The New Developments in Family Law – Green Paper „Less Bureaucracy for Citizens: Promoting Free Movement of Public Documents and Recognition of the Effect of Civil Status Records“, its Applicability in Marriage on the Example of Estonia

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Summary: The article gives the in-deep analyses of the European Commissions Green Paper – Less bureaucracy for citizens, particularly in connection with the harmonisation of certain aspects of Member States family law. It deals with the main means proposed in the Green Paper e.g. the abolition of administrative formalities for the authentication of public documents, cooperation between the competent national authorities, limiting translations of public documents, the European civil status certificate, mutual recognition of the effect of civil status records.

Keywords: free movement, marriage capacity, public administration, administrative capacity, subsidiarity, Europeanisation, co-operation between Member states, recognition of family documents, primary and secondary law of EU, conflict-of-law

1. Introduction

In 2010 European Commission (EC) prepared a Green Paper – Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records to work out the measures within the framework of Stockholm Programme[1] to guarantee full exercise of the right of freedom of movement by free movement of documents by eliminating legalisation formalities between Member states and recognising of the effects of

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[1] COM (2004) 401 final.

certain civil status records, so that legal status granted in one Member state can be recognised and have the same legal consequences in another.[3]

European Union (EU) and its Member states have long struggled with crossborder family matters because of their special character – on the one hand it is widely emphasized that family law belongs to the jurisdiction of every Member state and is characterised as a cultural-national law[3] and EU has no power to interfere into it, on the other hand EU policy more and more tries to involve with it and that exactly because of prevailing crossborder cases.

Meeusen explains it all: "Whereas family rights protection was at first constrained by the EC's economic objectives, the protection of family life became more important under the free movement project and the broader EU project. Family provisions have been resistant to the human rights discourse for some time, in spite of the EU's longstanding commitment to human rights in other areas of EU law and the human rights protection in the Council of Europe and the Hague Conference. Three important constitutional developments have led to the endorsement of family rights at EU level. First, the extensive interpretation of restrictions to economic free movement has resulted in a European recognition of family rights. The same approach has been endorsed with regard to economically inactive persons through the concept of EU citizenship[4]. Second, the Charter of Fundamental Rights, though dependent on the fate of the Treaty establishing a Constitution, is already serving as a bluebrint for human rights protection. Finally, a commitment to human rights has accompanied the communitarisation of family law activities in the Treaty of Amsterdam."[5]

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[2] European Commission. Green Paper. COM(2010) 747 final, 14. December 2010. Modification of this article is published in 2013 in a Korea University Law Review, 13. The Korea University Legal Research Institute, 25–42: "The New Developments in EU Family law – Its Applicability to Estonian Law."

[3] Meeusen J., Pertegás M., Straetmans G., Swennen F. (eds.), General Report. International Family Law for the European Union. Intersentia. 2007. pp. 4.

[4] Dani (2012) sees European citizenship as a vehicle for the amplifiaction of very social practices it was expected to reform. He writes „Through European citizenship, indeed, European individuals have not learned to organise themselves and voice in supranational politics their apirations for social justice". (Dani M. Rehabilitating Social Conflicts in European Public Law. European Public Law Journal, Vol. 18, No. 5, Sept 2012, pp. 621–643, pp. 634. As Habermas described „as a result, the European economic citizen have become EU citizens" (Habermas J. Bringing the Integration of citizens into the Line with the Integration of States. Europen Law Journal, Vol. 18, No 4, July 2012, pp. 485–488, pp. 485.

[5] Meeusen J., Pertegás M., Straetmans G., Swennen F. (eds.), General Report. International Family Law for the European Union. Intersentia.2007. pp. 5. According to the Art. 13. Allowing so called "two speed Europe". Member state that desired to further deepen European integration should not be slowed down by Member state who were not yet ready. (Kuipers J.-J. the Law Applicable to Divorce as Test Ground for Enhanced Cooperation. European Law Journal. Vol. 18. No 2, March 2012, pp. 201–229, pp. 202).

According to Stalford (2007) "the profileration of EU legislation in the family law arena has been a particularly controversial and suprising feature of the EU post-Amsterdam era[6]. The cultivation of the Brussels II Convention from an intergovernmental code or practice into binding, uniform legislation has attracted particularly heated debate among academics and practitioners alike. These debates have revolved around the ideological and practical implications of procedural harmonisation of matrimonial and parental responsibility laws: ideological in respect of the potential threat harmonisation poses to the cultural sanctity of domestic family law regimes or the absence of any specific legal bases from which the EU institutions can derive competence to legislate on family law issues; and practical in respect of the considerable demands these developments have imposed on the family law practitioner and private litigants who continue to grapple with the new procedural requirements set out in the Brussels II legislation."[7]

In 2001 the Commission on European Family Law (CEFL), as a purely scientific initiative, which is totally independent of any organisation of institutions[8], was established in order to elaborate upon non-binding Principles of European Family Law[9], that could serve as a model for national and supranational legislators, but as the family laws of the different European countries are embedded in their unique national culture and history[10], they cannot be harmonised deliberatedly.[11] In 2005 the Green Paper of applicable law and jurisdiction in divorce matters was presented by the Commission, who "identified the lack of legal certainty and predictability for the spouses. The insufficient party autonomy, the risk of results that do not correspond to the legitimate expectations of the citizens and the risk of forum shopping as shortcomings of the present situation."[12]

New policy was needed to solve the problems caused by the free movement of persons. According to Ninatti (2010) by Treaty of Lisbon a new article (197) was

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6 Hence according to Borras (2007) there were difficulties with family law issues already at a time when there were only six Member states with more closely related legal systems than at present. (Borrás, A., Institutional Framework: Adequate Instruments and External Dimension. Meeusen J., Pertegás M., Straetmans G., Swennen F. (eds.), International Family Law for the European Union. Intersentia.2007. pp. 147).

7 Stalford, H. EU Family law: A Human Rights Perspective. Meeusen J., Pertegás M., Straetmans G., Swennen F. (eds.), International Family Law for the European Union. Intersentia.2007. pp. 101.

8 Boele-Woelki K. The principles of European family law: its aims and prospects. Utrecht Law Review. Vol. 1, Issue 2 (Dec) 2005. http://www.utrechtlawreview.org/ pp. 160–168, pp. 160.

9 Today there are from 15 members 12 members as EU Member states.

10 EU itself is not a national state, but relies on the geographical, historical and cultural features of Member state (Laffranque J. Euroopa Liidu õigussüsteem ja Eesti õiguse koht selles. 2006. Kirjastus Juura. Tallinn. pp. 148).

11 Masha Antokolskaia, Objectives and Values of Substantive Family Law, Meeusen Johan, Pertegás Marta, Straetmans Gert, Swennen Frederik (eds.), International Family Law for the European Union. Intersentia.2007., pp. 50.

12 Kuipers J.-J. The Law Applicable to Divorce as Test Ground for Enhanced Cooperation. European Law Journal. Vol. 18. No 2, March 2012, pp. 201–229, pp. 207.

included to the Treaty providing that effective implementation of Union law by the Member states, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest. So Treaty of Lisbon "remarking this slow but relentless change, asking for a new stage in the process of creating ever closer union among people of Europe, thus suggesting an ambitious project of legal and political unification." Family law represents one of the inalienable competence of the national level of government.[13]

Green Paper consists of new development in EU administrative and legal space in harmonizing or converging family laws in EU Member states as well as public administration and co-operation between themselves. It is a new start for the purpose of CEFL not yet reached to. Green Paper is a document that will play an important role in family law developments for many years in EU. According to Green Paper since 2004 EC has emphasized the importance to facilitate the recognition of different types of documents and mutual recognition of civil status. To this end two studies were published by the Commission – in 2007 and 2008 on the problems encountered by citizens as a result of the requirements to legalise the documents between the Member states and on the problems relating to civil records. Within the framework of the Stockholm Programme the Council has asked the Commission to pursue the work on the follow-up to be given to these studies in order to ensure full exercise of the right to freedom of movement. In this connection, two legislative proposals are envisaged in the Stockholm Programme action plan, scheduled for 2013. The European Parliament has already stated on several occasions that it is in favour of the recognition of public documents and civil status records, the last time being in November 2010.[14]

Measures proposed in Green Paper are tensely related to the applicability of EU primary law, of principle of subsidiarity[15], co-operation between Member states as well as the public administration of Member states. So called cross-border marriage capacity is one of the questions directly related to the means proposed in Green Paper, EU primary law and independence of Member states substantial family law.

What kind of new developments of family law in EU can be concluded from Green Paper? How does Green Paper develop Family Law of legal space

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[13] Ninatti, Stefania, Adjusting Differences and Accomodating competences: Family Matters in the European Union. Jean Monnet Working Paper 06/10, pp. 3.

[14] European Commission. Green Paper Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records Brussels, 14.12.2010 COM(2010) 747 final, pp. 3.

[15] About the principle of subsidiarity see Kerikmäe T. Euroopa Liit ja õigus. 2000. Õiguskirjastus. pp. 52.

of EU and Estonia? To answer the question the primary and secondary law of EU regulating public administration as well as family law is analysed in this article by using the legal-political, sociological and historical method. Special attention has been turned to the mutual impact of principles of subsidiarity and harmonisation of public andministration and family law[16]. As an example Estonian legal space related to these questions is analysed.

In Estonian context marriage impediment certificate[17] has caused and causes probably the most problems in the process of marriage for public administration, who on the one hand has to follow the primary law of EU and on the other hand according to the subsidiarity principle domestic law. This causes many legal gaps, conflicts between EU primary law and domestic law as well as in a horisontal level between the domestic laws of Member states.

First part of the article explains the general principles of EU related to public administration – showing how the EU policy has developed the convergence of the administrative spaces of Member states despite subsidiary principle. It seems natural to use co-operation also by facilitating the free movement of documents as an important tool in Green Paper related also to other means suggested. Second chapter introduces the means proposed in Green Paper and analyses their applicability related to marriage.

2. Administrative capacity, Europeanisation and harmonisation of public administrations of Member states

From the late 1970s through 2000 there have been fundamental changes in the theory and practice of public administration. Michalopoulous explains it all: "The major transformation that the reform agenda has brought is a consideration of public administration from citizen point of view. The New Public Management gave the customer a special position in the assessment and evaluation of the newly emerging systems of public services. In the EU almost all Member states were doing considerable work in the policy area of improving service quality."[18]

Usually administrative capacity of single Member state has been assessed by the ability to follow the *aqui*, EU law and objectives as one of the domestic

[16] In this article the family relations related to third states are not discussed.

[17] See the essence of marriage capacity Joamets K. Marriage Capacity, social Values and Law-Making Process. International and Comparative Law Review. 2012, Vol. 12, No. 1 pp. 97–115.

[18] Michalopoulos N., Trends of Administrative Reform in Europe: Towards Administrative Convergence? Paper at First Regional International Conference of the International Institute of Administrative Sciences, University of Bologna, 19–22 June 2000. www.imp.unisg.ch, pp. 41–42.

facilitating factors.[19] As refered by Bauer, Knill and Pitchel (2007) implementation capacity of EU rules is largely dependent on the bureaucratic effectiveness of domestic administration (Hille, Knill, 2006).[20]

Kellermann states: "The Member states must be able to ensure the effective participation of its state in the EU Decision-making process, be able to ensure timely implementation of Regulations, Directives and Decisions etc."[21]

Already in 2000 Commission identified the reform of European Governance as one of its four strategic objectives in early 2000. European integration has achieved results which would not have been possible by individual Member states acting their own. These results have been achieved by democratic means. According to the White Paper – European Governance „The Commission alone cannot improve European governance, change requires concerted action by all the European Institutions, present and future Member states, regional and local authorities, and civil society."[22] In 2001 five principles underpin „good governance" and the changes proposed in this White Paper: openness, participation, accountability, effectiveness and coherence. The application of these five principles reinforces those of proportionality and subsidiarity.[23]

Already in 2004 it was emphasized that Union action cannot be effective, if it is not backed up in the Member states, by a declared political determination to ensure that European decisions have effect in reality. It is up to the experts in the Member states to use the opportunities for co-operation that European integration offers.[24]

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[19] See Sedelmeier U. Europeanisation in new member and candidate states. Living Reviews in European Governance, Vol. 6, 2011, No 1, pp. 13 and 22, refered to Hille, P. & Knill, C (2006) „It's the Bureacracy, Stupid": The Implementation of the Acquis Communautaire in EU Candidate Countries 1999–2003, European Union Politics, 7(4), pp. 531–552.

[20] Bauer M. W, Knill C., Pitschel D., Differential Europeanization in Eastern Europe: the impact of Diverse EU Regulatory Governance Patterns. Journal of European Integration 29 (2007), 4, pp. 405–423, pp. 410, refered to Hille, P. & Knill, C (2006) „It's the Bureaucracy, Stupid": The Implementation of the Acquis Communautaire in EU Candidate Countries 1999–2003, European Union Politics, 7(4), pp. 531–552.

[21] Kellermann A.E. The Impact of EU Accession on the Development of Administrative capacities in the States of Central and Eastern Europe. Similar Developments in Russia? Romanian Journal of European Affairs. Vol. 6, No. 3, 2006, pp. 46–51, pp. 47.

[22] Commission of the European Communities, European Governance, A White Paper, Brussels, 25.7.2001, COM(2001)428 final, pp. 3, 7, 9.

[23] European Commission (2001) European Governance: A White Paper, COM(2002) 428 final, 25 July.

[24] European integration involves the management of chance on a grand scale. The effectiveness of the European policy process as a whole depends on designing and developing networks of organizations capable of working together in the formulation and implementation of European policies. See Metcalfe L. building Capacities for Integration: The Future Role of the Commission. Eipascope 1996/2. www.eipa.eu/files/repository/eipascope/Scope/Scop96_2_1.pdf.

The development of the European judicial area has neither the object nor the effect of challenging the legal and judicial traditions of the Member states. This approach, based on the proportionality and subsidiarity principles, is stated by the draft Constitutional Treaty. The principle of mutual recognition has been placed at the heart of European Integration in this field. However, mutual recognition requires a common bases of shared principles and minimum standards, in particular in order to strenghten mutual confidence. One of the first priorities will have to be to continue an increase work provided for by mutual recognition programme. Efforts should concentrate on fields where there are as yet no community rules on mutual recognition. In addition, new mutual recognition instruments not appearing in the initial programme might be necessary. For example facilitating the recognition of various types of documents will become increasingly important. In addition, it might prove useful to facilitate mutual recognition in new fields such as the civil status of individuals. Family or civil relations between individuals (partnership) or paternity.[25]

According to Ninatti (2010) the Lisbon Treaty suggests an ambitious project of legal and political unification. It asserts also very distictly that „the process of creating an ever closer union" (art. 1 TEU) will proceed hand by hand together with pluralism; nonetheless it fails to say how this process will actually respect diversity. As refered by Ninatti (2010) „Constituting an extraordinary laboratory, from this point of view Europe „illustrates, even sometimes caricatures, the disorder caused by the interactions within the legal order and changes in organisational levels and time" (Delmas, 2009).[26]

Cărăuşan (2004) raises a question if there is a European administration, are we witnessing a new order in administration, or only mechanism aiming at ensuring co-operation between national administrations? He explains that the direct impact of the EU on administrative systems of Member states is guite limited. In fact, EU does not have any direct competence in this field. Administrative organisation of Member states is a matter that falls under the competence of Member state. Anyhow, there are numerous ways of indirect influence upon Member states and those states that desire the integration.[27]

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[25] In the Communication from the Commission to the council and the European Parliament – Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations SEC(2004)680 et SEC(2004)693.

[26] Delmas M. M. Ordering Pluralism. A conceptual Framework for Understanding the Transnational Legal World, Hart Publishing, Oxford, 2009, pp. 151.

[27] Cărăuşan M., Administrative Reform or the Strengthen of the Administrative Capacity to Govern in the EU Context, Paper presented at the Annual Conference NISPAcee, Vilnius, Lithuania, May 13–15, 2004. http://ssrn.com/abstract=1987021. 20.05.2012. pp. 1.

Michalopoulos (2000) states that "an individual administrative systems, at least in the dimension of the relationship between citizens and public services, are looking to resemble one another. But this cross-system similarity does not mean that we are witnessing a harmonisation in European administrative systems".[28] Schout and Jordan suggest (2008) that EU needs to take administrative capacity building much more seriously in order to govern in a less hierarchical manner.[29]

Concept of Europeanisation[30] has been introduced to explain the changes in domestic policy related to integration to EU[31]. Trondal (2007) refers that the literature mainly concludes that we are not witnessing a profound transformation of administrative structures[32] and styles, legal rules, cultures, and collective identities (Olsen, 2007).[33] Most studies suggest that adaption towards Europe is considerably mediated through and conditioned by existing domestic institutions, practices, cultures and traditions, thus contributing to a differentiated Europeanisation of domestic public administration (e.g. Kassim et al. 2000; Spanou 1998).[34] Similar conclusions are drawn in the study of the new member and candidate states (Sedelmeier 2006)[35] According to Bauer, Knill and Pitschel (2007) national administration acts "as key players in the implementation process of compliance, competition and communication, tend to react towards these distinct stimuli according to certain logics, which, in turn, impact

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[28] Michalopoulos N., Trends of Administrative Reform in Europe: Towards Administrative Convergence? Paper at First Regional International Conference of the International Institute of Administrative Sciences, University of Bologna, 19–22 June 2000. www.imp.unisg.ch, pp. 45.

[29] Schout A., Jordan A., The European Union's governance ambitions and its administrative capacities, Journal of European Public Policy 15:7, October, 2008: 957–974, pp. 957.

[30] See also about horisontal Europeanisation (Ninatti, S., Adjusting Differences and Accomodating competences: Family Matters in the European Union. Jean Monnet Working Paper 06/10, pp. 6.

[31] See also Trondal J., The Public Administration turn in integration Research, Center for European Studies, University of Oslo, Working Paper no 07 May, 2007, www.arena.uio.no, pp. 11.

[32] See about organisations in the process of Europeanisation (Jacobsson B. Europeanisation and organisation theory. The European Union and the Baltic States. Changing forms of governance. 2010. Routledge. London. pp. 24.

[33] Olsen J.P. (2007) Europe in Search of Political Order. An Institutional perspective on unity/diversity, citizens/their helpers, democratic design/historical drift, and the co-existence of orders, Oxford: Oxford University Press.

[34] Kassim H., Peters B.G and Wright V. (eds) (2000) The National Co-ordination of EU Policy. The Domestic Level, Oxford:Oxford University Press (Spanou, C. (1998) European integration in administrative terms: a framework for analysis and the Greek case, Journal of European Public Policy 5(3): 467–484).

[35] Sedelmeier U. (2006), „Europeanisation in new member and candidate states", Living Rev. Euro.Gov., Vol. 1, (2006), No. 3: cited [24.11], www.livingreviews.org/lreg-2006-3. (Trondal J., The Public Administration turn in Integration Research, Center for European Studies, University of Oslo, Working Paper no 07 May, 2007, www.arena.uio.no, pp. 12).

on the occurence and the scope of domestic institutional change".[36] As the same European policy might cause fundamental reforms in one country while having no impact at all in others[37], it is understandable, that it is difficult to find a common language. It is normal that every Member state is not interested to be the one who should change its system or practice. Lisbon amendments have not created any new horisontal administrative principles. The classic administrative principle of transparency still remains with some notable repositoring.[38]

However, todays administrative space of every single Member state can be described by convergence – even in the questions of administrative process more and more approaching can be felt. According to Michalopoulos (2000) "convergence is characterised as policy transfer, as the process, in which ideas, knowledge and institutions developed in one time or place are used in the development of policies, programs and institutions in another time or place… At root, the meaning of convergence is that countries at a similar stage of economic growth appear to be convergent".[39] Ninatti (2010) claims that "diversity is gently fading away in the land of Europe. For good or bad, the European legal scenario is rapidly changing and what was once firmly rooted in one system, and not acceptable to another, has to be seriously reconsidered nowadays".[40]

Popescu (2011) explains that "in the law of persons and family law, the Community legislation had at first only an indirect and subsidiary role, its influence being perceived as an effect of the play of fundamental freedoms asserted by the Treaties; as the unification of the legislations of Member states in areas that reflect national particularities is neither convenient nor particularly necessary, the Community law currently steps in by ensuring their coordination, through certain uniform choice of law rules. Community law is oriented towards the integration of markets and the construction of an area without interior borders".[41]

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[36] Knill C. & Lenschow, A. (2005), Coercion, Competition and Communication: Different Approaches of European Governance and their Impact on National Institutions, Journal of Common Market Studies, 43 (3), pp. 581–604, pp. 408.

[37] Knill C., European Integration, Administration and Implementation. Patterns of Institutional Change and Persistence. Cambridge University Press, 2001. www.catdir.loc.gov. 8.08.2012.

[38] See more detailed Smith M., Developing Administrative Principles in the EU: A Foundational Model of Legitimacy? European Law Journal, Vol. 18, No. 2, March 2012, pp. 269–288, pp. 281.

[39] Michalopoulos N., Trends of Administrative Reform in Europe: Towards Administrative Convergence? Paper at First Regional International Conference of the International Institute of Administrative Sciences, University of Bologna, 19–22 June 2000. www.imp.unisg.ch, pp. 44.

[40] Ninatti, S, Adjusting Differences and Accomodating Competences: Family matters in the European Union. Jean Monnet Working Paper 06/10. pp. 3.

[41] Popescu D. A., The European Space of Free Movement of Persons, Goods, Capitals and Services – a Space of Free Movement of Authentic Instruments as well? Transylvanian Review of

As the Green Paper itself is too superficial and raises only the questions on certain area in a wide scope, the opinions of Member states are also too surface. They consist the statements, but no profound reasoning or arguments. As stated earlier applying family law in EU is a complicated figure, because here the principle of subsidiary based on the cultural and traditional aspects, the general principles of EU, administrative organisation and rationality encounter. Though in general Member states support the idea that something should be done related to the crossborder family cases, it is very difficult to bring out statements and solutions similar to all Member states.

Empirical research in this chapter shows that even if it is as if obligatory to emphasize the principle of subsidiarity, which can be described as controversial attempts to protect local interests[42], convergence of administrative spaces of Member states can be reached without breaching the principle of subsidiarity. Trend to convergence of Member states plays an important role in applying the means of Green Paper as the main promoter of them in public administration.

3. Proposed Instruments in Green Paper

According to the Green Paper the mobility of European citizens is a practical reality, evidenced in particular by the fact that some 12 million people study, work or live in a Member state of which they are not nationals (further proof in this fact is the number of marriages and divorces recorded in the EU: by way of example, out of a total of roughly 122 million marriages, some 16 million (13 %) have a crossborder dimension). The Eurobarometer results on civil justice dating from October 2010 show that three-quarters of EU citizens (73 %) consider that measures should be taken to facilitate the movement of public documents between Member states. European citizens who move to a Member state other than the one origin or returning to their Member state of origin are faced with all kinds of buraucracy involving requests that public documents be presented.[43] This mobility is facilitated by the rights attached to citizenship of the EU: in particular the right to freedom of movement and, more generally, the right to be treated like nationals in the Member state of residence. These

Administrative Sciences, no 32 E/2011, pp. 207–234, pp. 213. www.rtsa.ro/en/files/TRAS-32E-2011-14Popescu-pfd

[42] Kerikmäe T. Euroopa Liit ja õigus. 2000. Õiguskirjastus, pp. 54.

[43] European Commission. Green Paper Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records. Brussels, 14.12.2010 COM(2010) 747 final, pp. 3.

rights are enshrined in primary EU law and implemented by means of secondary legislation.

Civil status records used by a Member state's authorities to record the main events governing peoples status do not necessarily have an effect in another Member state. Each Member state applies its own rules in this respect and they vary from one state to another.

The traditional way of authenticating public documents designed for use abroad – legalisation is replaced by the apostillé, but nowadays also this seems too much in the context of free movement. Article 21 of Brussels II quarantees the free movement of judgements.[44] Actually there are a lot of conventions between Member states simplifing the recognition of the family documents, but evidently this is not enough. All kinds of formalities make freedom of movement less attractive for European citizens and can even prevent them from exercising their rights fully[45].

The following means are proposed in Green Paper:

1. The abolition of administrative formalities for the authentification of public documents.
2. Cooperation between the competent national authorities.[46]
3. Limiting translations of public documents.
4. The European civil status certificate.[47]
5. Mutual recognition of the effect of civil status records[48].

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[44] See Kuipers J.-J. the Law Applicable to Divorce as Test Ground for Enhanced Cooperation. European Law Journal. Vol. 18. No 2, March 2012, pp. 201–229, pp. 04. However, this covers only positive decisions. A judgement not granting divorce, is not liable for recognition.

[45] European Commission. Green Paper Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records. Brussels, 14.12.2010 COM(2010) 747 final, pp. 3.

[46] This means that in case there arises a question related to the document presented, official contacts with the official in another state and exchanges the neccessary information and find appropriate solution. Co-operation means also exchange of information between different states about the new record made in certain state. Such application could be implemented by using suitable electronic means.

[47] At the moment, the information given on civil status certificates differ considerably from one Member state to another. The variety of forms causes problems in understanding and identifying documents, for both authorities and citizens, in particular when the language is not known.

[48] Civil status, for which each Member state has developed its own concept, based on its history, culture and legal system is followed by the rule, that EU has no competence to intervene in the substantive family law of Member state. The Treaty on the Functioning of the European Union does not provide any legal base for applying such a solution. Against this background, several practical problems arising in the daily lives of citizens in cross-border situations could be solved by facilitating recognition of the effects of civil status records legally established in other EU Member states.

As noticable, these means are related to each other. First four are more related and can be handled together. The last (fifth) is more complicated to apply as it intervenes the field of subsidiarity. In this article the first four are treated together and the fifth separatedly.

4. The abolition of administrative formalities for the authentification of public documents and marriage capacity

In EU the rules related to administrative formalities are much easier comparing those rules to the rules for the third countries, but still it is described as a lack of clarity and regulations, which does not provide the legal certainty European citizens need to cope with matters that have a direct impact on their everyday lives. Considerable difference of national laws, a number of international multilateral and bilateral conventions which have been ratified by a varied and limited number of countries and which are unsuitable when it comes to provide the solutions needed to ensure the free movement of Europeans and fragmented EU law, which deals only with certain limited aspects of the matters raised, are the main problems presented in Green Paper. EU treaties do not provide an authentic instruments for the free movement of public documents, the principle to „promote" is a derivative of the fundamental freedoms of the internal market and citizenship of the union[49].

In Estonian practice suggesting a citizen, which kind of vital statistic document to take for another state usually begins with the question if citizen knows what are the needs of this certain official the document is presented. The practice shows that even in one Member state the demands are different depending on the dictrict of certain state. Too often citizens need additional documents or official explanations about Estonian substantial family law and extracts Estonia issues on family events. Instability in this area can be exemplified also by the cases, where vital statistic official of another state has issued a certificate to Estonian citizen under the convention, Estonia is not a member. Every single crossborder case seems to be different and can be solved as an individual case finding the applicable rule through legal gaps and trying to outmatch conflicts between the laws of Member states, ensuring legality of the decision simultaneously.

[49] European Commission. Green Paper Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records. Brussels, 14.12.2010 COM(2010) 747 final.

Estonia has consolidated many European conventions related to the facilitation of family document movements – Estonia is a member of 1961 Hague Convention[50], 1968 Council of Europe Convention[51], 1976 Convention on the issue of multilingual extracts from civil status records[52] and is preparing the consolidation of 1987 Brussels convention abolishing the legalisation of public documents between Member states. In 2012 bilateral agreement between Estonia and Finland[53] has been enforced which establishes automatic recognition of certain family event documents. As there are many international legal acts regulating the same issue and they are applicable to the same case, in every single case there should be decided, which document issued by which convention or legal act is most suitable for a citizen in certain relation. Fee of issuing a document, translation costs as well as the state document should be presented to, is considered. For example, some Member states do not accept extracts from the Population Register in English, but demand a copy of original act in initial language with translation though in an extract are the same data and such extract has legal effect. For many Member states it is still difficult to understand that an extract of Population Register can have the same legal effect as certificate or act itsself, even more – that in some state the act is electronic, which means that the only „paper" certifing the deed or fact is an extract printed out after the electronic deed.

According to Green Paper it is time to consider abolishing the apostillé and legalisation for all public documents in order to ensure that they can circulate freely throughout the EU.

In the case of abolishing the apostillé, it should be figured out, how public authorities can ascertain the authenticity and validity of a document of foreign origin. After that comes the question about the effect of the document. In general most Member states and committees in their opinions for Green Paper support the idea of abolishing the apostille, but add that in such case there should be clear system how in the event of serious doubt about the authenticity of a document or if a document does not exist in a Member state, to control it. And here the difficulties emerge. European Economic and Social Committee suggest that in the event of serious doubt about the authenticity of a document or if document does not exist in a Member state, the competent national authorities could

[50] HCCH Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents.

[51] 1968 European Convention on the Abolition of Legalisation of Documents executed by Diplomatic Agents or Consular Officers (Legal Acts of Estonia II, 24.03.2011). www.riigiteataja.ee.

[52] CIEC Convention on the issue of Multilingual extracts from civil status records (signed in Vienna on 8 September 1976. Legal Acts of Estonia II, 02.05.2011, 1.

[53] Legal Acts of Estonia II, 22.06.2012, 3. www.riigiteataja.ee.

exchange the necessary information and find an appropriate solution. Also the Committee of the Regions emphasizes that administrative co-operation between the vital statistic officials in local level plays most important role.[54]

EU institutions and Member states must work together to set out an overall policy strategy. They should refocus the Union' policies and adopt the way they work. Change requires concerted action by all the European Institutions, present and future Member states, regional and local authorities, and civil society.[55] The EU's pursuit of these objectives has given its governance projects an even stronger horisontal (or policy co-ordination) dimension.[56] Co-ordination is not only about informal relations or bureaucratic politics, but also about creating the right administrative capacities to find common values and objectives.[57]

According to Stockholm Programme Training of and co-operation between public professionals should also be improved, and resources should be mobilised to eliminate barriers to the recognition of legal decisions in other Member states. ***Mutual trust*** between authorities and services in the different Member states and decision-makers is the basis for efficient co-operation in this area. Ensuring trust and finding new ways to increase reliance on, and mutual understanding between, the different legal systems in the Member states will thus be one of the main challenges for the future.[58]

Co-operation is also mentioned in the opinions of Member states as the main instrument to facilitate free movement of persons through less bureaucracy related to family event documents and certainly this is a mean to control the authenticy of document. But talking about co-operation, there should not be forgotten that there are about 125000 registrars in the EU on the civil status systems and about 80000 local vital statistics offices[59]. As Ninatti (2010) characterises „Europe has extended its frontiers to cover the significant number of 27 states (and almost 500 millions inhabitants), and has incorporated political,

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[54] Regioonide Komitee 9. koosolek. 6. juuni 2011. Kodakondsuse, valitsemisasjade, institutsiooniliste küsimuste ja välisasjade komisjoni töödokument "vähem bürokraatiat kodanike jaoks: avalike dokumentide vaba ringluse edendamine ja perekonnaseisuaktide õigusjõu tunnustamine. CIVEX-V-021.

[55] European Commission (2001) European Governance: A White Paper, COM(2002) 428 final, 25 July.

[56] Schout A, Jordan A, The European Unions governance ambitions and its administrative capacities. Journal of European Public policy 15:7 October 2008:957–974, pp. 961.

[57] Ibid, pp. 965.

[58] Stockholm Programme „An Open and Secure Europe Serving and Protecting citizens". Official Journal of the European Union (2010/C 115/01) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:en:PDF, pp. 4, 5.

[59] Opinion of the Committee of the Regions on „Less bureaucracy for citizens: Promoting free movement of public documents and recognition of the effects of civil status records.2012/C 54/05. http://eur-lex.europa.eu 06.08.2012.

economic and juridical systems that cannot be entirely ascribed to the history and development of European integration."[60] Kuipers (2011) states, that enhanced co-operation has never been applied in practice. Enhanced co-operation can only take place in areas where the Union does not have exclusive competence.[61] In Green Paper co-operation plays the main role in facilitating the free movement of civil status documents.

To think about marriage in the context of free movement of family documents there are many documents moving from one Member state to another. According to Estonian law a person who lives abroad and wants to marry in Estonia, has to present his/her birth certificate, document proving the end of previous marriage and marriage impediment certificate. There are often problems with those documents – most often with the marriage impediment certificate. Usual problem is that a state of residence does not issue such document, because the resident is not the citizen of the state he/she lives.

Similarly to any other document co-operation between Member state can solve difficulties arising related to the authenticity of a document in case there is no *apostillé* on it. Co-operation as a mean has also described as „informal" international regulation of law making.[62]

In Estonian administrative organisation family matters are divided between four ministries [Ministry of Justice, Ministry of Interior (Minister of Regional Affairs), Ministry of Social Affairs][63] and Ministry of Foreign Affairs. All these ministries make policy related to family matters but on different scope. In local level vital statistics procedure is carried out by the county governments and rural municipality or city governments. Marriages are contracted only by the county governments[64]. Notaries have limited authority to deal with family events as vital statistics official – since 2010 they have a right to contract and divorse the marriages. Estonian representations abroad issue extracts of family

[60] Ninatti S., Adjusting Differences and Accomodating competences: Family Matters in the European Union. Jean Monnet Working Paper 06/10, pp. 11.

[61] Kuipers J.-J., the Law Applicable to Divorce as Test Ground for Enhanced Cooperation. European Law Journal. Vol. 18. No 2, March 2012, pp. 201–229, pp. 211. Author of this article still sees increasing co-operation of Member states also in the matters of family events. This co-operation unfortunatedly does not solve the question of conflict-of -law.

[62] Chowdhury N., Wessel R.A., Conceptualising Multilevel Regulations in the EU: A Legal Translation of Multilevel Governance? European Law Journal, Vol. 18, No. 3, May 2012, pp. 335–357, pp. 338.

[63] Social workers apply family law as well, but they are not vital statistic officials.

[64] There are 15 county governments in Estonia. Alderman is appointed by the Minister of Regional Affairs and represents state interests in the county. There is no special department of vital statistics in the county government, vital statistics officials work usually under the county secretary.

events and certificate of marriage capacity. Clergymen contract the marriages as vital statistics officials since 2001.[65]

Such division of powers of ministries causes different interpretation of legal norms and often a question, whose authority it is to solve a certain question, to work out the policy and be responsible in its application. Co-operation between the ministries is poor and leading to different practice and influences the relations between the administrative bodies. As in a horisontal level there are problems between the ministries, also in relations with citizens often a question arises if a person should turn directly to the Estonian consulate, to some ministry or to the foreign consulate or vital statistics office abroad. This means that there is a lot of information all around about the different administrative bodies, when the similar case occures, it can be solved differently from the previous one. Also a question, how much one ministry can intervene into the sphere of other ministry can be raised.

In Estonian example there could be problems related to administrative capacity solving crossborder cases. Poor legal knowledge among vital statistics officials does not help in interpreting or explaining legally certain rule – its would be questionable if co-operation would act in local level between the vital statics officials of other Member states because of the poor foreign language skills[66]. Probably the only solution in Estonian example would be the cross-border co-operation on the level of Ministry. However, raising administrative capacity needs new policy and additional expenditures.

So, even if co-operation as such is a mean, that does not need guidelines from the EU institutions – and can work without any agreements or rules – needs only tolerance and wish to cooperate and trust, needs still certain changes in public administration in every Member state to ensure suitable administrative capacity.

Another solution, which does not need any guidelines and definitely promotes free movement of documents, is certain website giving useful information

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[65] Today 125 clergymen have such right. Clergymen have special status related to this certain authority. On the one hand they are in the jurisdiction of church, and related to the certain religion, but have to accept and apply the legal regulation of marriage, they get their right from the Ministry of Interior, they are under the supervision of county governments, who also advice them and control their deeds.

[66] Also Committee of Regions accepts in its opinion (Opinion of the Committee of the Regions on „Less bureaucracy for citizens: Promoting free movement of public documents and recognition of the effects of civil status records“ 2012/C 54/05), that current incomplete and ad hoc contacts between registrars of Member states may arise from legal, procedural, logistical and above all language difficulties. In Estonian context some speak German, some English, some French and some Russian as a foreign language. Could there be a consensus on this that which language should it be, all registrars in EU must speak?

about family law, certificates and other useful info of Member state to explain the law and administrative process of certain family deed. This information should be at least in three languages and contemporary[67]. Link to the homepages of domestic registrars office or official webpage of legal acts is not enough, because these are usually in the language of this state. Even when Member states have a central office of registrars it is not realistic to have there officials who speak all the languages of Member states.

Limiting translations as a mean offered in Green Paper is tensely related to the mean of uniform forms of family events. The European civil status certificate is proposed to take in use. This mean is highly supported by the opinions of Member states. This is also a mean, which does not interefere into the domestic substantial law. Form, which consists the fields of data common to all Member states and fields of data which are used only in certain Member state, is not difficult to establish. Even if such form consists too many data, it is easier to read and understand the form if there are certain uniform fields. Such form should be compulsory for all Member states and should consist the field of remarks, where every Member state can add some data or explain the data special for this state or event or person. According to Green Paper, that as there are different data in the certificates issued by Member states, civil registrars can be faced with details that are unknown in their legal systems and have to request additional information and citizens face additional problems, such as loss of time. In case civil registrar can get information from the website about the law and certificates or has possibility to contact the civil registrar issuing the document, there is no need to run a citizen to bring additional information.

Also uniform compulsory form can be treated separatedly from the recognition of data in it – uniform form does not obligate to recognise certain facts in it.

In most European states where prevails monogamy and which have from history the impacts of canonical law, marriage impediment certificate is obligatory to present in the process of marriage to ensure marriage capacity and hence the validity of the new marriage. Marriage impediment certificate is demanded in case a person wants to marry in a Member state, which is his/her state of citizenship or residence[68]. The problems arise when a person needs according to the law of Member state he/she wants to marry the certificate from the state of residence, but this state issues according to its law such certificate only to its

[67] Unfortunatedly also CEFL has not translated all materials in its webpage in English and German, only some of them.

[68] Some Member states wants the marriage impediment certificate from the state of citizenship, while the others from the state of residence.

citizen. Such problems arise especially related to the practice of common law states. For example, if Estonian citizen living in Great Britain, wants to marry in Estonia, he or she must present marriage impediment certificate issued by the Great Britain, because according to Estonian Private International Law the impediments of marriage are determined by the law of the state person is resident. Great Britain does not issue such document to Estonian citizen. Citizen has to turn to Estonian court to grant a permission to marry. In a proceedings court demands the document from the state of persons residence which proves that this state does not issue the marriage impediment certificate to this person. In the end also court makes its decision on the affirmation of the person. In such case continental law does not differ from common law, only has more steps to tread. This is an obvious example of bureaucracy. If Estonian vital statistics official knows that certain state does not issue marriage impediment certificate, there should be regulation that the vital statistics official takes the confirmation from the person who wants to marry about the fact, that he or she does not have marriage impediments instead of sending a person to court. On the other hand, in case the law of the state the marriage takes place provides for marriage impediments the principle of residence law, it is easy to cheat a state by registering his or her residence to the state of marriage and after marriage back to the real state a person actually lives. There is not legal bases to interfere into such performance of person as it is very difficult to prove that person actually did not live in state he or she is a resident. At least it is so in Estonian law. In such case formally the obstacles are controlled legally, but in essence the control is „empty".

If person has been living in a state which issues marriage impediment certificate for a very short time, the aim of marrriage impediments control is not performed as well. Not all states have the right to ask additional documents in case marriage impediment certificate is already presented. Again a question of hindering the free movement of person can be raised. In case state does not recognise same-sex marriages a person who has same-sex marriage[69] in another state, can marry in a state which does not recognise same-sex marriages as a fact of valid same-sex marriage is legally invalid- it does not exist.

In the Member states of common law tradition marriage impediment certificate is issued as an affidavit – a person him/herself affirms that he or she has no impediments to marry. In the Member states of continental law system administrative body contracting the marriage does not have authority to take such affirmation from the person getting married.

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[69] Article 9 of the Charter of Fundamental rights of the European Union leaves the decision whether or not allow same-sex marriages to the Member state.

In Estonian practice there has been no problems related to sex in the birth certificate. Differently from some other states[70] where sex of the person has been taken from the birth certificate and not from the register (as the last data), in Estonia sex of the person is taken from the identity document or Estonian Register, from the birth certificate only kinship as an possible obstacle to the marriage, is controlled.

In Green Paper related to co-operation the following important idea is mentioned – the exchange of information allows the civil registrar of the Member state of origin of a person to be informed of the fact that a record concerning this person has been made in another Member state. This would also be useful in terms of updating civil status records (There is CIEC conventions also regulating the same questions, but the European Council is convinced that the technological developments not only present new challenges to the protection of personal data, but also offer new possibilities to better protect personal data.[71]

Green Paper proposes also the Member state to think about establishing central registries. In Estonia there is a central register (Population Register) already from the 1990s, since 2010 it has been innovated and all the vital statistics deeds are made electronically in this register. Such central register is very comfortable and gives quick, updated and legally effective data to police, registrars, tax officials as well as to the judges, notaries and Estonian consulates all over the world. One common register in one state is justified, but over-European can be another problem, because as mentioned earlier, there are already too many registrars, not mentioning other public servants who should have an access to the register. Too widely used register could jeopardize the protection of personal data. Better solution would be the exchange of data by certain secured channels from one state to another.

Questionable would be the Committee's of Regions opinion, that the fundamental diversity of civil status systems (event-based, person-based and population register) and varying procedures in effect across the EU reflects the constitutional and legislative arrangements of their public authorities and represents their differing societal values[72], because registering is just collecting the data, so it does not make any difference if such data is collected by paper or electronically. This could be questionable if registering system carries so important

[70] See Case of Schalk and Kopf versus Austria (application no 30141) Judgement of European Court of Human Rights. Strasbourg.24.June 2010. Final 22/11/2010.

[71] Stockholm Programm „An Open and Secure Europe Serving and Protecting citizens" Official Journal of the European Union (2010/C 115/01) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:en:PDF, pp. 10.

[72] Opinion of the Committee of the Regions on „Less bureaucracy for citizens: Promoting free movement of public documents and recognition of the effects of civil status records" 2012/C 54/05.

social value that it cannot be changed (in this context a word „change“ should be understood as „development“?

In this chapter the means related to administrative formalities were analysed. Apostillé corresponds to the procedure ensuring the authenticity of the document, which means co-operation between the public administration of Member states. There is no clear solution as co-operation model. It is obvious that co-operation cannot be only „one-sided“ activity. Before EU works out certain principles or models for co-operation in this field, must Member states show initiative and update their homepages.

5. Mutual recognition of the effects of civil status records

Mutual recognition of civil status records is a complicated question, which should be handled separatedly from other means, because this causes more misunderstandings, debates and takes probably much more time to reach in some kind of agreement if at all.

Mutual recognition is directly related to the substantial law of every Member state and is therefore based on its history, culture and legal system. When in public administration changes can be made more easily, not splitting the so called values of the state and these changes can be described as innovation or updating, substantial law is more related to the sovereignty of a state and therefore more complicated to develop. Hurrell (2002) and Goldsmith (2000) argue, that states tend to lose control over norms when the international legal system, in which they are functioning, becomes denser and more complex.[73]

In crossborder situation, the main question is whether a legal situation recorded in a civil status record in one Member state will be recognised in another. It should be possible to guarantee the continuity and permanence of civil status situation to all European citizens exercising their right of freedom of movement[74]. In deciding to cross the border of a Member state to go and live, work or study in another Member state, the legal status acquired by the citizen in the first Member state should not be questioned by the authorities of the second Member state since this would constitute a hindrance and source of objective problems hampering the exercise of citizens' rights. As private international

[73] Van Kersbergen K., Verbeek B., The Politics of International Norms: Subsidiarity and the Imperfect Competence Regime of the European Union. European Journal of International Relations. 2007. http://ejt.sagepub.com/content/13/2/217.refs.html pp. 217–238, pp. 223.

[74] One of the basic features of European citizenship is the right to move and reside freely within the territory of other EU Member state (art 20 TFEU).

law is different in Member states (connecting factor can, in principle, be citizenship or habitual residence), the unavoidable consequence of such diversity is that civil status situation created in one Member state is not automatically recognised in another, because the result of the applicable law differs depending on the Member state in question.[75]

In 2001 a research to identify the possible problems that result from the differences in national choice of law rules with respect to divorce and other forms of dissolution of marriage was carried out. In this reseach profound problems were described related to the free movement of persons in family questions.[76]

EU power to action is limited as EU has no competence to intervene in the substantial family law of Member states, since the Treaty on the Functioning of the EU does not provide any legal bases for applying such a solution. Institutions and bodies of the EU must only enable the citizens of its Member states and all individuals in general to exercise as far as possible the rights and freedoms of which they are the beneficiaries, within the scope of the treaties and the current legal framework[77]. In an international field many international conventions have been contracted, but not all EU Member states have been active to consolidate them, including Estonia. Only in the last years Estonia has become active in consolidating the conventions facilitating the free movement of vital statistics documents. From the primary and secondary law of EU often is mentioned Regulation (EC) No 2201/2003[78] as an important step towards simplifying the recognition of crossborder documents. Related to the recognition of other documents than court decisions it is important to notice that Brussel II Regulation sets out a number of grounds for refusing to recognise a judgement. These grounds of non-recognition are meant to protect the public interests of Member state. The same model should be applied to other family event documents – to give an official a right to decide if the document is legally (by its effect) acceptable or not.

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[75] European Commission. Green Paper Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records. Brussels, 14.12.2010 COM(2010) 747 final.

[76] See Practical Problems from the Non-Harmonisation of choice of Law Rules in divorce Matters (JAI/A3/2001/04) Final Report. T.M.C. Asser Institute. The Hague, the Netherlands, December. 2002. pp. 22.

[77] Community provisions which impose a duty on Member states may be interpreted so as to create a right for individuals to have that duty performed (ECJ Judgement of 05/02/1963, C-26/62, Van Gend en Loos (Rec. 1963, 3). Itzcovich G. Legal Order, Legal Pluralism, Fundamental Principles, Europe and Its Law in Three Concepts. European Law Journal, Vol. 18, No. 3, May 2012, pp. 358–384, pp. 367).

[78] Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition an enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

Divorce of the previous marriage is an important aspect of marriage. In free movement of judgements has triggered an apparent need for uniform conflict of laws rules[79] European Council requested already in 1988 to investigate the possibility of drawing up legal instrument on the law applicable to divorce.[80]

Because of the prohibition to intervene suggests Green Paper the following means to recognise the effects of civil status records – assisting national authorities in the guest for practical solutions; automatic recognition and recognition based on the harmonisation of conflict-of-law rules. All these solutions are splitting the principle of subsidiarity and hence will not work many years. As a general rule, community law must be interpreted on the basis of its own criteria, which differ sharply from those familiar to international law. The assumption that Community law constitutes a legal order, has important implications in determining how conflicts between Community law and domestic law are to be resolved. These conflicts do not give rise to contradictions in a technical sense and, from the perspective of the Community legal order, the Community provisions must always prevail.[81]

If EU gives reccommendations, these must be very clear and not in contradiction with any Member states domestic family law, which probably is not possible and they are not legally binding anyway.

Hence, even according to the Court of Human Rights the institution of marriage has undergone major social changes since the adoption of the convention. Automatic recognition would mean that Member state abandons its own legal order and values and is not possible for that reason. Immediately arises a question of same-sex marriages and possibility to adapt a child by such spouses. Also harmonisation of conflict-of-law rules does not work, because giving a citizen to choose which states' law to apply on him/her would cause a general mess and misunderstanding, also fraud.

In case of marriage impediment certificate there can arise also a question related to the concept of European citizenship. Dani (2012) states, that "in a more or less distant future union would become the dominant site of political identification for the individuals living in Europe"[82] convinces that despite the differences of the family laws of Member states there should be some kind of common network to change the information and Member state should honestly

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[79] Kuipers J.-J. the Law Applicable to Divorce as Test Ground for Enhanced Cooperation. European Law Journal. Vol. 18. No 2, March 2012, pp. 201–229, pp. 206.

[80] OJ C19, 23 January 1999, 1.

[81] Itzcovich G. Legal Order, Legal Pluralism, Fundamental Principles, Europe and Its Law in Three Concepts. European Law Journal, Vol. 18, No. 3, May 2012, pp. 358–384, pp. 368.

[82] Dani M, 2012, Rehabilitating Social Conflicts in European Public Law, European Law Journal, Vol 18, No 5, 2012, pp. 621–643, pp. 634.

analyse which rules are those protecting their sovereignty and cannot be harmonised, and which ones are haphazard ones and can be „developed". It is not bureaucracy that causes problems, but differences in substancial family law of Member states.

6. Conclusion

Family law in EU is in an important stage of developments. As free movement with attention to work has been changed to the family-oriented question as the EU citizenship has been tided more securely to the person. Pushing the place of family law more clearly to the scope of EU regulations and strong influence of convergence of Member states by Lisbon Treaty has reached to the era, where the questions of family law are again in the great interests of EU institutions. Crossborder family events are in tendency of raising and no Member state will be untouched by this. It is obvious that Member states are on the one hand interested in convergence in family matters, on the other hand no Member state declares to be the one who will change its practise and law.

However, by Green Paper a strong influence has began towards harmonisation of family laws of Member state. Means proposed in Green Paper are based on the co-operation of Member states and on the principle that EU has the power to intervene into the laws of Member states where it is useful for granting the general aims deriving from the treaties. As free movement is one of such general principles of EU, there is possible to demand from Member states' actions ensuring this principle.

Instead of used reference to the principle of subsidiarity, EU has competence regarding the unification of private international issues in family matters. In order to guarantee the free movement of persons in Europe a new policy is worked out – Green Paper consists of means to harmonise step by step EU family law.[83]

It is generally accepted that family law is changing and it is not justified from Member state only protest every development, instead should states declare what they can do to solve current situation, because every Member state has problems with crossborder cases. But in proposing the possible solutions they are very modest. Current situation can be improved by some of the means in Green Paper without any interference to the culture and traditions of Member states and also there is no need to change EU primary or secondary law.

[83] Itzcovich G.: Legal Order, Legal Pluralism, Fundamental Principles, Europe and Its Law in Three Concepts. European Law Journal, Vol. 18, No. 3, May 2012, pp. 358–384, pp. 367.