is *ipso iure* part of that 'family' unit from the moment of his birth and by the very fact of it. There thus exists between the child and his parents a bond amounting to family life even if at the time of his or her birth the parents are no longer co-habiting or if their relationship has then ended.[12]

The creation of *de facto* family ties is reasoned in the case of *Söderbäck v. Sweden* (1998), in which the ECtHR decided that if the child lived since birth with the mother and since the age of eight months with the person who later became the child's adoptive father and he had taken part in the care of the child who regarded him as father

[11] *Marckx v. Belgium*, no. 6833/74, para.31, ECtHR 1979
[12] *Keegan v. Ireland*, no. 16969/90, para.44, ECtHR 1994

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> …*de facto* family ties had existed between the mother and the adoptive father for five and a half years, until they married…, and between him and M. [(child)] for six and a half years [until the adoption]. The adoption consolidated and formalised those ties.[13]

Through the right to respect for family life, which was extended also to other relationships than traditional family relationships, the ECtHR begun to give protection to the rights of children in cases of cross-border divorces or separations, such as the custody of the child and the right to maintain contact with both parents, even if not expressly as autonomous rights of children. Thus the ECtHR gave such a protection to these relationships in the cases of *Sylvester v. Austria*[14] and *Ignaccolo-Zenide v. Romania* [15].

It can be concluded that even if the ECHR does not contain any express provision on protection of rights of children, such protection has been afforded by the case law of the ECtHR through the interpretation of the right to respect for family life. Protection of fundamental rights was afforded to children since the early times and not only to biological children of married parents, but also to children born out of wedlock and adopted children. This differed from the case law of the ECJ. The difference may be seen in the subject the European Union was dealing with.

1.1.2 EU law and the case law of the ECJ: impact on the fundamental rights of children

For the early times of European law it was typical that it dealt with much less subjects than after its later evolution with the Community's increased competence. It was first concerned with the freedoms which were the means for the achievement of the single market, thus there is no surprise that "it was in the free movement of persons that Community law first granted

[13] *Söderbäck v. Sweden*, no. 24484/94, para.33, ECtHR 1998
[14] *Sylvester v. Austria*, no. 36812/97, 40104/98 ECtHR 2003
[15] *Ignaccolo-Zenide v. Romania*, no. 31679/96, ECtHR 2000

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entitlements to children."[16] Clare McGlynn argues that the secondary legislation granted rights to children to achieve greater movement of persons and thus children can be seen as instrumental to the achievement of a single market.[17] The ECJ first protected the rights of children through the right to family life, which is a fundamental right in the EU. Thus it protected children as a part of a family and only the later interpretation led to the extension into the sphere of autonomous rights of children.

A good example of secondary legislation is Article 10 of the Council Regulation 1612/68/EEC of 15 October 1968 on freedom of movement for workers within the Community[18], according to which the worker's "spouse and their descendants who are under the age of 21 years or are dependants" irrespective of their nationality, have the right to install themselves with the worker (who must be a national of the Member State). The ECJ in the case of *Baumbast*[19] treated a step-child as a member of the worker's family. The same approach towards the step-child was taken by the ECJ in the case of *Carpenter*[20] based on the right to family life.

The new Free Movement Directive[21] made a step forward in definition of who belongs to the family by establishing that family rights belong to "direct descendants who are under the age of 21 or are dependants and those of the spouse or partner."[22] However, Clare McGlynn points out that "[t]he intention of including the qualifying term 'direct' of descendant is not apparent."[23] She suggests that it could have been designed to exclude grandchildren, even if she does not

[16] Supra n. 2, p. 46
[17] Ibid.
[18] Council Regulation 1612/68/EEC of 15 October 1968 on freedom of movement for workers within the Community, OJ 1968 L 257/2
[19] Case C-413/99, *Baumbast and R. v Secretary of the State for the Home Department* [2002] ECR I-7091; [220] 3 CMLR 23, para.17
[20] Case C-60/00, *Carpenter v. Secretary of the State for the Home Department* [2002] ECR I-6279; [2002] 3 CMLR 64, para.94
[21] Directive 2004/58/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L 229/35
[22] Article 2 (2) (c) of the Directive 2004/58/EC, OJ 2004 L 229/35

[23] Supra n. 2, p. 47

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doubt they are also 'direct' descendants.[24] Clare McGlynn refers here to a problem which then can arise with adopted children or children born to parents by fertility treatments, in which cases, she argues, these children cannot be said to be direct 'descendants', however she does not doubt the Court would provide protection to them.[25]

Authors suggest, as will be shown, that the interpretation of the term 'family' and 'spouse' in cases under Free Movement Directives is based on the traditional ideology of family. In the case of *Netherlands v. Reed*[26] the ECJ limited the term 'spouse' to married partners. Regarding the case of *Diatta v. Land Berlin*[27] Clare McGlynn points to the uncertainty for all children of the marriage because of the confusion of the rights of a non-working spouse on divorce if he/she is a primary carer and a third country national.[28] Commentators thus criticize that the Free Movement Directive sticks to the dominant ideology of the family and because of that, children who are coming form families which do not fall under the category of traditional families, can be adversely affected and that the rights of children are the consequence of the parent's working status and not the autonomous rights of children[29].

The further case law of the ECJ showes the departure from the position of granting rights only in the close relationship with the employment of the migrant worker, however rights granted to children still had to 'facilitate free movement'[30]. "The rights remain parasitic on the migrant; rights are granted to children instrumentally in order to ensure economic success."[31]

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[24] Ibid, p. 47, 48
[25] Ibid, p. 48
[26] Case 59/85, *Netherlands v. Reed*, [1986] ECR 1283; [1987] 2 CMLR 448
[27] Case 267/83, *Diatta v. Land Berlin* [1985] ECR 567
[28] Supra n. 2, p. 48
[29] For example Clare McGlynn, supra n. 2 p. 48, 49 and also Louise Ackers and Helen Stalford, *'Children, Migration and Citizenship in the European Union: Intra-Community Mobility and the Status of Children in EC Law'* (1999) 21 *Children Services Review* 987-1010 at 1007 as in supra n. 2, p. 48, 49
[30] Supra n. 2, p. 49
[31] Ibid.

A significant change in the approach of the ECJ towards autonomous rights of children in connection with free movement is its decision in *Chen and Zhu*[32]. Until this time, as can be seen from the previous cases, the rights of children were dependent on the free movement of their parents. "It was assumed that a child could not, therefore, independently exercise rights of free movement (unless a worker in their own right) and could not access benefits unless they were deemed to 'facilitate' the free movement of the parent."[33]

The ECJ in *Chen and Zhu* held that children have the rights of Union citizens granted by the Council Directive on right of residence[34] to move and take up residence in another Member State so long as they have sufficient financial resources and medical insurance. Moreover, the ECJ stated that

> …a refusal to allow the parent, whether a national of a Member State or a national of a non-member country, who is the carer of a child to whom Article 18 EC and Directive 90/364 grant a right of residence, to reside with that child in the host Member State would deprive the child's right of residence of any useful effect. It is clear that enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his or her primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence.[35]

Thus the court not only established the independent right of the child to move and reside within the Union, but also allowed from this autonomous right of the child to derive the rights of carers. Here the Irish government argued that the child was very young to exercise the rights independently. The court held that the rights of free movement of persons "cannot be made conditional upon the attainment by the person concerned of an age prescribed for the acquisition of legal capacity to exercise those rights."[36] The position of the ECJ clearly shows the attitude to grant rights to children '*qua* children', meaning independently of their capacity to exercise them.

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[32] Case C-200/02, *Chen and Zhu v. Secretary of the State for the Home Department* [2004] 3 CMLR 48
[33] Supra n. 2, p. 56
[34] Directive 90/364/EEC of 28 June 1990 on the right of residence, OJ 1990 L 180/26
[35] Supra n. 32 para.45
[36] Supra n. 32 para.20

1.2 Towards autonomous rights of children

As was shown in the previous subchapter, the approach of the ECJ changed through time in favor of autonomous rights of children. This change followed the long lasting debate in sociological and legal science about the family, family roles and the system of granting right to children or deriving them from the rights of other members of the family. The main points of this discussion will be shown in this subchapter. This subchapter will also deal with the importance of the Charter of Fundamental Rights of the EU in protection of independent fundamental rights of children in the EU. The role of the Charter will be considered in the light of the Lisbon Treaty, which is nowadays in the process of ratification.

1.2.1 Necessity of protection of children 'qua children'

Social science in its dealing with the family patterns points to the fact that the family practices changed radically through time.[37] It is also pointed out that the dominant family ideology promotes traditional form of family[38] and that legal changes are not as fast as social changes.[39] Clare McGlynn sees the children's 'policy vacuum' in the EU as a reason for the fact that the dominant ideology has shaped Union law.[40] However, as she points out, new ways of thinking about children's rights emerged and are beginning to be incorporated in Union law. [41]

The discussion about whether or not to have autonomous rights of children can be seen as a discussion about the role of children in the family. Clare McGlynn suggests that the traditional

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[37] As can be seen for example from the work of Diana Gittins, *The Family in Question – Changing Households and Familiar Ideologies* (2nd edn, Basingstoke:Macmillan, 1993) as in supra n. 2 p. 23
[38] Alison Diduck and Felicity Kaganas, *Family Law, Gender and the State* (Oxford:Hart Publishing, 1999) p. 10 as in supra n. 2 p. 23
[39] Supra n. 2, p. 23
[40] Supra n. 2, p. 42
[41] Ibid.

family ideology views the child as 'becoming adult' and not as 'being a child'.[42] This concept creates a dependent child with no autonomy, which can be achieved only by achievement of adulthood.[43]

The 'new sociology of childhood' shifted towards seeing a child as 'being' rather than 'becoming'[44], which presupposes "individual recognition of children and their interests, agency and rights."[45] This is very important especially if we take into consideration that the rights or interests of children may differ from the interests of the family or of the particular members thereof.

Clare McGlynn sees the reason for resistance to children's rights in the "perceived attack on 'the [private] family'"[46] . The concept of private family meaning the separation of the private and public sphere and the non-interference of the latter in the former, according to feminists, has negative effect on the autonomy and freedom of individuals in families.[47] Taking into consideration the fact that children themselves, according to Anthony Giddens and Christopher Pierson, prefer to be treated as individuals, with their views heard and with their capacity to participate in the decision making in families, simply said they prefer democracy in the family, [48] the necessity of the autonomous individual rights of children is evident.

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[42] Ibid.
[43] Ibid.
[44] Allison Diduck, *Law's Families* (London: Butterworths, 2003) as in supra n. 2 p. 43
[45] Ibid.
[46] Supra n. 2, p. 45
[47] Jo Bridgeman and Daniel Monk (eds.), *Feminist Perspectives on Child Law* (London: Cavendish, 2000) as in supra n. 2, p. 45
[48] Anthony Giddens and Christopher Pierson, *Conversations with Anthony Giddens: Making sense of Modernity* (Cambridge: Polity Press 1998)as in supra n. 2 p. 43 and Smart, Neale and Wade, *Childhood,* p. 58 as in supra n. 2 p. 43

1.2.2 Importance of the Charter of Fundamental Rights of the European Union for the protection of autonomous rights of children

As was shown in the first subchapter of this chapter, the approach towards autonomous rights of children was evident in the case of *Chen and Zhu.* Not only the case law changed in this direction, but also the primary and the secondary law. Children were first expressly mentioned in the Treaty of Amsterdam. Then the development followed by the Union's first steps in the family law through secondary law.[49] At the same time[50] the Charter of Fundamental Rights of the European Union was 'solemnly proclaimed'.

The importance of the Charter for the protection of fundamental rights of children lies in the fact that it makes a clear distinction between the right to respect for family life and the autonomous rights of children. The right to respect for family life is established in its Article 7 by stating that "[e]veryone has the right to respect for his or her private and family life, home and communications". The autonomous rights of children are established in Article 24 of the Charter.

As follows from the Explanations Relating to the Charter of Fundamental Rights[51], Article 24 of the Charter is based on the New York Convention on the Rights of the Child which was signed on 20 November 1989 and was ratified by all Member States. UNCRC is an international instrument for the protection of rights of children which reflects "the growth of children's movement and particularly the significant voice of children's liberationists."[52] Clare McGlynn summed up that in the development of children's rights on the international level, the direction can be seen from the 'investment' motive in promoting rights of the children, to

[49] These measures will be analyzed in more detail in the second chapter
[50] In 2000
[51] Explanations Relating to the Charter of Fundamental Rights of the European Union 2007/C 303/02
[52] Supra n. 2, p. 68

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protectionist 'child-saving' approach with the latest phase of combination of the protection with the independent and autonomous rights of children.[53] The latest approach can be seen in the UNCRC and by the adoption of the same basis of rights in Article 24 of the Charter also in this document.[54]

Article 24 (1) of the Charter establishes that

> [c]hildren shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

Analysis of the first sentence of this article leads to the conclusion that this is a protective part of the provision, whereas the second and the third sentence provide for autonomous rights of children-for their right to participate in decision making.[55] However, McGlynn notes, there are claims of difficulties in operationalising the participation principle.[56]

Article 24 (2) of the Charter establishes that "[i]n all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration." Even if the provision of the best interests of children both in a private and public institutions' actions can be seen as a significant protective provision, McGlynn questions the term 'primary' consideration.[57] She points out that the same wording in the UNCRC was achieved as a compromise in a debate which led to the conclusion that there are also other interests such as justice and society at large, towards which the interests of the child must be balanced.[58] She argues that such a balancing exercise in the Union context encompasses the danger that other interests, such as 'commercial interests of the single market', will prevail; but

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[53] Supra n. 2, p. 68, 69
[54] Ibid.
[55] As in supra n. 2, p. 70
[56] Louise Ackers, 'From "Best Interests" to Participatory Rights – Children's Involvement in Family Migration Decisions (2000) 12 *Child and Family Law Quarterly* 167-84 in supra n. 2, p. 70
[57] Supra n. 2, p. 69, 70
[58] Ibid.

as she rightly concludes, the rights and interests of children now at least must be considered and the balancing exercise must take place.[59]

Article 24 (3) of the Charter establishes that "[e]very child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests." Here the Charter establishes the right of the child to maintain personal relationship and direct contact with both parents, which can be restricted only in the interest of the child. The right to contact may be seen as a reference point in cases of family reunification, but also protects the visiting rights of the child in cases of cross-border divorces or separation of parents.[60]

Except for Article 24 and Article 7, several other Articles of the Charter have impact on the rights of children. Non-discrimination of the children is ensured by Article 20 of the Charter, which establishes that "[e]veryone is equal before the law." Non-discrimination is ensured also by Article 21 of the Charter, which prohibits, among others, discrimination on the ground of age.

It can be said that the inclusion of the rights of children into the Charter was a positive step towards autonomous rights of children. Regardless of the argument that the judiciary in case of rights of children contained in the Charter seemed "reluctant to engage with the human rights arguments, considering them unnecessary in that the positive outcome could be achieved by an interpretation of the relevant legislation relying on the aims and objectives of Union policy…"[61] it must be said that the position of the Charter in the legal framework of the EU is changing. Today, even if the Charter is not a legally binding document, the ECJ started to make express

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[59] Supra n. 2, p. 70
[60] Supra n. 2, p. 71
[61] Supra n. 2, p. 73 commenting on Advocate General's opinion in *Chen and Zhu*

reference to it.[62] The nature of the Charter will change with the successful ratification of the Lisbon Treaty after which the Charter will become a part of primary law of the EU.

To conclude, it can be said that basically it is possible to divide the rights of children in cases of cross-border divorces into three main categories. The first category, the category of rights of contact of children with parents which is reflected in custody of the child and visiting rights, is afforded to children both through the ECHR, namely through the right to respect for family life and through the Charter as autonomous rights of children. Thus the right of children to maintain contact with both parents is established as a fundamental right and it will be clearly established as an autonomous right of children by becoming the Charter a legally binding document. Second, the procedural right of children, the right to express freely their views, which must be taken into consideration in matters of concern of the child (in accordance with their age and maturity), is established by Article 24(1) of the Charter as a fundamental right. The same applies here about the nature of the Charter. However, this differs substantially from the third category of rights, the right to child maintenance. None of the documents mentioned here regulates this right as a fundamental right. As an economic right it can not be enforced through the ECtHR. Thus, in relation to this category of rights other mechanisms must be employed.

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[62]First time in the case C-540/03 *European Parliament v. Council of the European Union* [2006] OJ C 190

2. Nature, necessity and sufficiency of EU action in the field of family law for the protection of the rights of children in cross-border family disputes

The influence of the European Union in the field of family law developed gradually. The first steps were taken by the way of adoption of measures of private international law and concretely private international family law. These measures became 'communitarized' after the adoption of the Treaty of Amsterdam. This chapter focuses on the gradual development of the influence of the EU in family law, on the criticism of commentators of EU action in this field because of the parallel existence of the system of protection under the Hague Conference, and on justifications for EU action in this field. This chapter aims to show that despite the criticism, there are also undeniable positives of the EU measures if we compare them to the measures taken through the Hague Conference in the field of private international family law. It will be argued that in the case that action was taken by the EU in the field of family law, further development is irreversible and also necessary in order to cover all the areas of the rights of children in cases of cross-border divorces and separations. This will be shown in relation to the parental responsibility which encompasses custody of the child, contact with the child (and the related prohibition of parental abduction of the child) and child maintenance in cases of cross-border divorces and separation of parents.

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2.1 From intergovernmental cooperation to Community legal measures: in the light of European family policy

European family policy began to be developed only in the 1980s. Not surprisingly the main actors in the development were the European Parliament which adopted the Resolution on

Family Policy[63] and the Commission, through its Communication on Community Family Policies[64]. The Council's Conclusions[65] and other further steps followed.

2.1.1 Intergovernmental measures

The first measure concerning the family law dates back before the period of the discussion on European family policy. As early as 1968, the Member States were already aware that "it was necessary to simplify the procedure of the recognition and enforcement of judgments"[66]. But because the judicial cooperation was not a competence of European Communities, this field could be regulated only by international treaties –conventions.

Such a measure was the Convention known as Brussels I[67] which applied to civil and commercial disputes, but which expressly excluded family law disputes, but applied to maintenance agreements[68]. The reasons for the exclusion of family law disputes are provided by Paul Beaumont and Gordon Moir, who argue that such exclusion was due to the role of the EEC which was not perceived as a "body aimed directly at the regulation of family law matters."[69] Rather, the EEC had economic objectives. As Clare McGlynn points out, reasons for exclusion were provided by the explanatory report to the Convention, which states that the family matters were excluded because of the 'disparity' of national family laws.[70]

[63] Resolution on Family Policy in EEC, OJ 1983 C 184/116
[64] Communication from the Commission on Family Policies, COM (89) 363 final
[65] Conclusions of the Council and of the ministers responsible for family affairs meeting within council of 29 September 1989 regarding family policies, OJ 1989 C 277/2
[66] Supra n. 5, p. 248, my translation
[67] Convention on jurisdiction and enforcement of judgments in civil and commercial matters (consolidated version) OJ 1990 C 189/2
[68] Article 1 of the Brussels I Convention, OJ 1990 C 189/2 as interpreted by Clare McGlynn, in supra n. 2, p. 155
[69] Paul Beaumont and Gordon Moir, 'Brussels Convention II: A New Private International Law Instrument in Family Matters for the European Union or European Community?' (1995) 20 *European Law Review* 268-288 in supra n. 2, p. 155
[70] Explanatory report to the Convention on jurisdiction and enforcement of judgments in civil and commercial matters (Jenard Report) OJ 1979 C 59 as in supra n. 2, p. 155

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The adoption of the Maastricht Treaty –Treaty of European Union[71] in 1992 was the basis for the creation of the three pillar system, the system of the European Union and of closer integration. Institutionalization of the cooperation in the fields of justice and home affairs by the Title VI of the Treaty of the European Union was "partly modeled on …pre-existing intergovernmental cooperation system…"[72] Hence, the Union was provided with the power to take action in the field of judicial co-operation in civil and criminal matters.[73] Such actions were to be taken within the third - intergovernmental pillar of the EU.

This led to the adoption of the Convention on Jurisdiction and Recognition and Enforcement of Judgments in Matrimonial Matters[74] ('Matrimonial Convention') in 1998, as a result of the German proposal to adopt a Convention which would extend the scope of the Brussels I to matrimonial matters. Such a development was connected, as Paul Beaumont and Gordon Moir suggest, with the rendering of judgment in the case *Hoffman v. Krieg* [1988], after which the German government became concerned by the new Convention, since Dutch divorces were not recognized in Germany.[75] In this regard certain commentators[76] argue that this situation could have been resolved if those "member states [which] lack commitment to the Hague Conference"[77] would sign the Hague Convention on the Recognition of Divorces and Legal Separations[78] .

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[71] Treaty of European Union, OJ 1992 C 191
[72] as on http://europa.eu/scadplus/leg/en/lvb/a11000.htm last visited 20 February 2008
[73] Article K.1, Title VI of the Treaty of European Union, OJ 1992 C 191
[74] Council Act of 28 May 1998 drawing up the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters , OJ 1998 C 221/1
[75] Supra n. 69, p. 269 as in supra n. 2, p. 156
[76] For example Peter McEleavy, 'The Brussels II Regulation: How the European Community Has Moved Into Family Law' (2002) 51 *International and Comparative Law Quarterly* 889-908, as in supra n. 2, p. 156; and Clare McGlynn, supra n. 2 p. 156
[77] Supra n. 2, p. 156
[78] 1970 Hague Convention on the Recognition of Divorces and Legal Separations, 11th session of the Hague Conference on Private International Law , 1 June 1970

The new intergovernmental measure, the Matrimonial Convention, applied to the cases of divorce, legal separation, annulment of marriage and parental responsibility for the children of both spouses and established the recognition and enforcement of judgments in these cases. With regard the inclusion of parental responsibility for the children of both spouses into this Convention, similar claims of possibility of alternative solutions arose. Peter McEleavy claims that other possibilities to the solution of child custody in cases of cross-border divorces and separations existed, such as the solution through the Hague Conference[79], which was negotiating a new Convention relating to the issues of the child custody[80]. Peter McEleavy further claims that EU action in this case means the "Community staking a claim to this area, possibly for internal political motives and for reasons of future external competence"[81].

However, the claims of 'duplicity' as a result of the new measures on the European Union level can be countered by advantages and justifications provided in favor of adoption of measures on the EU level. One of the main advantages of the Union's measures, which is argued also in the following subchapter with regard to Community measures, can be seen in the speed of their adoption in comparison to the measures adopted by the Hague Conference which has a worldwide participation and is not limited to European countries. However, the Matrimonial Convention was an intergovernmental measure and this nature allowed for the discretion of Member States to decide whether and when to incorporate it into a national law[82], which differs significantly from the later measures adopted as measures of Community law. Hence, if we compare EU measures with the measures adopted through the Hague Conference, it can be said

[79] Peter McEleavy, 'The Brussels II Regulation: How the European Community Has moved into Family Law' (2002) 51 *International and Comparative Law Quarterly* 889-908, as in supra n. 2, p. 157
[80] 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for Protection of Children, 18th Session of the Hague Conference on Private International Law, 19 October 1996, in force 1 January 2002
[81] Supra n. 79
[82] Supra n. 2, p. 158

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that the advantages are not so visible in cases of intergovernmental measures as in the case of measures adopted within the first 'Community' pillar of the EU. Thus it can be said that the advantages of EU action are more visible in the case of Community first pillar measures.

Clare McGlynn points also to the rationales of the adoption of the Matrimonial Convention provided in an explanatory report to the Convention[83], which stated that "integration is now no longer purely economic and is coming to have an increasingly profound effect on the life of the European citizen."[84] The report continued that "family law therefore has to be faced as part of the phenomenon of European integration."[85]

Hence, it can be said that even the family law matters were first excluded from the Community competence because the Community had other, mainly economic aims, the Community became involved in them through a specific area of judicial cooperation.[86]

2.1.2 Community legal measures

The adoption of the Treaty of Amsterdam, which was signed on 2 October 1997 and entered into force on 1 May 1999, introduced the gradual creation of the 'area of freedom, security and justice'. This concept replaced the concept of 'justice and home affairs' established by the Treaty of Maastricht, which created the third - intergovernmental pillar of the European Union. The aim of the creation of an area of freedom, security and justice, according to the

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[83] Explanatory Report on the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (the 'Borrás Report'), OJ 1998 C 221/27
[84] Paragraph 1 of the explanatory report, as in supra n. 2, p. 157
[85] Paragraph 1 of the explanatory report, as in supra n. 2, p. 158
[86] Supra n. 2, p. 158

European Council, is "to reconcile the right to move freely throughout the Union with a high degree of protection and legal guarantees for all."[87]

Even if the Treaty of Amsterdam does not contain any provision regarding family law, its adoption was one of the major steps in the development of European family law, since it empowered the Community to adopt measures in the field of private international family law. Thus the Treaty of Amsterdam transferred from the third – intergovernmental pillar to the first - community pillar not only areas of immigration, visas and asylum, but also judicial co-operation in civil matters. This transfer means that European institutions began to fulfill different roles in the transferred areas compared to the roles they had in the third pillar. Furthermore, the measures adopted in the first pillar differ substantially from measures adopted in the third pillar, because for those adopted in the first pillar principles of supremacy, direct effect and in case of regulations direct applicability apply.

The legal basis for gradual establishment of the area of freedom, security and justice is Article 61 which was included into the EC Treaty stating that "[i]n order to establish progressively an area of freedom, security and justice, the Council shall adopt measures in the field of judicial cooperation in civil matters as provided for in Article 65."[88] Article 65 of the EC Treaty provides that

> [m]easures in the field of judicial cooperation in civil matters having cross-border implications …in so far as necessary for the proper functioning of the internal market, shall include [among others those] improving and simplifying the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases[89]… [and those] promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.[90]

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[87] Tampere European Council, 15-16 October 1999 as on http://www.europarl.europa.eu/facts/4_11_1_en.htm last visited on 19 February 2008
[88] Article 61 (c) of the EC Treaty
[89] Article 65 (a) (3) of the EC Treaty
[90] Article 65 (b) of the EC Treaty

On this legal basis the Matrimonial Convention was transferred into a Community Regulation. Apart from the legal basis for transfer of any policy from the third pillar to the first pillar, political will is necessary, which was in this case the Tampere European Council's project of 'European judicial area'. This project was to be built on the "firm commitment to freedom based on human rights, democratic institutions and the rule of law."[91] The Council emphasized the need for "special common procedural rules for simplified and accelerated cross-border litigation"[92] and the need for common procedural rules in the area of maintenance claims.[93] The Council also required automatic recognition of certain decisions in family law proceedings, such as maintenance claims and visiting rights.[94]

Hence, after the creation of a legal possibility to adopt Community measures in judicial cooperation in civil matters by the Amsterdam Treaty, soon, in 2000, the Regulation on jurisdiction and recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses[95] ('Brussels II') was adopted. This Regulation transposed the Matrimonial Convention into the Community law. However, maintenance claims became regulated by the Community measure only in 2001, when Brussels I was transposed into Community law[96].

Since the Matrimonial Convention became a Community measure its nature changed. For Regulation in comparison to Convention supremacy is typical and it is directly applicable in Member States, whereas the Convention must be transposed to the national legal system. Regulation falls under the judicial review of the ECJ, but the Convention only in the case if it

[91] Tampere European Council, presidency conclusion, as in supra n. 2 p.159
[92] Ibid., para.30 as in supra n. 2, p. 159
[93] Ibid., para.41 as in supra n. 2, p. 160
[94] Supra n. 2, p. 160
[95] Council Regulation 1347/2000/EC on jurisdiction and recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ 2000 L 160/19
[96] Council Regulation 44/2001/EC of 22 December 2000 on jurisdiction and enforcement of judgments in civil and commercial matters, OJ 2001 L 12/1

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expressly provides so. There is also no possibility for Member States to derogate from a Regulation in comparison to the Convention.

The Brussels II Regulation was not the final measure adopted. The main criticism and the reason for the replacement of Brussels II by Brussels II *bis*, namely the Council Regulation concerning jurisdiction and recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility[97], was the limited scope of Brussels II.[98] Brussels II established uniform rules on jurisdiction on divorce, legal separation and annulment of marriage, and it aimed to reach automatic recognition of judgments in these cases in Member States of the EU and it also established uniform rules on jurisdiction in cases of parental responsibility for joint children and recognition and enforcement of the judgments in these cases. This limited scope, which did not encompass other children except of those of both spouses, was thus the main reason for the early adoption of a new Regulation in this field.

2.2 Necessity and sufficiency of EU action in the field of private international family law: parental responsibility

The parallel existence of regulation of private international family law through the Hague Conference and by EU measures in private international family law or secondary EU law in the field of judicial cooperation in family matters introduced the question of the necessity of regulation on the EU level. This sub-chapter deals with the question of the necessity and sufficiency of EU action in this field. It shows the improvements brought by the adoption of Brussels II *bis* Regulation and argues that the following development of EU action is irreversible and expected.

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[97] Council Regulation 2201/2003 of 27 November of 2003 concerning jurisdiction and recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation 1347/2000/EC, OJ 2003 L 338/1

[98] Supra n. 2, p. 167

2.2.1 Criticism of EU action in the field of private international family law

There is wide criticism among academics of the action taken by the EU in the field of private international family law relating principally to two main issues: the necessity of such an action and the justifications for it. First, what is widely questioned is whether it was necessary at all to adopt measures in private international family law at the EU level in the case that there already functioned a system created under the Hague Conference. Authors who question the necessity of EU action differ in their reasons. First are those stating that it was unnecessary because the Hague Conventions provided better solutions because of their global nature[99]. Second are those who point to the subsidiarity of Community law in the sense that the Community should 'not go beyond what is necessary in order to achieve the goals of the Treaty' and question whether these measures were necessary[100]. And finally those who prefer the Hague Conference compared to EU measures because of the arguments of lack of transparency and the democratic deficit in the EU[101].

However, there are also opposite views, such as that of Nigel Lowe, who rightly suggests that even if the Hague solutions were preferable, the speed of the adoption of EU measures makes EU measures welcome[102]. Other justifications for the adoption of EU measures were those established by the institutions adopting them, such as the aim of European integration, the operation of the single market, the creation of a common judicial area and the promotion of European citizenship. These justifications became the source of further criticism of commentators, since EU measures were not adopted because of the failing or non-functioning of

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[99] Supra n. 2, p. 162
[100] Helen Stalford, 'Regulating Family Life in Post-Amsterdam Europe', (2003) 28, *European Law Review* 39-52, as in supra n. 2 p. 162
[101] Peter McEleavy, 'First Steps in the Communitarisation of Family Law: Too Much Haste, Too Little Reflection?' as in supra n. 2 p. 162
[102] Nigel Lowe, 'The Growing Influence of the European Union on International Family Law - A View From the Boundary' (2003) 56 *Current Legal Problems* 439-480 as in supra n. 2, p. 169

private international family law, but rather on other grounds.[103] In this regard McGlynn argues that "there is no clear legitimate legal basis for family law"[104] and this might really be seen as the reason why the measures became adopted on different bases – those relating to the aims of the Union.

2.2.2 Improvements brought by Brussels II bis to protection of rights of children

As already mentioned, the limited nature of Brussels II can be seen in the fact that it applied to civil proceedings relating to divorce, legal separation and marriage annulment and within them to decisions on parental responsibility for the children of both spouses if these decisions were taken in procedure of divorce, legal separation or marriage annulment. As early as November 2000, the European Council adopted the Program on the mutual recognition of decisions in civil and commercial matters[105] which in the field of family law set out the aim that all decisions rendered in one Member State will be directly enforceable in another Member State without the need for an intermediate procedure –'exequatur procedure'. This aim became realized by the subsequent adoption of Brussels II *bis*, which applies as of 1st March 2005.

The new Regulation Brussels II *bis* compared to Brussels II brought three substantial improvements. First, it "extend[ed] the rules on mutual recognition and enforcement…to all decisions on parental responsibility"[106]. Thus it encompasses decisions "relating to the attribution, exercise, delegation, restriction or termination of parental responsibility [and]

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[103] Supra n. 2, p. 167
[104] Supra n. 2, p. 170
[105] Programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, OJ C 12 of 15. 1. 2001
[106] As on http://ec.europa.eu/justice_home/fsj/civil/parents/wai/fsj_civil_recognition_parents_en.htm, last visited on 27 March 2008

…covers court judgments, decisions issued by relevant authorities and out-of-court agreements provided that they are enforceable in the member state in which they were concluded."[107]

Second, it can be said that it promotes the right of the child to maintain contact with both parents by ensuring that decisions on visiting rights will be automatically recognized in other Member States and that they will be enforceable there[108]. In this relation, Clare McGlynn admits that Brussels II *bis* improved the approach to children by encompassing all parental responsibility decisions including also step-children, but she points out that the Regulation is "weaker than an earlier draft"[109] in the sense, that it does not include the express statement of the draft establishing the right of the child to 'maintain on a regular basis a personal relationship and direct contact with both parents, unless it is contrary to his interests' and that '[a] child shall have the right to be heard on the matters relating to parental responsibility over him or her in accordance with his or her age and maturity'.[110] Even if the Brussels II *bis* Regulation is 'weaker than an earlier draft', the provisions which were not included were designed to protect the same rights as those in Article 24 (1) and 24 (3) of the Charter of Fundamental Rights of the EU, to which the ECJ began to refer in the case of *European Parliament v. Council of the European Union*[111]. Moreover, the non-binding nature of the Charter will change with the successful ratification of the Lisbon Treaty by which the Charter will become a source of primary law of the EU.

Third, the new Regulation Brussels II *bis* improves the prevention of parental child abduction and reinforces the obligation of the courts to order, in the case of parental child

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[107] Supra n. 2, p. 168
[108] Supra n. 106
[109] Supra n. 2, p 169
[110] Supra n. 2, p.169, 170
[111] C-540/03 *European Parliament v. Council of the European Union*, [2006]

abduction within the European Community, the return of the child.[112] The Regulation complements the Hague Convention on Child Abduction[113] by imposing stricter rules.[114] Here Clare McGlynn questions the necessity of the Community action by pointing to the existence of rules under the above mentioned Convention and points to the success of the Hague Convention in the EU [115] which is also acknowledged by other commentators[116] .

It can be concluded that despite the criticism, there are undeniable advantages in EU action in the field of family law. Moreover, since measures begun to be taken, further steps are expected in order to supplement the existing rules or in order to react to the changes in the society. Thus further action is inevitable. Further development is expected also in order to regulate those areas of protection of the rights of children in cross-border family disputes which are not regulated until these days. An example of the inevitability of further development can be seen in the regulation of child maintenance. In the Green Paper on Maintenance Obligations[117], the Commission admitted that certain Member States would prefer the solution through the Hague Conference, but pointed to the empowerment of the Community to act in this field which was obtained through the adoption of the Amsterdam Treaty.[118] As a result, the Maintenance Regulation was adopted in 2007, which provides for the enforceability of the maintenance decisions in another Member State of the EU without the need for additional proceedings. By its adoption basic questions were resolved but still others remain to be regulated by further measures; such as the guarantees of the procedural rights of the defendants, cooperation among

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[112] Supra n. 106
[113] 1980 Hague Convention on the Civil Aspects of International Child Abduction, 14th Session of the Hague Conference on Private International Law, 25th October 1980, in force 1December 1983
[114] Supra n. 106
[115] Supra n. 2, p. 168
[116] For example by Peter McEleavy in supra n. 79, p.903-4, as in supra n. 2 p.168
[117] Green Paper on Maintenance Obligations, COM (2004) 254 final
[118] Ibid, p. 9 as in supra n. 2, p. 172

Central Authorities and questions of bilateral agreements on maintenance matters between the Member States and third countries.[119]

Thus it might be said that if measures began to be taken in the specific system, further measures are expected in order to avoid a situation in which adoption of certain measures would lead to the situation that not all relevant areas are covered. Following adoption of measures can lead to establishing a comprehensive system of protection even if supplementing the existing system. Furthermore, the adoption of new measures can be required because of the ever-changing social reality which law reflects.

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[119] as on http://www.bmj.bund.de/enid/0,89906e706d635f6964092d0934353133093a0979656172092d0932303037093a096d6f6e7468092d093036093a095f7472636964092d0934353133/Press_Office/Press_Releases_zg.html, last visited on 15 March 2008

3. Possible future unification or harmonization of national family laws in EU: impact on the rights of children in cases of cross-border divorces and separations

Family law was first mentioned in EU primary law with the adoption of the Treaty of Nice in 2001 in connection with the judicial cooperation. However, EU action in the field of family law became established and further action is inevitable. As Clare McGlynn rightly concludes, there is no debate as to whether Union should have a family law, but rather its scope should be discussed.[120] But on the question of scope opinions of scholars differ substantially. There is wide criticism mentioned in the previous chapter of the measures taken by the EU in the field of private international family law. However, in this field the competence of the EU is established and the further adoption of measures is inevitable, which is visible from the constant advancement by EU institutions. More problematic is the question of harmonization or unification of the national family laws in order to achieve better protection of children in cases of cross-border divorces or separation of parents.

This chapter aims to show how the diversity of national family laws could be overcome in future, to the extent necessary for the better solution of the situation of children in cross-border family disputes, by harmonization of family laws. This chapter discusses the possible methods of harmonization of national family laws. Alternative proposals of improvements in European family law will be presented, which are aimed at reaching the goal of the protection of rights of children.

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[120] Supra n. 2, p. 171

3.1 Harmonization or unification of national family laws of the Member States

As already discussed in previous chapters, the basis of the protection of rights of children in cases of cross-border divorces and separation of parents is the protection of their fundamental rights. In Europe two regional systems provide for such protection – the system adopted under the Council of Europe with the protection through ECHR and the system of protection of fundamental rights in the EU. As mentioned in the first chapter, the protection is afforded through the right to family life and through the autonomous rights of children, such as the right to maintain contact with both parents and the right of the child to be heard.

Even if the protection of fundamental rights is the basis of the regulation, presumably a regulation only on this level can not be enough in the complicated cross-border cases, as further regulation of these specific relationships begun to take place in various systems – in the Hague Conference and through specific measures of the EU in the field of private international family law. However, the question is, whether this is enough. Whether in order to secure better protection of children it would not be more appropriate to take further measures, particularly in the field of the harmonization or unification of national family laws.

Indeed, there is a huge debate on the topic in academic circles. On the one side there are those who advocate harmonization or even unification of family law, on the other side there are those who support the preservation of the diversity and plurality as will be shown. The fact remains that in 2001 Commission on European Family Law ('CEFL') was established with the aim of drafting 'Principles of European Family Law' as a means of harmonization of the family law in the European Union which can be seen as a step towards harmonization.

The first group is the group of those who see it possible to adopt the European Civil Code as a comprehensive code of private law also containing family law. This can be best shown by a

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quotation from Walter Pintens that "European Civil code …will one day replace Euro as the symbol of European integration"[121]. According to Clare McGlynn, these are the ideas of the federalists or those who wish to promote European statehood.[122] Reinhard Zimmermann argues that it would remove 'legal nationalism' in order to achieve 'European Unity'.[123] This view is in contrast with the position of Clare McGlynn who argues that "erasure of difference and promotion of harmonization and codification is a vision of a future for Europe which is divorced from the European legal order and of the needs for the future."[124] It can be thus said that certain authors claim the need for the code on the basis of integration. As Clare McGlynn suggests, other authors support the codification by the need for creation of European identity.[125] For example, Katharina Boele-Woelki claims that "absence of harmonized family law creates an obstacle to …the creation of a truly European identity and an integrated European legal space."[126]

The solution to the better regulation of rights of children in cross-border family disputes seems improbable through a comprehensive Civil Code which would entail family law. There are more reasons why. First, there is a claim that family law is very much connected to the culture, society and the policy of the Member States[127]. Second, in the current discussion, even if advocates can be found for such an idea, there are still many opponents, mainly from the common law countries. This is a fact which Clare McGlynn and other authors claim, that the opposition of the code is natural for authors who were taught in a common law culture and that

[121] Walter Pintens, 'Europeanisation of Family Law', paper presented to the conference entitled 'Perspectives on the Unification and Harmonisation of Family Law in Europe' organized by the Commission on European Family Law, University of Utrecht, December 2002 as in supra n. 2 p.176,185
[122] Supra n. 2, p. 184, 185
[123] Reinhard Zimmermann, 'Savigny's Legacy – Legal History, Comparative Law and the Emergence of European Legal Science' (1996) 112 *Law Quarterly Review* 576-605 at 581 as in supra n. 2 p.186
[124] Supra n. 2, p. 201
[125] Supra n. 2, p. 186
[126] Katharina Boele-Woelki, 'Comparative Research-Based Drafting of Principles of European Family Law' as in supra n. 2, p. 186
[127] For example supra n. 2 p. 193, 200

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the imposition of codes is more natural for those lawyers who come from a continental legal culture.[128] Thus, even if it is undeniable that the imposition of the code for the whole EU would erase a problem in the regulation of rights of children in cross-border divorce and separation disputes, the problem of differences in national laws of Member States, it is very questionable whether consensus could be reached on such a vital question as family law, regulating the most private questions of the status of persons.

Much more viable than unification, even if also opposed, seems the solution through harmonization of national family laws, which would eliminate those differences that might be obstacles for the good and quick solution of these complicated life situations. There are more possibilities of harmonization of national family laws. First, what was already mentioned, the EU made concrete steps in this direction by establishing the CEFL, with the aim to draft 'Principles of European Family Law' which can "directly serve as a model for both national and European legislators elaborating new family laws and in that way can facilitate voluntary evolutionary harmonization of family law within the EU."[129]

Another possibility is the harmonization through directives which are binding on Member States as regards the objective to be achieved but which leave the concrete arrangements to Member States. This seems to be a good solution which can secure the achievement of the goal through individual solutions of the Member States. It can be said that harmonization through directives is less coercive than uniform rules imposed on all the Member States and still capable of achieving the objective. However, Clare McGlynn opposes such a solution by contrasting the 'top-down' imposition of rules with a more 'bottom-up' approach.[130] She argues for the 'bottom-

[128] Supra n. 2, p.188, and for example Walter Van Greven, 'Codifying European Private Law? Yes, If…!' (2002) 27 *European Law Review*, 156-176 p. 164 as in supra n. 2, p. 188
[129] Supra n. 126, p. 182 as in supra n. 2, p 182, 183
[130] Supra n. 2, p. 179

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up' "methodology which seeks to bring about a gradual realization of common principles via common legal education and work of scholars, lawyers and judges in incorporating these principles into their work and eventually making them reality."[131] She advocates the solution through the creation of 'European legal science'[132] and the "reform of legal education by introducing European approaches…the end result being a European legal tradition which harmonizes from 'bottom-up'"[133]. However, as she also admits, harmonization from 'bottom-up' is slower than the 'top-down' approach.[134] Thus it might be said that it can be seen as a valuable approach, but in cases of serious problems caused by the diversity of the national laws, other, more prompt solutions could be employed.

Indeed, as was the case of private international family law, according to Nigel Lowe[135], the EU measures could be seen as positive because of the length of time of their adoption in comparison with the measures adopted at the level of the Hague Conference. The same can be said here, if the 'bottom-up' approach is to take too long, adopting 'top-down' measures might be welcomed, even if supplementing the 'bottom-up' approach.

3.2 Possible future European family law: methods of harmonization and proposals of its content

There are two possible ways of harmonization (and also unification) of family laws of the Member States of EU, which were already used in other fields of law: the 'common core' and the

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[131] Ibid.
[132] Ibid.
[133] Ibid.
[134] Supra n. 2, p. 180
[135] Supra n. 102 as in supra n. 2 p. 169

'better law' method.[136] The 'common core' method, even being the simplest method[137] because of choosing the most common rule or functional approach among the Member States[138], is criticized for its shortcomings. Clare McGlynn suggests that there are two shortcomings in the 'common core' method: first, that there does not have to be a 'common core' in the case of great disparity of the laws and second, that the existence of the 'common core' does not ensure that this is the best solution to a particular situation.[139] Thus a 'better law' approach seems a more suitable solution. However, here also a crucial question arises: "[o]n what basis is the chosen rule better?"[140] The CEFL, with its aim to draft 'Principles of European Family Law' as a tool of harmonization of European family law, adopted the 'common core' approach, but in certain situations it adopted alternative solutions and a 'better law' approach.[141]

Indeed, it is a crucial question, in the case that there will be a common family law, what will such family law encompass? There are still several fields in which the family laws of Member States differ substantially. An example is the field of divorce law, where the Nordic countries differ substantially from certain other countries. For example, if we compare Sweden to Ireland, in Swedish law, "[t]here is no question of guilt, nor proof of irretrievable breakdown, nor a requirement to finalise financial arrangements."[142] Moreover, divorce is permitted on application of each party and with delay of six months only in the case that one of the parties objects.[143] Compared to this, in Ireland "the spouses must have lived apart for four years, the

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[136] Masha Antokolskaia, 'The "Better Law" Approach and the Harmonization of Family Law', as in supra n. 2, p. 194
[137] Supra n. 2, p. 194
[138] Ibid.
[139] Ibid.
[140] Ibid.
[141] Supra n. 2, p. 189
[142] Supra n. 2, p.173
[143] Ibid.

court must be convinced that there is no opportunity for reconciliation and financial provisions must have been determined."[144]

Although the trend is towards liberalization of divorce, some authors advocate stricter rules being incorporated into the common European family law in order to protect the interests of children. Thus Aspasia Tsaoussis-Hatzis criticizes the reform of divorce laws taken in the late 1960s, which led to the introduction of no-fault grounds for dissolution of marriage.[145] Libertad Gonzales and Tarja K. Viitanen found in their research on 18 European countries that the liberalization of divorce laws led to a significant increase in the number of divorces.[146] They estimate that these reforms of divorce laws account for 20 percent of increase in the divorce rates.[147] Aspasia Tsaoussis-Hatzis proposes to "make [spousal and parent-to-child] commitment norms more concrete and thus legally enforceable"[148] by the way of "introduction of covenant marriage statutes in the context of a unified European marriage law". [149] She suggests that the possibility should exist for couples to choose between classical marriage and covenant marriage, which is a "voluntary contract between a man and a woman whereby they agree to 'opt-out' of the system of no-fault divorce."[150] Also already-married couples would have such a possibility.[151] Thus she proposes a system of dual marriage and dual divorce in which under one system spouses can get divorced on no fault grounds in a short time period and under the other they can not.[152] Under covenant marriage, as Aspasia Tsaoussis-Hatzis proposes, spouses would

[144] Ibid.
[145] Aspasia Tsaoussis-Hatzis, 'Strengthening The Ties That Bind: Proposals For a Child-Centered Divorce Law', (February 2003) Available at SSRN: http://ssrn.com/abstract=378360, p.1
[146] Libertad Gonzales and Tarja K. Viitanen, 'The Effect of Divorce Laws on Divorce Rates in Europe' (March 2006) IZA Dicussion Paper n. 2023, Available at SSRN: http://ssrn.com/abstract=892354, p.1
[147] Ibid.
[148] Supra n. 145, p. 2
[149] Ibid.
[150] Supra n. 145, p. 10
[151] Ibid.
[152] Ibid.

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be able to dissolve their marriage "only upon proof that the other spouse has committed adultery, or been imprisoned for a felony, or abandoned the home for a year and refuses to return, or committed sexual or physical abuse on a spouse or a child of one of the spouses."[153] Except for these four fault grounds, no-fault ground is advocated, by which "either spouse…may obtain a divorce by living 'separate and apart' and without reconciliation for a period of two years."[154] However, such a proposal seems questionable in terms of effectiveness since there is a question mark about how many couples would choose this option of a 'stricter' marriage.

It can be concluded that EU action in the field of family law is nowadays real and inevitable. Despite the wide discussion on its necessity and its justifications, the direction of the EU shows that further steps are going to be taken. If once they prove effective in improving the situation of the rights of children in cases of cross-border divorces or separation of parents, their adoption can be seen as a positive development. However, the question still remains open: what form the measures will have and how far will the EU go in the field of family law?

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[153] Supra n. 145, p. 10,11 on the basis of covenant marriage acts adopted in US
[154] Supra n. 145, p. 11

Conclusion

The existence of the specific situation of cross-border divorces and separations requires specific regulation. Despite the existence of system of regulation through the Hague Conference, the situation of cross-border divorces and separations in the EU introduced a regulation on regional basis. This thesis aimed at analyzing the protection of rights of children in the EU in cross-border family disputes.

The protection of rights of children in the above mentioned cases is complicated due to the regulation on three levels. The first level, the level of protection of fundamental rights of children is in the geographical region of EU secured both through the Council of Europe and through the European Union. However, in these two systems the protection of the rights of children differs. The category of rights relating to contact with parents is protected through the ECHR, concretely through the right to respect for family life and these rights are also established by the Charter of Fundamental Rights of the EU as autonomous rights of children. The role of the Charter is important and its importance will increase after the successful ratification of the Lisbon Treaty since after the ratification the Charter will become a source of primary law of the EU. Thus the right of children to maintain contact with both parents is established as a fundamental right.

Also the procedural right of children, their right to express freely their views, which must be taken into consideration in matters of concern of the child in accordance with their age and maturity, is established by Article 24(1) of the Charter as a fundamental right. This differs substantially from category of financial rights, namely the right to child maintenance. None of these two documents regulates this right as a fundamental right. Other mechanisms of protection,

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namely the private international law and national laws of the Member States provide the protection of this right.

The second level is the level of regulation of the private international family law either through the Hague Conference or through EU measures adopted in this field. The influence of the EU in family law developed gradually through the private international law. The necessity of the EU action in this field in case of the parallel existence of the system of protection under the Hague Conference is widely criticized as well as justifications for the EU action in this field. However, the thesis points to the positives of the EU measures if we compare them to the measures taken through the Hague Conference. It is also argued that in the case that action was taken by the EU in the field of family law, further development is irreversible and also expected in order to create a comprehensive system of protection of the rights of children in cases of cross-border divorces and separations.

The third level is the level of regulation of rights of children by national family laws. Wide discussion arose about whether to harmonize or unify the national family laws, to what extent and through what means. The thesis argues that the diversity of national family laws could be overcome in future to the extent necessary for the better solution of the situation of children in cross-border family disputes by harmonization of national family laws. It explains the possible methods of harmonization and argues that the harmonization through directives is a less coercive and more viable way than unification through a Code of family law. Further, alternative proposals of improvements in harmonized European family law are presented.

European Union action in the field of family law became a reality. The direction of the EU shows that further steps are going to be taken. However, the question of how they will look like is still without a clear answer.

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