Chapter 8
A Unified System of International Family Law in the European Union: Which Way Forward?

8.1 Introduction

The field of international family law currently has a predominantly national nature: the EU Member States provide for autonomous rules in this field of law.

However, this situation will probably change in the future, as the European Commission develops a common European system of international family law. According to the Hague Programme, instruments in the field of family law including divorce, maintenance, and matrimonial property should be completed by the year 2011.[1] With the Maintenance Regulation and the accompanying Hague Protocol determining the law applicable to maintenance obligations, the Brussels II*ter*-Proposal and the Green Paper in the field of matrimonial property the establishment of such a common system is taking shape more and more. Moreover, also issues such as personal status, names and adoption have been mentioned as future areas of Union action in the field of private international law.[2] Although the introduction of the common choice of law rules on divorce was not as successful as the Commission had hoped, its intentions as regards issues of international family law are clear: this field of law will be 'Europeanised'. However, the failure to reach a compromise on the Brussels II*ter*-Proposal will certainly have its repercussions on the establishment of and the negotiations over other issues of international family law to be arranged for. Yet whether this is an unfavourable development remains to be seen. Section 8.2 therefore aims to detect the pitfalls of the Brussels II*ter*-Proposal.

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[1] The Hague Programme, p. 13. The Commission also published the Proposal for a Succession Regulation. This Proposal will; however, not be taken into consideration in the following analysis, since the law of succession is regarded as a matter distinct from family law (see the Explanatory Memorandum to this Proposal, p. 3).

[2] See Communication from the Commission to the Council and the European Parliament establishing for the period 2007–2013 a framework programme on Fundamental Rights and Justice, COM(2005) 122 final, p. 67.

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When discussing the future of European international family law, one of the primary questions is what the European Union actually wishes to attain by Europeanising this field of law (Section 8.3). From these aims and objectives some guidelines for the future unification of issues of international family law will be tried to be derived. In view of the consequences which the unified choice of law in family matters may have, legal doctrine has emphasised not to proceed too fast and to firstly lay a theoretical foundation for European private international law.[3] For the risk exists that the current — fragmented — approach will not allow for the development of a coherent system of European international family law and it will inevitably lead to problems of definition of the respective fields of application.[4] Section 8.4 will therefore seek to instigate the development of such a coherent system of international family law.

Finally, in Section 8.5 a number of recommendations resulting from the analysis on the Europeanisation of international family law will be made to the EU legislature.

8.2 What can be Learned from the Brussels II*ter*-'Adventure'?

The preceding three chapters showed that the development of a unified system of choice of law on divorce is not an easy task; on the contrary, it turns out to be a rather slippery path.[5] It proved to be impossible to reach a consensus between the Member States on the issue of the law applicable to divorce.

As a means to overcome the resulting paralysis, the procedure on enhanced cooperation has been launched and has resulted in the establishment of the Regulation on enhanced cooperation in the field of divorce. This regulation allows a group of Member States to move ahead in the area of the choice of law on divorce, while others have the possibility either to join the cooperation or to stay behind.

This paragraph analyses the lessons that can be drawn from the experience of the failed attempt to establish a common choice of law on divorce. The analysis in Chapter 6 above on the failure of unified choice of law rules on divorce has shown that the most important bottleneck was the lack of agreement between the Member States on the methodological and theoretical foundation of a unified system of the choice of law on divorce, mainly because of the differences in the substantive law approach of the Member States.[6] Initially also the position of Malta, the only Member State that does not provide for divorce in its national legislation, and the

[3] See e.g. Kohler 2003, p. 409: '*Die wirkliche Herausforderung, der sich der Gemeinschaftsgesetzgeber stellen muss, betrifft die Formulierung einer Politik für das Gemeinschaftskollisionsrecht*'; Vlas 2003, p. 393 (with regard to the private international law aspects of succession); Gaudemet-Tallon 2005, p. 168; Pontier 2005, p. 25; Dethloff 2007, p. 995.

[4] Cf., Gaudemet-Tallon 2005, p. 168; Fiorini 2008b, p. 195.

[5] Cf., Baarsma 2009, p. 14.

[6] See *supra* Sect. 6.4.

issue of competence with regard to the unification of the choice of law posed problems. During the negotiations in the Council to both these problems a solution was found.[7]

In this paragraph the failure of an agreement between the Member States on the Brussels II*ter*-Proposal will be analysed on a more general level in order to draw lessons from it. After the discussion of some general aspects (Section 8.2.1), Section 8.2.2 will elaborate on the question of transparency. Finally, the influence of the interrelationship between divorce and other fields of family law on the establishment of a single instrument in one area will be discussed (Section 8.2.3).

8.2.1 General

The Brussels II*ter*-Proposal has been described as too ambitious.[8] Boele–Woelki has accordingly observed that whether this holds true undeniably depends on the aims and objectives of the legislative measure to be taken.[9] She further noted that

> [I]n trying to achieve these aims the unification of private international law rules within the European Union as such and at all costs should never be a goal in itself. The content of the rules is more important. In addition, it should be respected that for some Member States higher values than the uniformity of rules and a coherent approach prevail.[10]

Obviously Boele-Woelki touches here upon a very important issue: the sole goal of Europeanisation of the choice of law rules should not take place at the expense of the content of these rules. However, the Union legislature tends to adhere to a functional approach of the unification of the private international law rules: the Europeanisation of this field of law is aimed at European integration.[11] Therefore, the risk that the Europeanisation of the choice of law in a certain area is considered as a goal in itself is certainly present. It should nevertheless be noted that the goal of Europeanisation of the choice of law does already include more objectives, such as enhancing legal certainty and predictability, the prevention of limping relationships and reducing the risk of forum shopping.

The Brussels II*ter*-Proposal showed that one of the main difficulties with regard to the Europeanisation of international family law is that it is very dependent on

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[7] See *supra* Sects. 6.2 and 6.3, respectively.

[8] See Fiorini 2008b questioning whether the Europeanisation of family law is going too far.

[9] See Boele-Woelki 2008, pp. 785, 786. See on the aims and objectives of European international family law *infra* Sect. 8.3.

[10] Boele-Woelki 2008, p. 786. See also Duintjer Tebbens 2002, p. 184: '*Insgesamt ergibt sich das Bild eines EG-Gesetzgebers, der sich begierig auf das IPR richtet und […] mehr an quantitativem Scoren als an der guten Qualität und Funktionsfähigkeit der Rechtssetzungsprodukte interessiert zu sein scheint*.'

[11] See *infra* Sect. 8.3.

political will.[12] The Member States were highly divided as to the content of the unified choice of law on divorce, which originated from the different substantive law approaches of the Member States.[13] Although the substantive divorce laws of the Member States differ, within the European Union a spouse seeking a divorce will sooner or later obtain it, irrespective of the applicable law, in all of the Member States (with the exception of Malta). In addition, the methodological approach of the common choice of law plays an important role as well: do the EU Member States wish to further a distinct policy with regard to divorce by means of unified choice of law? Or is their position in this respect completely neutral, i.e. excluding any *favor* tendency? The latter point of view does, however, require consensus on the possible application of foreign law, as any solution that does not automatically lead to the application of the *lex fori* would otherwise fail. A question that needs to be answered furthermore is which result the unified choice of law rules on divorce actually mean to achieve: 'substantive justice', i.e. the designation of a law that achieves a certain result, or 'conflicts justice', i.e. designating the law that represents the closest connection in an 'objective', impartial way?[14]

The question can be asked why the Member States did succeed in establishing common choice of law rules in other fields of law, such as contractual obligations (Rome I) and maintenance obligations, without any of such methodological problems. This can partly be accounted for by the fact that these other fields of law are less sensitive than divorce and the differences between the substantive laws of the Member States on these issues are — on the average — also less strong. The lack of any methodological problems in these fields of law may explain why the Commission probably thought that the unified choice of law on divorce could easily be established.

This difficulty surrounding the Brussels II*ter*-Proposal shows that a more fundamental discussion between the Member States as regards the methodology of the choice of law should precede the actual proposal establishing a unified choice of law.

The failure of the Brussels II*ter*-Proposal has led to a more fundamental discussion in the Council. During the informal meeting of the Justice and Home Affairs Council of 15 and 16 January 2009 the question on the future of judicial cooperation in family matters was under discussion.[15] The discussion subsequently showed that many Member States hold a rather reserved attitude in regards to the future of judicial cooperation in family law. Matrimonial property, child protection and adoption have been mentioned as fields of family law of which the private international law aspects should be regulated on the European level. However,

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[12] Cf., *supra* Sect. 1.1

[13] See *supra* Sect. 6.4. See also Hess 2010, p. 435: '*Die Hauptursache sind die Unterschiede der materiellen Scheidungsrechte der EG-Mitgliedstaaten*.'

[14] See further on this question *infra* Sect. 8.4.3.

[15] See Press Release of the Informal Meeting of the Justice and Home Affairs Council of 15–16 January 2009 held in Prague, p. 1. Available at http://www.eu2009.cz/scripts/file.php? id=9958&down=yes. See also *Kamerstukken II* 2008–09, 23 490, No. 537, p. 7.

many Member States proved to have no need of new European rules in the field of international family law.[16] Consequently, the Europeanisation of issues of international family law has become even more delicate than it already was.[17]

The Commission may have slightly underestimated the establishment of common choice of law rules in the field of divorce. The previous experience with the unification of issues of international family law has shown that the road towards the adoption of a European instrument in this field of law is certainly not easy. The Brussels II-Regulation — containing common European rules on jurisdiction and on recognition and enforcement in matrimonial matters and in matters of parental responsibility — has taken quite some time to come into force: work on drafting this instrument began already in 1992 and the regulation has only entered into force on 1 March 2001.

8.2.2 Transparency

As seen above, one of the obstacles in the negotiations over the Brussels II*ter*-Proposal was whether the European Community was actually competent to unify the choice of law rules on divorce.[18] Mainly the question to what extent the internal market needs such unified choice of law rules was pressing. Although this issue has lost some of its importance by the entry into force of the Treaty on the Functioning of the European Union, which has removed the imperative character of the internal market requirement, the analysis of the problem in Section 6.3 proved the significance of the justification of the legal basis of the Union action.

In this regard the European Commission does not always justify satisfactorily whether the requirements of Article 81 TFEU have been fulfilled. If the legislative proposal is already accompanied by a clarification justifying the legal basis of the issue concerned, this justification is often not satisfactory.[19] Two examples of such statements are:

> […] the objectives of this Regulation cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community. This Regulation does not go beyond what is necessary to achieve those objectives.[20]

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[16] See *KamerstukkenII* 2008–2009, 23 490, No. 541, p. 5. The European Council has responded to this opposition of some Member States in the Stockholm Programme; see the Stockholm Programme, p. 24: 'the European Council considers that the process of harmonising conflict-of-law rules at Union level should also continue in areas where it is necessary.'

[17] Cf., Sect. 1.1.

[18] See *supra* Sect. 6.3.

[19] This critique is often expressed, see *inter alia* Schack 2001, pp. 618–619; Duintjer Tebbens 2002, pp. 177–180; Vigand 2005, pp. 145–147; Meeusen 2007, p. 337; Fiorini 2008a, pp. 7–8; Knot 2008, p. 166. With regard to the Brussels II*ter*-Proposal this critique is also shared by some national parliaments; see the COSAC-Report, pp. 12–13.

[20] Recital No. 5 of the Preamble to the Brussels II-Regulation.

> The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.[21]

Moreover, the statistics used to underline the necessity of Union action in a certain area and reliable derivations thereof are of crucial importance to the credibility of the basis of the Union action. As already observed above, the reliability of the statistics and of the resulting derivations with regard to the number of international divorce cases in the European Union have been questioned.[22] The European Union Committee of the British House of Lords has expressed serious doubts concerning the reliability of the European Commission's statistical analysis:

> Only 13 Member States could provide the information requested and in five cases not for the full period of time (4 years) requested. Significantly only one large Member State (Germany) responded. The UK was unable to do so because it does not keep the sort of statistics requested by the Commission. Whether it is safe to extrapolate for the whole Union on the basis of the Commission's study has been questioned. Practitioners expressed concern that the responses from smaller Member States with high numbers of foreign residents (such as Luxembourg and Belgium) may have skewed the statistics. […] How, in the apparent absence of statistical data from any large Member State save Germany, the Commission can state that "the rates of international marriages and divorces do not vary enormously amongst the larger EU countries" is extraordinary.[23]

This statement clearly undermines the European Commission's statistical analysis.

Furthermore, there is an inconsistency in the percentage representing the number of international divorces in the European Union: in the course of time the Commission seemed to juggle with the figures. While according to the Impact Assessment the estimated 170,000 international divorces that take place each year in the European Union represent about 16% of the total number of divorces,[24] soon after these same 170,000 divorces all of a sudden represent 19% of all divorces.[25]

It cannot be denied that these two statistical concerns damage the credibility of the basis of the Union action in the field of choice of law on divorce. The Brussels II*ter*-Proposal therefore shows that in sensitive areas of law, such as the choice of

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[21] Recital No. 6 of the Preamble to the Rome II-Regulation.

[22] See *supra* Sect. 6.3.1.

[23] See House of Lords Rome III Report, para 18.

[24] See Impact Assessment on Divorce, p. 13.

[25] See the letter of the Vice-President of the European Commission of 7 December 2006, *Kamerstukken I/II*, 2006–2007, 30 671, F and No. 6.

law on family matters, a clear and reliable reasoning behind the Union's action is required.[26]

8.2.3 Interrelationship with Other Areas of (International) Family Law

The Brussels II*ter*-Proposal provides for uniform choice of law rules on divorce and legal separation. Marriage annulment is excluded from its scope of application, even though the jurisdictional rules of the Brussels II*bis*-Regulation do apply to marriage annulment.[27] Moreover, although the Brussels II*ter*-Proposal regulates the law applicable to divorce, strangely enough the preliminary question of the existence of a marriage is not provided for. The latter issue has been left to the discretion of the Member States.[28]

Besides, the Brussels II*ter*-Proposal deals with the choice of law on divorce alone and in most countries the court deciding on the divorce will go on to determine financial applications including maintenance, pension sharing and the division of the matrimonial property. Furthermore, if present, the latter court will also make arrangements concerning the parental responsibility over the child(ren). Consequently, given the ties between these fields of law it is argued that divorce and all the ancillary aspects need to be seen and dealt with together.[29]

The Commission has declared to be aware of the interrelationship between divorce and the ancillary financial matters. After displaying the activities that have been launched in the fields of maintenance obligations and matrimonial property, the Commission expressly stated that it:

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[26] Although it is not certain whether the Brussels II*ter*-Proposal has had any direct influence on this inquiry, but the British House of Lords has questioned the transparency of the EU legislative proposals in general. See the House of Lords European Union Committee, Sub-committee E (Law and Institutions), 'Inquiry into the initiation of EU legislation', April 2008; available at: http://www.publications.parliament.uk/pa/ld200708/ldselect/ldeucom/150/15002.htm.

The EU itself also seems to put more emphasis on the transparency of its work. Article 15(1) TFEU determines that 'in order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible.' Although this provision is not new (ex Article 255 EC-Treaty), it received a more prominent place in the Treaty on the Functioning of the European Union.

[27] See recital No. 6 of the Preamble to the Brussels II*ter*-Proposal. See equally Explanatory Memorandum to the Brussels II*ter*-Proposal, pp. 7, 9. See further on the exclusion of marriage annulment from the scope of application of the Brussels II*ter*-Proposal *supra* Sect. 5.4.2.1.

[28] See Press Release No. 8364/07 (Presse 77) of the 2794th Council Meeting of Justice and Home Affairs held in Luxembourg 19–20 April 2007, p. 11.

[29] See Boele-Woelki 2008, p. 783; Fiorini 2008b, p. 195; Jänterä-Jareborg 2008, p. 340. See also the German Bundesrat 3 November 2006, Ratsdok. 11818/06, Drucksache 531/06 (Beschluss), pp. 1–2; and the Opinion of the European Economic and Social Committee on the Brussels II*ter*-Proposal of 13 December 2006, SOC/253, n. 4.3.

> […] is aware that the question of applicable law in divorce matters cannot be examined in isolation from these ancillary matters [i.e. maintenance obligations and matrimonial property; NAB] and will therefore carefully consider the interrelationship between the different issues when preparing future projects.[30]

Although currently several Union instruments in the field of international family law are being developed, no parallel development seems to be taking place. The current approach is rather fragmented. Moreover, not all ancillary matters are the subject of unification, e.g. the law applicable to parental responsibility. According to Weber this fragmented approach can be explained by virtue of the fact that it will be easier to achieve consensus on these issues taken in isolation than it would have been had work been undertaken on a wider area.[31] However, a more systematic approach is called for, as unnecessary overlap and contradiction should be avoided.[32]

8.3 Aims and Objectives of European International Family Law

The development of European private international law rules raises the question on what goals the European Union wishes to further by such a proper system. In other words, are there any specific aims and objectives to be achieved by the private international law rules adopted by the European Union, as compared to the traditional ones? This question can be answered with a straightforward 'yes'.

Section 4.3 above has disclosed the objectives pursued by the unification of the choice of law at the European level. Besides the general objectives that would be fulfilled by any choice of law unification,[33] the European system of international family law strives for four specific objectives.[34]

In the first place, one of the principal objectives of the European Union as a whole is the creation of an internal market. Indeed, private international law exists for the purpose of the establishment and functioning of the internal

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[30] See Commission Staff Working Document — Annex to the Green Paper on applicable law and jurisdiction in divorce matters, SEC(2005)331 of 14 March 2005, p. 3.

[31] Weber 2004, pp. 228–229. See equally Fiorini 2008b, p. 195.

[32] See further *infra* Sect. 8.4.1.

[33] See *supra* Sect. 4.3.1 on the objectives that would be fulfilled by Europeanising the choice of law: such unification would increase legal certainty, it might provide for the uniformity of decisions, it would grant better protection to the legitimate expectations of the parties, it would prevent the development of limping relationships and, finally, it would enable the achievement of justice.

[34] See *supra* Sect. 4.3.2.

market.[35] Initially this objective kept the role of the EU in the development of common rules of international family law fairly limited. The introduction of the Union citizenship was a milestone in this respect, taking the development of European rules on international family law one step further by detaching the principle of free movement of persons from its purely economic connotation. Compared to a traditional private international law system, the European system of private international law is in this regard utilised to promote, rather than just to manage international mobility of citizens. Secondly, the establishment of the area of freedom, security and justice meant another (major) step forward, in particular the creation of a European judicial area, in which international family law occupies a prominent position. The third objective disclosed is the principle of mutual recognition. Although this principle seems to give more priority to the development of common rules on the recognition and enforcement of foreign judgments in the EU, it has two important characteristics that equally influence the European choice of law. The first is that by virtue of this principle the legal traditions and systems of the Member States should be respected. The second characteristic is that on the basis of the principle of mutual recognition European law assumes an equivalence of the legal norms of the Member States. Finally, the EU strives for the protection of stability interests, which is particularly important for the realisation of the internal market, as the fundamental freedoms can solely be ensured if the exercise of those freedoms does not involve the loss of legal positions that have already been acquired in another Member State.

The coordinating interest of the abovementioned specific aims and objectives pursued by the Europeanisation of international family law seems to be the promotion of European integration.[36]

Ever since the establishment of the European Economic Community the process of European integration is at the center of European law.[37] European integration was founded on the principles of the free movement of goods, capital and services, but also of people. Since the EEC-Treaty of 1958, European citizens living in (what is now) the European Union have enjoyed progressively stronger rights to move freely, to reside and work in other EU Member States.[38] Pursuant to Article 1 of the EU-Treaty the European Union is 'in the process of creating an

[35] Ex Article 65 EC-Treaty limited the competence of the European legislature to enact measures of private international law to those 'necessary for the proper functioning of the internal market'. The current provision (Article 81 TFEU) has abandoned this imperative character, but does still refer to the internal market (particularly when necessary for the proper functioning of the internal market).

[36] Cf., as regards this interest in the field of international civil procedure, Hess 2001, p. 389 ff; and Hess 2010, p. 4 ff and 81 ff.

[37] Cf., the Preamble to the EU-Treaty: 'RESOLVED to mark a new stage in the process of European integration undertaken with the establishment of the European Communities'.

[38] Cf., Borrás Report, para 1: '[…] *integration is now no longer purely economic and is coming to have an increasingly profound effect on the life of the European citizen* […]. *The issue of family lawtherefore has to be faced as part of the phenomenon of European integration*.'

ever closer Union among the peoples of Europe.' This process entails the transfer of increasingly far-reaching policy areas and of the corresponding powers to the European Union.

The creation of a European system of private international law equally contributes to this process of integration.[39] Private international law can very well help shape the policy options embodied in the EU legal order. The development of the Union's competence as described in Section 4.2 clearly shows the increasing transfer of powers: the first tentative efforts were taken in the Treaty of Maastricht, through which judicial cooperation in civil matters became an element of European cooperation. The Treaty of Amsterdam actually transferred competence in the field of private international law to the European Union, but formally limited this power in Article 65 EC-Treaty. Furthermore, the EC-Treaty introduced a new objective, namely the creation of an area of freedom, security and justice. The Treaty on the Functioning of the European Union, finally, removed the imperative character of the internal market requirement and thereby formally expanded the legal basis of Union action in the field of judicial cooperation in civil matters.

Viewed from the aim of European integration, the development of a European system of international family law should ultimately lead to the construction of a genuine European judicial area in which all citizens are able to assert their rights, irrespective of the Member State where they reside. This assertion of rights implies the identification of the competent jurisdiction, the designation of the applicable law and the effective enforcement of judgments in all areas of international family law.[40]

In fact this broad aim of European integration does not seem to pose any limitations on the development of common choice of law rules on issues of family law. Because of this broad aim the risk exists that the European system of private international law is not an end in itself (a better private international law), but a means to an end (European integration).[41] In other words, there is a risk of a too functional approach as regards the Europeanisation of international family law. Consequently, the European legislature should make sure not to fully subordinate the Europeanisation of this field of law to the sole goal of European integration.

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[39] That private international law is the instrument *par excellence* for the purposes of integration has been demonstrated by Hay et al. 1986. See also Fentiman 2008, p. 2041 ff, spec. p. 2045: '*It* [*i.e. EU private international law; NAB*] *is to create a further building block in the edifice of European integration*.' Fentiman reasons from the ECJ Case C-281/02 *Owusu* v. *Jackson* [2005] ECR I-01383.

[40] Cf., Communication from the Commission to the European Parliament and the Council, An area of freedom, security and justice serving the citizen, COM(2009) 262 final, p. 10 ff.

[41] Cf., Jayme 2000, p. 168; Kohler 2001, pp. 41–53; Van den Eeckhout 2008, p. 8; and Fentiman 2008, p. 2041 ff.

From the foregoing it is clear that there are a reasonably high number of goals and objectives that can be discerned. These aims and objectives can roughly be divided into three categories:

1. Aims related to the promotion of European integration (such as the principle of mutual recognition and the establishment of the area of freedom, security and justice).
2. Aims ensuing from European law (such as the principle of non-discrimination on grounds of nationality, respect for human rights, respect for the national identities of the Member States); and
3. Aims attached to any choice of law unification (such as increasing legal certainty and predictability, the prevention of forum shopping and enabling the achievement of justice).

Besides these 'general' aims, which apply to any European choice of law instrument, the protection of specific interests will come into play depending on the field of family law at issue. For example, in the choice of law on divorce the principle of gender equality plays an important part, whereas in the choice of law on adoption the protection of the best interests of the child is of major importance. Also the following other interests may be acknowledged in one or more fields of international family law: the protection of incompetent persons, the protection of the weaker party and increasing party autonomy.

This high number of objectives leads to the question whether there is a hierarchy between them. Such hierarchy would certainly be helpful, as in a particular case the objectives to be fulfilled may even conflict: e.g. the protection of the weaker party may lead to the establishment of a choice of law rule that is not the most suitable one for the establishment of the area of freedom, security and justice or to increase predictability. However, it is very hard to make any general statement on this issue, since in every subfield of international family law different interests play a part.

8.4 The Methodology of European International Family Law

This paragraph will focus on the quest for a specific methodology for the European system of international family law. In the first place, the need for a theoretical foundation of the European system of international family law will be elaborated upon (Section 8.4.1). The EU system of international family law would constitute a full part of European law, which has repercussions on its content. Therefore, the unique character of the European Union and its consequences for the development of a common European system of international family law will be analysed (Section 8.4.2). Thirdly, Section 8.4.3 will disclose the general characteristics of European international family law that can be deduced from the instruments that have been introduced and proposed so far. Finally, the initial impetus will be given to the development of a proper method of European international family law (Section 8.4.4).

8.4.1 The Need for a Theoretical Foundation of European International Family Law

There is no denying that the establishment of an EU system of international family law is on the European agenda.[42] Despite the recent setback of the failure to adopt the Brussels II*ter*-Proposal, it is beyond doubt that an EU system of international family law will see the light of day sooner or later. Presumably, besides the areas that have already been regulated or been 'fixed' in European policy plans — i.e. maintenance obligations, divorce and matrimonial property — more fields of international family law will be Europeanised in the future. Although several Member States have recently stated to have no need for new unified European rules in the field of international family law,[43] one day the Commission will undoubtedly attempt yet again to Europeanise new fields of international family law.[44]

As mentioned above, the current approach of Europeanisation of international family law is not very coherent. Two distinct factors seem to underlie this lack of coherence.

One of the problems of establishing a coherent common system of international family law is the procedure through which a legislative measure is established. The European Commission initiates the legislative procedure by making a proposal to adopt a specific instrument. This proposal is probably designed and structured in a certain direction so as to achieve a specific goal (such as the aims and objectives observed above). Subsequently, many compromises are made in the Council in order to have all the Member States accept the instrument. Many instruments are, consequently, not achieved by a specific methodological form and content but instead by moving from compromise to compromise in order to reach unanimity among the Member States.[45]

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[42] See the Hague Programme.

[43] See *KamerstukkenII* 2008-2009, 23 490, No. 541, p. 5.

[44] Cf., Rühl 2008, p. 187: '*Es bedarf keiner hellseherischen Fähigkeiten, um angesichts dieser Entwicklungen vorauszusagen, dass das Kollisionsrecht in wenigen Jahren nahezu vollständig vergemeinschaftet sein wird*.'

[45] See Borrás 2007, p. 56 ff; Fiorini 2008b, p. 192. Cf. in this regard, De Boer 2008b, p. 993. Jayme and Kohler 2000, p. 465 also indicate that a further difficulty in this respect is that within the European Commission different Directorates-General are involved in the Europeanisation of the choice of law: '*Die Aufgabenverteilung innerhalb der Kommission trägt nicht zu einer kohärenten Entwicklung bei. Neben der Generaldirektion Justiz und Inneres, die für Rechtsakte nach Art. 61 Buchst. c) EGV zuständig ist, bereiten die Generaldirektionen Binnenmarkt und Verbraucherschutz in ihrem jeweiligen Bereich Rechtsakte vor, die auch das Kollisionsrecht berühren. Hier kommt es zu Spannungen* […].' See for this point of view equally Schaub 2005, p. 329. Under the Treaty of Lisbon the judicial cooperation has received an own Commissioner (Justice, Fundamental Rights and Citizenship).

Therefore, the essence of the lack of a clear methodology of the common choice of law may already be found in the legislative procedure leading to the adoption of a specific instrument in the field of international family law.

In addition, a second factor that does not contribute to the development of a coherent European system of international family law is the approach of the Commission as regards its unification. As already observed, the unification of European private international law is currently very much proceeding via a piecemeal approach with no *Kodifikationsidee*.[46] This approach can be explained by two reasons: it will be easier to achieve consensus on the issues taken in isolation and the unification of issues of international family law remains very sensitive as is proven time and again.[47] Obviously the Commission has to be very careful not to overplay its hand: the Member States all hold a power of veto in the field of international family law pursuant to Article 81(3) TFEU.

However, the separate legislative development of the instruments will inevitably lead to fragmentation. Unnecessary overlap and contraction should be avoided. A more systematic approach is, therefore, desirable, particularly from the perspective of legal certainty and predictability.[48] Moreover, the ease of use of the common choice of law rules would also benefit from a more systematic approach.

A lack of coherence between the different European choice of law instruments is obviously undesirable.[49] This view is endorsed by the Stockholm Programme:

> The European Council also highlights the importance of starting work on consolidation of the instruments adopted so far in the area of judicial cooperation in civil matters. First and foremost the consistency of Union legislation should be enhanced by streamlining the existing instruments. The aim should be to ensure the coherence and user-friendliness of the instruments, thus ensuring a more efficient and uniform application thereof.[50]

Although this initiative should be applauded, it does not alter the fact that a proper and sound methodology of European international family law should be developed in order to overcome the abovementioned risk. For a comprehensive and consistent choice of law system requires that there is a basic agreement on the

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[46] Cf., Siehr 2005, p. 95; and Jayme and Kohler 2006, pp. 540–541.

[47] The current fragmentation of the choice of law can also be explained by the priority that is awarded to the different subfields of international family law; see Asín Cabrera 2004, p. 173: '*le réalisme impose de procéder* step by step *de manière qu'il soit possible de bien définir et sélectionner les secteurs prioritaires d'intervention eu égard au bon fonctionnement du marché intérieur et, partant, à la réalisation d'un espace européen*.' See equally Weber 2004, pp. 228–229.

[48] Cf., Martiny 2007, p. 98; Fiorini 2008b, p. 195; Rühl 2008, p. 188.

[49] See equally Ehle 2002.

[50] See Stockholm Programme, p. 24. See also already Communication from the Commission to the European Parliament and the Council, An area of freedom, security and justice serving the citizen, COM (2009) 262 final, p. 5: '[T]he achievement of a European area of justice must be consolidated so as to move beyond the current fragmentation'.

determination of the applicable law.[51] From this point of view, the development of a European system of international family law actually raises several general questions related to the establishment of a new private international law instrument:

> How do they [i.e. the legislators; NAB] determine whether a policy-oriented rule is called for, or whether a neutral approach will do? When do they opt for one type of rule rather than another one, and why? Do they articulate their views on the objectives of the rules to be created? Is their final draft consistent with those views? And to what extent does political compromise taint the coherence between the purpose of the rules as originally conceived and their expression conceived in subsequent amended versions?[52]

Evidently the question is what a 'proper and sound methodology' of European international family law should enhance. Considering the problems that the European legislature Union faces surrounding the establishment of common international family law rules, this question is obviously not easy to answer.

In the following the initial impetus to such answer will be given. An important point of departure is the character of the European Union, which is clearly of relevance to the development of a proper European methodology on international family law. This character will be discussed in the next paragraph.

8.4.2 Unique Character of the European Union

The European Union constitutes a unique supranational organisation. It is for the first time in history that the sovereign Member States of an intergovernmental organisation have voluntarily transferred so much of their sovereignty.[53] As a result of this transfer of sovereignty the European Union is now for a large part a supranational organisation, which has many traits of a federation. Although the EU is not a federation in the strict sense, it is far more than a free-trade association such as ASEAN, NAFTA or Mercosur. Moreover, the EU has many attributes that are associated with independent countries: its own flag, anthem, motto and founding date (Europe Day), as well as an incipient common foreign and security policy in its dealings with other nations.[54] In the future, many of these nation-like

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[51] The analysis of the failure to reach a compromise on the establishment of a common choice of law on divorce has shown that precisely this basic agreement was lacking. See further *supra* Sect. 6.4.

[52] De Boer 2009, p. 299.

[53] It is to be noted that the transfer of powers from the Member States to the Union is of an irreversible nature. See ECJ Case 7/71 *Commission* v. *France* [1971] ECR 1003.

[54] See for this definition of the EU, the World Fact Book of the American Central Intelligence Agency (CIA): https://www.cia.gov/library/publications/the-world-factbook/geos/ee.html.

characteristics of the Union are likely to be further developed.[55] The European Union is often characterised as a new and separate entity that strongly differs from all other existing regional and international organisations. Therefore, the character of the European Union can be defined as unique.[56]

What is the significance of the EU's unique character for the Europeanisation of private international law?

In the first place, it should be borne in mind that private international law is traditionally a 'national' field of law. In other words, private international law is in many states part of their legal order. Even when a state has ratified international conventions containing rules of private international law, these conventions are solely integrated in that state's legal order according to its constitutional procedure on account of the wish of that state to do so.[57] National private international law rules can furthermore be intended to define the personal and spatial scope of application of the national substantive law rules.[58]

The creation of the EU legal order has greatly changed this perspective. It is widely accepted that the European Treaties and the secondary legislation can be regarded as constituting a single legal order. The Union's system is distinguished from — but not unconnected with — the legal orders of its Member States. European law is therefore often identified as an own legal order. Its enforceability is greatly advanced by the doctrines of direct legal effect and primacy: European law is directly enforceable in the courts of the Member States and prevails over national law.[59] These characteristics of EU law equally apply to the EU private international law rules.

From the foregoing it is clear that the European Union stands midway between a sovereign state and an intergovernmental organisation. This characteristic entails that the unification of private international law by the European Union cannot be compared with any other unification process and is, consequently, unprecedented.[60]

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[55] E.g. the Treaty of Lisbon introduced in the EU-Treaty a High Representative of the Union for Foreign Affairs and Security Policy to coordinate the Union's foreign policy with greater consistency and to present a united position on EU policies (Article 18 EU-Treaty).

[56] Cf., Santer 1999, p. 15: '*L'Union européenne, ce n'est pas un Etat, mais c'est une construction politique originale regroupant des nations séculaires qui veulent, à juste titre, préserver leurs différences*.' See equally Traest 2003, pp. 32–33.

[57] Cf., Borrás 2005, pp. 324–325.

[58] See, e.g., Siehr 2008, p. 85.

[59] See Jessurun d'Oliveira 2003, p. 268; Calvo Caravaca 2006, pp. 28–29. The European Court of Justice has often held that the Treaties have called into being a new, distinctive legal order, see *inter alia* ECJ Case 26/60 *Van Gend en Loos* [1963] ECR 1; ECJ Case 6/64 *Costa* v. *ENEL* [1964] ECR 585; ECJ Cases 90 and 91/63 *Commission* v. *Luxembourg and Belgium* [1964] ECR 625; ECJ Cases C-6 and 9/90 *Francovich* et al. v. *Italy* [1991] ECR I-3365. See in general on these doctrines Kapteyn and VerLoren van Themaat 1998, p. 551 ff.

[60] See Poillot-Peruzzetto 2005, p. 31: '*La communautarisation par la méthode conflictuelle opérée par le règlement propose une expérience nouvelle puisqu'il s'agit de construire des règles de structure sans* lex fori *de base*.' See equally Badiali 1985, p. 37 ff.; Basedow 2005, p. 280.

The organisation with which the European Union could in this regard be compared with is the Hague Conference on Private International Law. In developing common private international law rules, these two institutions share a number of specific goals, such as increasing legal certainty and contributing to the uniformity of decisions. However, the very essence of their respective approaches differs. In the first place, the Member States of the Hague Conference did not transfer any power to the Conference. Furthermore, the European Union attaches the pursuance of more specific political goals to the development of its proper system of private international law, such as the functioning of the internal market and the establishment of the area of freedom, security and justice.[61]

Besides, the European Union can be compared neither to a sovereign state nor to a federation, such as the USA, that develops its own system of private international law.[62]

This unprecedented process of Europeanisation which is currently taking place entails two specific difficulties. In the first place, it must be admitted that, because of the lack of harmonisation of the substantive law at Union level, a great challenge arises as to how to develop a common system of private international law for 27 Member States.[63] Moreover, all the persons involved in the development of the EU private international law rules are still primarily connected to their respective national legal order and will yet slowly know their way around in the specific merits and needs of the European legal order, which differs by its very nature from the national ones.[64]

The different character of European private international law equally involves a change in thinking. Whereas many national private international law systems are based on a 'nationalistic' perspective, the European system of private international law should be established on a more international, European perspective: the EU system of private international law 'transcends' the national interests of the Member States.[65]

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[61] See further on the relationship between the European Union and the Hague Conference on Private International Law and the different levels of integration pursued *infra* Sect. 8.4.4.3.

[62] See further on the relationship between (American) federalism and choice of law notably the publications of Brilmayer and Yntema. See also Baxter 1963, pp. 1–42. See very recently Symeonides 2010.

[63] Cf., Siehr 2008, p. 85 has argued that the absence of a substantive law poses a great advantage, as a correct choice of law system should not be based on a specific substantive law, but should be neutral instead. See equally Basedow 2008, p. 8: '*For the first time the legislative decisions relating to choice of law will be made by a legislator who is not responsible for the substantive law in that field. For the twenty-seven national laws of its Member States, the Community acts like a referee who has to be strictly neutral. He may even pursue objectives other than those of the single players*.'

[64] See Kadner Graziano 2002, pp. 10–14; Siehr 2008, p. 81; Basedow 2009, p. 458.

[65] Cf., Mills 2009, p. 12 ff. This perspective is not entirely new, as the treaties that are agreed upon in the Hague Conference on Private International Law can also be considered as efforts to find coordinated solutions between different countries.

It is thus clear that the European Union has a unique character. Does it influence the arrangement of the European private international law rules? Below two specific issues that are related to this question will be dealt with. In the first place, the question is whether the unique character of the European Union will not be better guaranteed by the establishment of an intra-European system of international family law (Section 8.4.2.1). The second sub question that will be discussed is whether and to what extent the EU system of international family law should respect the existing legal diversity of the sovereign Member States (Section 8.4.2.2).

8.4.2.1 An Intra-European Choice of Law System?

The special character of the European Union justifies the question whether the specific European aims and objectives distinguished above would not be better served by the establishment of an intra-European choice of law system. Such a limited scope of application of the European choice of law could then be used in order to strongly promote these specific EU aims and objectives.

The unification of international family law in European context seems to lay on a paradox. Universally applicable choice of law rules, which currently seem to be the norm,[66] aim at regulating cross-border family relations, regardless of the countries with which the persons involved are connected. On the contrary, the objectives of European international family law seem to suggest that the cross-border family relations are only to be regulated in a European context with little regard to the rest of the world.[67] It is not clear then why the requirements which are typical of the structure of the internal market or of the creation of the European judicial area should have impact in relation to third countries.

The development of an intra-European system of international family law would offer the possibility to establish a European system of private *interregional* law, which might allow for a closer cooperation between the Member States on the basis of the principle of mutual trust.[68] One of the advantages of such an intra-European choice of law system is that the promotion and advancement of the specific European objectives, such as the creation of the European judicial area, can be ensured.[69] However, are these European aims and objectives actually better served with specific intra-European choice of law rules? According to the EU legislature these aims and objectives require not only the Europeanisation of the choice of law rules for intra-European cases, but also of those rules concerning

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[66] Cf., *infra* Sect. 8.4.3.

[67] See Pataut 2008, p. 123.

[68] See for the advantages of a private interregional law system, Ten Wolde 2004, pp. 504–506. See Spamann 2001 for an explorative analysis of the establishment of an intra-European choice of law.

[69] Cf., Vonken 2006, p. 48.

extra-European cases. This argument relies on the view that differing rules dealing with extra-European cases may still have an indirect and undesirable effect distorting the internal market and the European judicial area.[70]

It thus seems that the specific EU aims and objectives of private international law are not per se better served with the limitation of the scope of application of the common choice of law to intra-European cases. Consequently, the establishment of an intra-European choice of law is not recommendable, especially if one takes into account that the efficiency of the EU system of choice of law would highly benefit from a universal scope of application. Indeed, the establishment of universal choice of law rules would certainly offer advantages.[71]

The application of the same law to one and the same legal relationship by the courts of the Member States is the ultimate goal of the European unification of private international law. It would encourage parties to effectively make use of their basic freedoms assigned by the European Treaties, which would in turn improve the proper functioning of the internal market. This holds true for both intra-European situations and for situations involving third States.

Furthermore, universal choice of law rules has the advantage that the EU and its Member States make a uniform appearance *vis-à-vis* third countries. In all Member States of the European Union the same choice of law rules will be applied to a certain case, regardless of the nature of the case, i.e. whether it concerns an intra- or an extra-European case. Such a situation would certainly make things less complicated: it would facilitate the application of the choice of law rules and would, accordingly, be conducive to legal certainty.

Thirdly, it may generally be doubted whether a differentiation between intra- and extra-European cases is to be recommended, as there will most certainly be cases in which it is very hard to decide whether a certain situation concerns an intra- or an extra-European case. If universal choice of law rules would be established, it would not be necessary to make the intricate differentiation between intra- and extra-European relationships.[72]

Finally, the current jurisdictional rules of the Brussels II*bis*-Regulation and the Maintenance Regulation are not restricted to intra-European cases. A limitation of the scope of application of the choice of law to intra-European cases could then very well lead to the situation in which the common jurisdictional rules determine that the court of a Member State is competent, but in which the common choice of law rules do subsequently not apply. Such a situation is clearly undesirable.

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[70] Cf., Fletcher 1982, p. 52 ff; Duintjer Tebbens 1990, p. 65 ff; Kreuzer 2006, pp. 65–66. See also ECJ Case C-281/02 *Owusu* v. *Jackson* [2005] ECR I-01383, spec. paras 33 and 34, in which the court considered the distinction between intra- and extra-European cases. The ECJ held that the purpose of the Brussels I-Convention was not solely to ensure the free movement of judgments between the Member States, but also to facilitate the functioning of the internal market. This latter objective was, however, not served only in intra-European cases, but by the uniform application of the Convention's rules on jurisdiction in any case.

[71] See already Sect. 5.4.1.1 above.

[72] See *supra* Sect. 5.4.1.1 for a number of examples.

It is to be noted that the mentioned concerns with respect to the limitation of the scope of application of the choice of law to intra-European cases can partly be met by the establishment of a choice of law instrument in which both intra- and extra-European legal relationships are regulated, but which provides for different rules for each of the two situations. In other words, in intra-European situations a different connecting factor may be applied than in extra-European situations.[73] However, this does not circumvent the need of a precise distinction between intra- and extra-European cases, which is truly intricate. Besides, since the European aims and objectives do not require the establishment of an intra-European choice of law system, it is not necessary to make the mentioned distinction.

8.4.2.2 Respect for the Existing Legal Diversity

Regardless of all the competences that have been transferred to the European Union, the Member States have remained sovereign states with their own legal systems and traditions. Besides, each Member State is, within the boundaries of European law, still free to pursue its own (legal) development. The respect for the diversity of these national systems is the cornerstone of the European integration in the field of justice.[74] This follows from Article 4(2) EU-Treaty, which determines that the Union shall respect the national identities of the Member States. In particular, the area of freedom, security and justice — the framework within which European private international law rules are established — is to be build upon respect for the different legal systems and traditions of the Member States (Article 67(1) TFEU).

Do these provisions have any influence on European international family law? The 'national identity' of the Member States in the context of Article 4(2) EU-Treaty refers to their distinguishing features.[75] To what extent is the legal system of a state part of its national identity?[76]

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[73] Cf., Ten Wolde 2004, p. 504; and Ten Wolde and Knot 2006, p. 29, arguing that the intra-European choice of law is to be based on principles that differ from those on which the choice of law rules in relation to third states are based.

[74] See the Hague Programme, p. 11, in which the Council indicated that the progressive development of a European judicial culture was to be based on the diversity of legal systems and unity through European law.

[75] See Hilf 1995, spec. p. 163: '*Nationale Identität stellt ab auf das subjektive Zusammengehörigkeitsgefühl, das sich in einem Volk aus historischen, wirtschaftlichen, religiösen oder sonstigen soziokulturellen Unterschieden zu anderen Nationen bildet*.' See equally Uhle 2004, spec. pp. 475–476. Cf., the German *Bundesverfassungsgericht* (the Constitutional Court) held in its judgment of 12 October 1993 (BVerfGE 89, 155, the so-called *Maastricht-Urteil*, para 109) that the national identity of the Member States concerns their independence and sovereignty ('*die Unabhängigkeit und Souveränität der Mitgliedstaaten*').

[76] See generally on this question Friedman 1975.

Law has been defined as 'a part of the cultural web that shapes and defines people's lives.'[77] Indeed, their lives are shaped by the values embodied and given effect through the legal order.[78] Law is thus culturally defined. What is culture then?

> Culture gives people a sense of who they are, of belonging, of how they should behave, and what they should be doing. Culture impacts behaviour, morale, […] and includes values and patterns that influence […] attitudes and actions.[79]

This definition shows that culture influences many aspects of life, such as attitude, social organisation and thought patterns. Thought patterns in turn affect the process of reasoning, be it legal or otherwise. What is perfectly logical, self-evident and reasonable for one culture may be offensive, illogical and unreasonable for any other. Consequently, the cultural background of a state strongly influences its legal system and understanding.[80] The legal system can thus be considered as a mirror of a state and of its culture.[81] Therefore, the legal system of a state definitely forms part of its national identity.

Law must always be considered in a specific cultural context. Neither economically oriented private law nor family law can be viewed as independent of culturally shaped values or ideals. However, few — if any — fields of law form a more clear expression of culture than family law.[82] Divorce is a good example of a culturally coloured legal concept. As seen above, throughout the European Union there are currently five grounds for divorce present in the legal systems of the Member States.[83] On one end of the spectrum there is the divorce based on fault (divorce as a sanction) and, on the other end, there is divorce on demand (divorce as a right). Whereas it is not easy to have a marriage dissolved in the catholic Member States such as Cyprus, Poland and Ireland, and not permitted at all in Malta, there are virtually no obstacles to divorce in more liberal Member States such as Sweden and the Netherlands.

The European Union secures the respect for the legal diversity of its Member States — and thus for their national identities — in two distinct ways.[84] In the first place, the national peculiarities of the substantive family laws of the Member States are left untouched. Apart from the lack of competence to unify issues of substantive law, it is questionable whether a European unification of substantive family law would be feasible, as quite often the field of family law is described as

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[77] See Haltern 2003, p. 15: '*Recht ist Teil des kulturellen Gewebes, das unser Leben prägt und definiert*.'

[78] Cf., Mills 2009, p. 256.

[79] Moran et al. 2007, p. 6.

[80] See ibid., p. 61.

[81] See e.g. Sanada 1989, p. 128.

[82] See Thue 1996, p. 59; Poillot-Peruzzetto and Marmisse 2001, p. 465; Dethloff 2003, p. 59.

[83] See *supra* Sect. 5.2.1.

[84] It is not certain to what extent the EU legislature particularly had the respect for the national identity of the Member States in mind in this regard.

being too deeply rooted in the national legal cultures, which would prevent any attempt to unification.[85] By not interfering in the substantive family laws of the Member States the European Union respects the existing cultural diversity in its territory.[86] By pursuing the unification of private international law — a field of law that coordinates the diversity of national laws[87] — the EU urges to respect the peculiarities of each legal system.

Secondly, the common choice of law rules would respect the diversity by allowing the application of foreign law.[88] In this respect KOHLER has observed that the refusal of some Member States to apply foreign law (*i.c.* with regard to divorce) — and thus automatically excluding the application of the laws of other states — does not express much willingness to cooperate, which is after all one of the key features of European integration.[89] The willingness to apply foreign law — certainly in intra-European cases — ensues from the principle of mutual recognition and expresses the trust in the fundamental equivalence of the legal systems.[90] The European choice of law rules on issues of family law that have been enacted and proposed so far do not exclude the application of foreign law. Therefore, this characteristic of the European choice of law expresses that the diversity of the Member States' legal systems is respected.[91] Yet the attempt to unify the choice of law on divorce has shown that the willingness to apply foreign law is under great pressure.[92] Considering the importance of the application of foreign law from the perspective of the respect for legal diversity, the European legislature needs to make great efforts to ensure that this feature occupies an important place in the choice of law.

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[85] Cf., *supra* Sect. 1.1.

[86] Poillot-Peruzzetto and Marmisse 2001, p. 465: '*Organiser et structurer un corpus de règles de droit international privé en matière familiale permettrait d'assurer l'unité dans la diversité, de maintenir les spécificités en coordonnant les systèmes.*'

[87] Cf., *supra* Sect. 1.1.

[88] It is to be noted that also a restrictive application of the public policy exception may reflect the respect for the legal diversity. Cf., the resolution of the Institute of International Law on 'Cultural differences and ordre public in family private international law' of 2005, available at: http://www.idi-iil.org/idiE/navig_chon2003.html.

The European choice of law in family matters meets this requirement: it does allow the public policy exception, but only in cases in which it the application of the applicable law would be *manifestly incompatible* with the public policy. Both Article 13 of the Protocol on the Law Applicable to Maintenance Obligations and Article 20e of the Brussels II*ter*-Proposal contain this limitation.

[89] Kohler 2008b, p. 196.

[90] Although, as indicated in Sect. 6.4 above, the principle of mutual trust does not seem to require that Member States can no longer propagate a *lex fori*-approach, since a refusal to apply foreign law does not necessarily infringe the equivalence of the legal systems of the Member States.

[91] It is to be noted that this feature may incline to a different regulation of intra-European and extra-European legal relationships, as the Member States may be more willing to apply foreign law in the former cases.

[92] See *supra* Sect. 6.4.

Although the question of the respect for the legal diversity is justified in light of the European motto of 'unity in diversity', Mankowski has rightly stressed that legal scholars tend to overestimate the cultural element that can be attributed to the law.[93]

However, in the European context one should not be surprised that many — if not all — Member States will search for the protection of fundamental characteristics of their own legal system (such as the marriage open to couples regardless of their sex), which are part of their national identity.[94] The Brussels II*ter*-Proposal has shown that, even though the proposed choice of law rules are aimed neither at replacing nor at harmonising the national substantive divorce laws, the unification of the choice of law can lead to strong resistance of the Member States.[95] This attitude of the Member States can be explained by the search for the respect of their national identity.

Consequently, despite the danger that the significance of the respect for the legal diversity is slightly overestimated by legal scholars, it does play an important part in the Europeanisation of the choice of law on family issues.

8.4.2.3 'United in Diversity'

From the previous paragraph it is clear that the EU legislature has to respect the existing legal diversity. In establishing unified choice of law rules on family law the same legislature is, however, also required to observe the motto 'united in diversity'.

A particular issue that comes into play in this regard is the fact that within the European Union both common and civil law systems exist.[96] According to Fiorini the common European choice of law has to show a 'mixedness' of these two legal traditions:

> Given that the European Union involves legal systems belonging to both the common and the civil law tradition, and that the very aim of private international law is the coordination of legal systems, it would seem rather sensible that European private international law should borrow from both traditions and therefore display characteristics of *mixedness*.[97]

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[93] Mankowski 2004, p. 284. See also already Henrich 2001, p. 444.

[94] See equally Gaudemet-Tallon 2002, pp. 175–176; De Groot and Rutten 2004, p. 282; Siehr 2008, p. 85.

[95] In this respect the strong interconnection between substantive law and the choice of law plays an important part. See *supra* Sect. 6.2, in which the position of Malta has been discussed. Malta is the only Member State that does not provide for divorce in its legislation. Malta fiercely opposed the Brussels II*ter*-Proposal, as it feared that the adoption of common choice of law rules would oblige the Maltese courts to apply foreign law in order to circumvent its ban on divorce. A special provision was added to the Brussels II*ter*-Proposal so as to solve the Maltese problem in order to prevent Malta from using its power of veto.

[96] In the EU the following Member States are common law jurisdictions: the United Kingdom, Ireland, Cyprus and (in some but not all respects) Malta.

[97] Fiorini 2008a, p. 3.

Given a number of recent common law publications, in which the ECJ has been reproached of tending to adopt a 'civil law based approach',[98] it seems wise to consider such mixedness, which would certainly contribute to the adherence to the European motto 'united in diversity'. However, what does it mean in practice?

The experience of the Louisiana private international law code shows that it is not impossible to establish a private international law system that successfully mixes common and civil law features.[99] Symeonides concluded that this code did not aspire to resolve the 'eternal tension' between common and civil law traditions, but that it could reconcile the two traditions and provide a framework for them for an interactive coexistence.[100] The Louisiana private international law code has managed to find 'an independent third path between the common law and the civil law paths'.[101] This 'third path' is best illustrated by the balance struck between the principles of legal certainty and flexibility.

Broadly speaking common law systems lay strong emphasis on the notion of flexibility, whereas in civil law systems, on the contrary, the notion of certainty prevails. The Louisiana private international law code provides for three distinct techniques to strike a balance between these notions: in the first place, the use of alternative connecting factors (e.g. 'a marriage is valid in the state where contracted, or in the state where the parties were first domiciled as husband and wife, shall be treated as valid […]'),[102] secondly, the use of 'soft' connecting factors (e.g. application of the most closely connected law), and, thirdly, the use of escape clauses (e.g. exception to the designated law if it is manifestly clear that the circumstances of the case are more closely connected to another law').[103]

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[98] See Mance 2007, p. 87 ff. Mance specifically refers to the following cases: ECJ Case C-116/02 *Erich Gasser* v. *Misat* [2003] ECR I-14693; ECJ Case C-159/02 *Turner* v. *Grovit* [2004] ECR I-03565; and ECJ Case C-281/02 *Owusu* v. *Jackson* [2005] ECR I-01383. See for a similar view: Hartley 2005, pp. 813–828.

[99] Equally Book Ten of the Civil Code of Quebec is a successful fruit of a private international law codification in a mixed legal system. See on this Act, Glenn 1996, pp. 231–268.

[100] Symeonides 1993; Symeonides 2009.

[101] See Symeonides 2009, p. 1054.

[102] Rules that employ alternative connecting factors authorise the court to apply the law of the country which produces the preferred substantive result (e.g. upholding the marriage).

[103] See Symeonides 2009, pp. 1061–1062. Moreover, the Louisiana code has introduced two other 'innovative' features. In the first place, there is a careful combination and interplay between, on the one hand, rules that specifically designate the applicable law for certain cases or issues and, on the other hand, a general 'approach', namely a list of factors providing courts with guided directions and discretion in selecting the applicable law. Secondly, the Louisiana code calls for an issue-by-issue analysis: rather than seeking to choose a law as if all aspects of the case were in dispute, the focus is on the narrow issues where a conflict exists and, subsequently, to proceed accordingly. Depending on the circumstances of the case, this analysis may lead either to the application of the law of the same country to all issues, or to the application of the laws of different countries to different issues in the same case ('*dépeçage*').

Can the Louisiana experience serve as a model for the European choice of law methodology?

The Louisiana code shows that three specific techniques can be used to strike a balance between the common and civil law traditions: the use of alternative connecting factors, the use of soft connecting factors and the use of escape clauses. The balance between certainty and flexibility is in this regard absolutely crucial.[104] The ultimate goal of a unified choice of law system is that in all Member States the same national law is applied to an international family dispute in the European Union, irrespective of which court is seised. In this context the use of alternative connecting factors is not suitable, as it will not lead to the mentioned goal of the European private international law system. Every connecting factor of the choice of law rule containing alternative connecting factors can refer to the applicable law in random order, which fails to give the parties certainty as to the applicable law before making use of their right to free movement. It is to the discretion of the court to determine which legal system produces the desired result. However, what happens if several legal systems would produce this result? Do the parties have any say in this matter? If so, this approach may have a negative effect on the balance in the procedural position of the parties resulting from their unequal financial possibilities. For the parties do not always have the same (financial) means to examine which of the connecting factors leads to the application of the law that is most advantageous to his or her cause. Consequently, the use of alternative connecting factors does not provide for a proper balance between certainty and flexibility. This same conclusion holds true for the second technique mentioned — the use of soft connecting factors; leaving the courts the discretion to determine the most closely connected law on the basis of the circumstances of the case has disadvantages, most importantly its subjectivity and unpredictability.[105]

The third technique — the use of escape clauses — could, however, very well lead to a solution. The European Union should develop choice of law rules that refer to the law of the closest connection but that are also adaptable to the circumstances of the case. Although such a correcting mechanism carries the risk with it as regards legal certainty and predictability, on the other hand, it would imply a just adjustment of the result of the connection with a certain legal system in light of the principle of the closest connection. However, this possibility should have a reasonably high threshold in order to displace the otherwise applicable law: it should be demonstrated that the particular case has only a very slight connection to the law designated as applicable and has a much closer connection to another

[104] See equally Basedow 2008, p. 17: '*flexibility without certainty means anarchy. Flexibility and certainty have to be brought in balance*.'

[105] Cf., *supra* Sect. 6.5.4. For exactly these reasons the Rome I-Regulation amended the provision on the law applicable to contractual obligations, which was previously governed by the law which was most closely connected to the contract.

law.[106] By means of a combination of strict rules and a flexible possibility to displace the presumptively applicable law in favour of the principle of the closest connection, the European choice of law on family issues should attempt to attain an appropriate balance between certainty and flexibility and, accordingly, between the common and civil law traditions.[107]

8.4.3 *General Characteristics of European International Family Law* De Lege Lata

From the development of European choice of law rules in the field of family law so far, some general characteristics can be deduced. These characteristics are present in the adopted instrument on maintenance, the Brussels II*ter*-Proposal and they can partly be deduced from the Commission's Green Paper on matrimonial property.

In general the prime characteristic of the EU's choice of law approach is its strong emphasis on legal certainty, uniformity and predictability.

Without having the intention to enumerate exhaustively the general characteristics of the European choice of law rules in the field of family law, the following five characteristics can be distinguished:

- *adherence to the Savignyan choice of law methodology*

The autonomous private international law systems of the majority of the continental Member States of the European Union basically follow the classical Savignyan choice of law approach: the choice of law rules designate the law of the country with which the case is most closely connected.[108] Yet other Member States, such as the United Kingdom, Ireland and Cyprus, follow a different choice of law approach: their choice of law rules exclusively designate the *lex fori* as the applicable law.

The choice of law rules that have been enacted and proposed so far show that the European Union adheres to the classical choice of law approach, as the common choice of law rules are based on the principle of the closest

[106] See Sect. 5.5.3.4 above, in which is argued in favour of the insertion of such an escape clause in the common choice of law on divorce.

[107] Cf., Basedow 2008, pp. 17–18 who refers in this respect to the *technique of presumption and rebuttal*.

[108] Although many countries have developed and 'materialised' their private international law in the course of time, which led to the disappearance of the requirement that a choice of law rule should be abstract and neutral, the classical Savignyan method remained the basis of their private international law systems. See e.g. Kadner Graziano 2003; De Boer 2004, spec. p. 41 on the 'inroads on the tenets of traditional choice of law'.

connection.[109] The basis of the determination of the applicable law to an international case is that the legal systems involved are equally and evenly eligible for application.

- *The achievement of 'conflicts justice'*

The European choice of law rules in the field of family law are — just as any legal provision — aimed at achieving justice. In the context of private international law the reference to justice can entail either 'substantive justice' or 'conflicts justice'.[110] The achievement of substantive justice refers to the solution of a case that is considered the most 'just' in a direct, material sense (*das sachlich beste Recht*). However, in European context the reference to substantive justice makes no sense, as it should not involve a determination of whether one legal system gives a more just outcome of the case than another.[111] Instead it should 'merely' ensure the application of the legal system that is most appropriate to the resolution of the case, which is indicated by the term conflicts justice (*das räumlich beste Recht*). In European private international law — an area which includes different jurisdictions with diverging laws — justice thus characterises a legal environment which enables the predictability of which courts will be competent and which law will be applied in a given case.[112]

The aim of achieving conflicts justice by the European choice of law is already clear from the EC-Treaty, as it provides the legal basis for the unification of private international law and not of substantive law of the Member States.[113] In the European choice of law there is, consequently, no room for the designation of *das*

[109] See *inter alia* Kohler 2003, p. 409; Schaub 2005, p. 335: '*Methodischer Ausgangspunkt des europäischen Kollisionsrechts ist nach wie vor der Savigny'sche Ansatz: Zunächst wird nach Rechtsverhältnissen, also sachrechtlichen Kategorien, systematisiert, um bestimmte Anknüpfungsgegenstände zu schaffen. Für diese werden anschließend — ausgehend vom Prinzip der engsten Verbindung — Anknüpfungspunkte ermittelt.*'; Michaels 2006, p. 3: '*What the EU legislates in the realm of private international law is, in shape and approach, widely compatible with traditional private international law.*'; Pocar 2008, p. 15: '[…] *the method of conflict of laws remains formally unchanged*'; Leible 2009, p. 7: '*Der "Triumpf" des klassischen Kollisionsrechts.*' According to Ballarino and Ubertazzi 2004, p. 124 ff equally the European Court of Justice has shown a clear preference towards this method, which results from the case *Garcia Avello* (ECJ Case C-148/02 [2003] ECR I-11613).

[110] This idea was defended by Zweigert: see Zweigert 1948, p. 50; Zweigert 1973, pp. 283–299. See equally Kegel 1953; and Symeonides 2001.

[111] There are, however, exceptions; see e.g. the choice of law rules in EU labour law. See further on these rules Susanti 2008, p. 82 ff.

[112] See equally Basedow 2009, p. 458.

[113] Cf., Weber 2004, pp. 234–235; Basedow 2009, p. 457.

sachlich beste Recht, the law which achieves substantive justice in the individual case.[114]

- *The choice of law contains* 'Sachnormverweisungen'

The European choice of law rules that have been enacted and proposed so far contain so-called *Sachnormverweisungen*, i.e. choice of law rules that refer solely to the substantive rules of the applicable law. Foreign choice of law rules are not referred to. This implies that the legal system referred to by the common choice of law rules applies, irrespective of further references by the choice of law rules of that legal system. Also if the choice of law rules of the applicable law would refer back to the law of the competent jurisdiction, such a reference cannot be accepted. Consequently, the European choice of law precludes the application of *renvoi*.[115]

- *Universal scope of application*

The aim of the European Commission is to establish a common choice of law that applies to both intra- and extra-European cases. In order to achieve this goal the scope of application of the European choice of law rules in the field of family law that have been enacted and proposed so far is universal. Such a scope of application implies that the choice of law rules are not dependent on any other link to the European Union than that the court of a Member State has jurisdiction and is by reason of this competence dealing with the case.[116]

The universal scope of application of the choice of law rules joins the wide scope of application of the European jurisdictional rules.[117] For instance, the jurisdictional rules of the Brussels II*bis*-Regulation apply not only to Union citizens, but also to third country nationals, as the competence of the courts of the Member States is pursuant to Article 3(1)(a) of the Brussels II*bis*-Regulation primarily based on the habitual residence of the spouses.[118]

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[114] De Boer is very critical on this characteristic with regard to the Rome II-Regulation. See De Boer 2008b, p. 993: '*De opstellers van de verordening hebben zich teveel laten leiden door de aanhangers van het neutrale, waardevrije IPR, waarin nog een onderscheid gemaakt wordt tussen conflictenrechtelijke en materieelrechtelijke rechtvaardigheid* […]. *De evolutie van het conflictenrecht in Europa — een antwoord op de* conflicts revolution *in de Verenigde Staten — is kennelijk aan de Europese wetgever voorbij gegaan*'. However, Schaub does not share the opinion that the European choice of law on non-contractual obligations is 'non-normative'. See Schaub 2005, p. 335: '*Jedenfalls in den zahlreichen Eingriffsnormen und ordre public-Regelungen dieser Entwürfe* [i.e. *the proposals for the Rome I- and II-Regulations; NAB*] *und des Aussenkollisionsrechts der Gemeinschaft zeigt sich aber eine deutliche Tendenz zur Materialisierung des europäischen Kollisionsrechts. Ziel scheint nicht mehr die rein internationalprivatrechtliche Gerechtigkeit und dadurch der sachnächsten Rechtsordnung zu sein, sondern das Erreichen eines auch materiell als gerecht empfundenen Ergebnisses*.'

[115] See further on *renvoi infra* Sect. 8.4.4.2.

[116] See more elaborately *supra* Sects. 5.4.1.1 and 8.4.2.1 on the universal scope of application of the European choice of law.

[117] See Mansel 2003, pp. 144–145.

[118] The same goes for the jurisdictional rules of the Maintenance Regulation (Article 3).

- *Party autonomy*

In European choice of law party autonomy is the cornerstone in the determination of the applicable law; it is becoming a fundamental principle.[119] Leaving the parties the opportunity to choose the applicable law themselves is part of a general trend towards liberalisation in private international law, which more and more frequently recognises that it is the individual, and not the state, who can best weigh the relevant choice of law interests.[120] The *professio iuris* grants the parties involved the absolute certainty that the law they have chosen will be applied. In fact one of the core objectives of private international law is to facilitate — rather than to obstruct — the search for consensual solutions by the parties involved in family disputes.[121] The introduction of party autonomy is therefore to be welcomed.

The principle of party autonomy is certainly not a 'makeshift solution', i.e. a *solution faute de mieux*.[122] In the past the principle of party autonomy could bring a solution in case of a failure to reach a compromise on the connecting factor to be employed. However, in the European context there is no case of such situation; the principle of party autonomy has been deliberately chosen as the prevailing principle.[123] The right to choose the applicable law fits very well in the emerging area of freedom, security and justice, in which the citizen can freely exercise his rights. Party autonomy leaves the parties the possibility to shape themselves their legal relationships.[124]

Allowing (limited) party autonomy certainly has advantages: a valid *professio iuris* has the effect that the court is relieved of *ex officio* finding and applying any law other than the one chosen. This would produce a less complicated choice of law rule and even serve legal economy. Finally, party autonomy provides for the largest possible chance of the achievement of (material) justice, as not the abstract objective, but rather the subjective interests of the parties determine what is just.[125]

8.4.4 *The Methodology of European International Family law* De Lege Ferenda

In Section 4.3.2 the internal market and its four fundamental freedoms, the area of freedom, security and justice, the principle of mutual recognition and the

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[119] See *inter alia* Martiny 2007, pp. 90–91; Hohloch 2007, p. 262; Pertegás 2007, p. 329 ff; Rühl 2008, p. 209.

[120] See Hohloch 2007, p. 263; Basedow 2008, p. 14 ff.

[121] See Pertegás 2007, p. 321.

[122] See Leible 2004.

[123] See more elaborately on the theory of party autonomy, Pontier 1997, p. 275 ff.

[124] Cf., Weber 2004, p. 240 ff.

[125] Ibid., pp. 242–243.

protection of stability interests have been distinguished as the specific European aims and objectives of private international law. The consequential question is whether these aims and objectives involve a private international law policy of the European Union that distinguishes the new common European rules from the traditional national ones?

One of the main tasks — and at the same time difficulties — of the methodology of the European choice of law is to secure a balance between unity and diversity.[126]

It should be noted in this context that now the EU pursues the progressive development of an EU system of private international law, it can no longer get around the highly sensitive issues of family law, such as the institution of same-sex marriage.[127] Although it is hardly surprising that the European Union legislature finds it difficult to tackle these highly sensitive issues, it is not wise to continue avoiding them. Resulting from the increasing mobility of citizens, the Member States will be more and more faced with problems connected to same-sex marriages. Efficiency calls for a Union-wide solution. Moreover, the fundamental EU principles of equality and non-discrimination would also require such a solution.[128]

Again it must be admitted that the Union legislature has little room for manoeuvre in this respect, as Article 81(3) TFEU requires a unanimous Council decision on legislative instruments in the field of international family law.

When discussing the unification of international family law, the first issue that emerges is what the basic premise of the European choice of law should be. Due to the high number of objectives attached to the unified choice of law, the underlying choice of law methodology is characterised by a pluralism of methods, within which the principle of the closest connection is the point of departure (Section 8.4.4.1). Not only the specific choice of law methodology is important for the establishment of a coherent system, an EU approach to the general doctrines of

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[126] See also Gaudemet-Tallon 2001, p. 337.

[127] Cf., Sect. 5.4.2.2 above on the halfhearted application of the proposed choice of law rules on divorce (Brussels II*ter*-Proposal) to the dissolution of same-sex marriages, i.e. leaving it to the discretion of the Member States whether or not to apply the common choice of law on divorce to the dissolution of same-sex marriages.

[128] The issue of the recognition of same-sex marriages is on the European agenda. In January 2006, the point of view of the European Commission became clear with the announcement of its vice-president, Frattini, that Member States which do not eliminate all forms of discrimination against homosexuals, including the refusal to approve 'marriage' and unions between same-sex couples, would be subject to sanctions and eventual expulsion from the EU. See: http://www.cwnews.com/news/viewstory.cfm?recnum=41919. Moreover, on 14 January 2009 the European Parliament has accepted a resolution that proposes to standardise among all Member States the legal status of same-sex relationships. See European Parliament resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004–2008 (2007/2145(INI)), p. 13. Equally the European Parliament resolution of 2 April 2009 on the application of Directive 2004/38/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 (2008/2184(INI)) calls for the recognition of same-sex couples.

private international law should also be developed (Section 8.4.4.2). Finally, in Section 8.4.4.3 the relationship with the Hague Conference on Private International Law will be discussed.

8.4.4.1 Basic Premise: A Pluralism of Methods

From the foregoing it is clear that the regulation of issues of international family law in the European Union is characterised by a pluralism of objectives. As a result of the large diversity of objectives attached to European international family law also the underlying choice of law methodology is marked by pluralism.[129] Besides the adherence to the Savignyan choice of law methodology, within which neutral and multilateral choice of law rules are propagated, there is also place for a balanced policy of private international law, within which interests such as the protection of the best interests of the child, the protection of incompetent persons, the principle of gender equality and the respect for the rights of the defence may be acknowledged.[130]

The first matter of importance in the development of the European system of international family law is to provide for clear, coherent and transparent choice of law rules that ensure legal certainty.[131]

The current European choice of law rules are based on the principle of the closest connection.[132] This principle joins the abovementioned objectives of the common choice of law rules.[133] In addition, the principle of the closest connection ensures that the legal systems involved are equally and evenly eligible for application. This aspect is of great importance in the European Union, in which the principle of mutual recognition presumes an equivalence of the legal norms of the Member States.[134] Finally, an important feature of the principle of the closest connection is that it can be concretised in the majority of cases, which highly contributes to the goal to ensure certainty.

Therefore, within the observed pluralism of methods the principle of the closest connection should be the point of departure.

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[129] Gannagé 2001, p. 13; Gaudemet-Tallon 2005, pp. 23–24. See in general on the pluralism of methods in private international law: Battifol 1973.

[130] Meeusen 2006, p. 24 rightly stresses that the adoption of European provisions on private international law within a genuine area of freedom, security and justice seems to leave scope for such a balanced policy of private international law.

[131] See equally Fiorini 2008a, p. 15.

[132] See Article 3 of the Hague Protocol on the Law Applicable to Maintenance Obligations and Article 20b of the Brussels II*ter*-Proposal. The principle of the closest connection is also the basic principle of the Rome I- and II-Regulations and the Proposal for a Succession Regulation.

[133] See equally Kohler 2003, p. 410.

[134] See *supra* Sect. 4.3.2.3.

The closest connection is to be established by the use of appropriate connecting factors providing for an objective connection.[135] The success of the choice of law methodology thus depends heavily on the adequacy of the connecting factors employed. Therefore, the identification and establishment of the connecting factors are essential tasks.[136]

The application of the most closely connected law requires the determination of what constitutes a close relationship. Family relations are first and foremost personal relations. It is therefore natural that the decisive connecting factor for the choice of law is the connection of the persons involved with a certain legal system.[137] Both the law under which a person has lived for a considerable period of time and the law of a person's place of origin can have such an impact that these legal systems may qualify for the application in cross-border cases.[138]

As has already been noted above, the lack of a substantive European family law is a great challenge for the establishment of a common choice of law.[139] For the national choice of law rules on family law always reflect to a certain extent the state of internal substantive family law. The stricter the rules of substantive family law are, the stricter the choice of law rules tend to be.[140] The choice of law methods employed by the Member States are often used to further certain national preferences.[141]

In specific issues the influence of particular principles, such as the protection of the best interests of the child and the principle of gender equality, or national preferences needs to be considered on a case by case basis. Such influence may very well lead to choice of law rules deviating from the principle of the closest connection.

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[135] See Lagarde 1986, for his theory on the '*principe de proximité*', particularly pp. 29–126 on the principle of the closest connection in the choice of law. See for an analysis of this principle in the European context: Fallon 2005.

[136] Cf., Martiny 2007, p. 85.

[137] See also Thue 1996, p. 54; Vischer 1999, p. 7; and Henrich 2001, p. 437.

[138] In this regard some authors make a strong appeal to the respect for the cultural identity of persons. Jayme even considers that the respect for the cultural identity of persons is one of the functions of private international law. See Jayme 1995. See also Mankowski 2004, p. 282 ff.

[139] See Poillot-Peruzzetto 2005, p. 31. According to Badiali the lack of a unified substantive law even renders the development of a European system of choice of law based on the traditional private international law approach impossible. See Badiali 1985, p. 37: '*l'impossibilité d'envisager, dans les systèmes communautaires, des règles de conflit de type traditionnel est indirectement confirmée par la constatation que les systèmes en question ne contiennent pas un droit privé formulé par eux-mêmes*.'

[140] This is clearly shown by the analysis in Sect. 5.2 above on divorce in substantive and private international law of the Member States.

[141] See *inter alia* Poillot-Peruzzetto and Marmisse 2001, p. 465.

8.4.4.2 General Doctrines of Private International Law

The unification of issues of international family law does not only require the development of a proper and sound methodology, but it equally requires a proper EU approach as regards the general provisions of private international law. Otherwise the consistency of the EU system of international family law would seriously be undermined by diverging national views on the interpretation of certain general doctrines.[142] Moreover, the absence of a uniform approach as regards these doctrines is not very conducive to legal certainty.[143]

Recently several academics have plunged into the development of general provisions of European private international law, derived from the existing and the proposed instruments in the field of private international law.[144] Leible admits, however, that the hardest phase in the development of EU general provisions of private international law is yet to come with the Europeanisation of issues of international family law.[145]

From the analysis of the Brussels II*ter*-Proposal five general doctrines emerged that are of particular importance, namely the *ex officio* authority, the preliminary question, characterisation, *renvoi* and the public policy exception.[146] In the following the development *de lege ferenda* of these five general principles of European private international law will be discussed.

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[142] Cf., Jayme and Kohler 2006, p. 541: '*Trotz aller kollisionsrechtlicher Vereinheitlichungstendenzen fehlt dem europäische Kollisionsrecht bislang ein Allgemeiner Teil, der die verschiedenen gemeinschaftsrechtlichen Instrumente "verklammert"*.' See equally Siehr 2008, p. 92. Currently there is a risk that, due to the present fragmented unification of European private international law, a coherent approach of the general doctrines of private international law may not arise. Theoretically, in each Regulation a distinct approach on these general doctrines can be adopted.

[143] In this respect Bogdan 2006, p. 12 rightly stressed that a full uniformity of results would require much more than a unification of the choice of law rules of the Member States as such, namely equally a unified approach to a number of general doctrines of private international law.

The analysis of the Brussels II*ter*-Proposal has shown that a lack of a unified approach on the general provisions may have serious implications on the uniform interpretation and application of the common choice of law rules; see *supra* Sect. 5.4.2.2 as regards the preliminary question, Sect. 5.5.3.4 on the *ex officio* authority of the courts, Sect. 5.6 as regards the application of foreign law and Sect. 5.7 on the public policy exception.

[144] See *inter alia* Leible 2007; Heinze 2008; Kreuzer 2008a; Sonnenberger 2008; and Leible 2009.

[145] See Leible 2009, p. 77: '*Die beiden Rom-Verordnungen sind Bausteine für einen allgemeinen Teil eines umfassenden europäisches Kollisionsrechts. Die meisten Grundsatzfragen stellen sich in aller Schärfe freilich erst bei der anstehenden Vergemeinschaftung des IPR der familien- und erbrechtlichen Rechtsbeziehungen*.'

[146] It cannot be excluded that also other general doctrines of private international law, such as adaptation and overriding mandatory provisions, come into play in issues of international family law. However, from the analysis above concerning divorce no problems as regards the latter doctrines have arisen, as a result of which they are not further deliberated upon.

- Ex officio *authority*

Does the competent court have *ex officio* authority to apply the European choice of law, provided that the parties fail to designate the applicable law themselves and do not plead the application of a certain law applicable pursuant to the European choice of law?

The fact that the choice of law will be included in a regulation implies that these rules should be applied *ex officio*. As seen above, a regulation has as a main characteristic that it is binding in its entirety and directly applicable in all Member States.[147] Moreover, the principle of solidarity contained in Article 4(3) second sentence EU-Treaty would require that courts apply the foreign law *ex officio*.[148] Furthermore, the uniform application of the common choice of law rules in all Member States equally necessitates the *ex officio* authority of the courts to apply the common rules.[149]

Consequently, the courts should be obliged pursuant to a general provision to apply the European choice of law rules *ex officio*.

- *Preliminary question*

When faced with an issue of choice of law, the competent court is usually equally faced with one or more preliminary questions. For example, in case of a divorce, the court first needs to verify whether there is actually a valid marriage: divorce is only available if the parties are married.[150]

Since one of the aims pursued by the Europeanisation of international family law is the creation of a European judicial area, an EU approach to the preliminary question would be desirable. The preliminary question actually plays a significant part in the decision on the main issue of the case and, therefore, has major consequences on the uniform application of the common choice of law rules.[151] The uniform application of the preliminary question in the European Union is thus in the interest of the unification of the choice of law in family matters: both legal certainty and predictability are highly promoted.[152]

In the absence of European choice of law rules in most issues of family law currently no autonomous response can be given to the majority of the preliminary questions that may arise. Therefore, the approach of the Union legislature in the Brussels II*ter*-Proposal — response to the preliminary question *lege fori* — is an obvious solution. Yet if it is up to the European Commission this situation will change in the future: the development of a European system of international family

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147 See *supra* Sect. 4.4.4.3.

148 See Jänterä-Jareborg 2003, spec. p. 367 ff.

149 Cf., Siehr 2008, p. 86.

150 The Brussels II*ter*-Proposal provides that the question whether there is case of a marriage is to be determined by the national choice of law rules of the Member States. See Council Document No. 9712/08 JUSTCIV 106 of 23 May 2008, Article 20e-1, p. 16.

151 Cf., Heinze 2008, p. 113 ff.

152 See equally Sonnenberger 2008, pp. 240–241.

law is on the agenda. Once this system is established, an autonomous response to the preliminary question should be the general rule.

- *Characterisation*

The choice of law sets out specific 'connecting categories' by deciding, for instance, that maintenance obligations are governed by the law of the habitual residence of the creditor. Consequently, when the court has to determine the law applicable to a factual situation, it must first place this situation in the correct legal category before ascertaining the applicable law. This characterisation process is a question that relates to the interpretation of rules. Therefore, in European context characterisation is influenced by the general interpretative criteria developed by the Court of Justice.[153]

The ECJ developed the principle pursuant to which the meaning of the concepts and terms used in European legislation may either be established by developing autonomous notions or by reference to domestic law.[154] Unsurprisingly, the Court took the position that an autonomous definition should be preferred to the extent possible.[155] In the case *Leffler* the ECJ pointed out that

> the objective pursued by the Treaty of Amsterdam of creating an area of freedom, security and justice, thereby giving the Community a new dimension, and the transfer from the EU Treaty to the EC Treaty of the body of rules enabling measures in the field of judicial cooperation in civil matters having cross-border implications to be adopted testify the will of the Member States to establish such measures firmly in the Community legal order and thus to lay down the principle that they are to be interpreted autonomously.[156]

This case indicates that as regards issues of international family law that have been Europeanised the possibility of recourse to national law for the purpose of characterisation is precluded, save where EU law refers to, or can be interpreted as referring to, national law.

The notions used in European private international law should be primarily construed according to substantive EU law, if any such rules exist. A number of family law notions are present in free movement legislation, social security provisions, sex equality law and in the Staff Regulations as legal grounds for the application of EU law.[157] The European Court of Justice and the Court of First Instance have interpreted family law notions on several occasions, such as 'spouse', 'marriage', etc.[158]

However, the autonomous interpretation of the common choice of law precludes the automatic transposition of the above mentioned family law notions. The

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[153] See Bertoli 2006, p. 379. See on this issue equally Audit 2004, pp. 789–816.

[154] ECJ Case 12/76 *Tessili* v. *Dunlop* [1976] ECR 1473, para 10.

[155] See ECJ Case C-27/02 *Engler* v. *Janus Versand GmbH* [2005] ECR I-481, para 33.

[156] ECJ Case C-443/03 *Leffler* [2005] ECR I-9611, para 45.

[157] See McGlynn 2000, p. 223 ff; Caracciolo di Torella 2004, p. 32 ff.

[158] ECJ Case 59/85 *Netherlands State* v. *Reed* [1986] ECR 1283; joined cases C-122/99P and C-125/99P *D and Sweden* v. *Council* [2001] ECR I-4319.

respective fields of law often pursue distinct aims. For example, whereas a polygamous marriage may very well qualify as a marriage according to the choice of law, residence rights are only assigned to one spouse and for that purpose the polygamous marriage does not qualify as a marriage (see Article 4(4) of the Family Reunification Directive).[159]

In order to promote the uniformity of application of the Union law the interpretation of the common choice of law should be interpreted autonomously.[160] The principle of equality would also require such an autonomous interpretation.[161] Moreover, the lack of autonomous interpretation of the common choice of law rules is not conducive to legal certainty and predictability and might again lead to forum shopping.

- *Renvoi*

The choice of law rules contain so-called *Sachnormverweisungen*, i.e. choice of law rules that refer solely to the substantive rules of the applicable law.[162] It is clear that there is no place for *renvoi* if the parties have chosen the law to be applied to their divorce. If they have made such a choice, the parties clearly intended that the substantive law provisions of the chosen law be applicable; their choice accordingly excludes any possibility of *renvoi* to another law.[163]

If the parties have not chosen the applicable law, it is clear that in cases in which the law of a Member State is designated as the applicable law the issue of *renvoi* does not arise. If the choice of law rules on issues of family law are unified within the European Union, all Member States apply the same choice of law rules, which means that every reference to the law of a Member State will automatically be accepted.[164]

However, the exclusion of *renvoi* is not obvious in cases in which the law of a third country is designated as the applicable law. The issue of *renvoi* arises where the common choice of law rules refer an issue to the law of another country which, under its choice of law rules in turn refers the issue back to the law of the forum (*Rückverweisung*) or to the law of yet another country (*Weiterverweisung*). The exclusion of both these forms of *renvoi* in extra-European cases has been questioned.[165] According to some *renvoi* should be accepted, at least in cases of *Rückverweisung*. Although the acceptance of a *Rückverweisung* is certainly tempting — it would allow the competent court to apply its own law — it should

[159] See Council Directive 2003/86/EC on the right to family reunification, [2003] OJ L251/12.

[160] Cf., ECJ Case C-523/07 *A* [2009] ECR I-02805 as regards the concept of habitual residence.

[161] See also Tomasi et al. 2007, p. 374.

[162] See *supra* Sect. 8.4.3. See on *renvoi* in general: Sauveplanne 1990.

[163] Cf., Report on the Convention on the law applicable to contractual obligation (Giuliano-Lagarde Report), [1980] OJ C 282/1, at Article 15.

[164] Cf., with regard to the European choice of law on succession, Knot 2008, pp. 200–201.

[165] See Martiny 2007, p. 96; Kohler 2008a, pp. 1679–1680; and Siehr 2008, pp. 90–91.

be rejected from a methodological point of view.[166] The European choice of law rules are to be based on the principle of the closest connection. These rules have been constructed in such a way that they refer — in the view of the European legislature — to the most closely connected law.[167] From this perspective, accepting *renvoi* would be contrary to the principle of the closest connection. Moreover, Kropholler rightly points to the fact that the aim of the regulation is the development of a new, uniform choice of law, which refers directly to the applicable substantive law, and not the development of a '*Superkollisionsrecht*', which refers to the existing choice of law systems.[168] Finally, from a practical point of view also *renvoi* should be excluded, for *renvoi* would only detract from the clarity and ease of use that the uniform choice of law aims to realise, as it implies a considerable burden on legal practice.[169] Therefore, the uniform European choice of law system requires the exclusion of *renvoi*.

- *Public policy exception*

The public policy exception is meant to exclude the application of foreign law if this would result in a violation of fundamental values of the society involved.

The common choice of law rules on issues of international family law that have been enacted and proposed so far refer to the public policy notion of the forum.[170] Yet the national approaches to the application of the public policy exception differ greatly from one Member State to another, which might endanger the objective of decisional harmony.

Is it possible to refer to the European public policy exception? The advantage of the reference to a European public policy exception would be that the European Court of Justice can provide for a uniform interpretation of this concept. The European Union system does have its own public policy that is formed by the fundamental freedoms, European citizenship, human rights and the principles of

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[166] Incidentally accepting *renvoi* would involve a strict European definition of the concept. Cf., Kropholler (2006), p. 178 stating that countries can take: '*eine verschiedene Haltung zu den einzelnen Renvoi-Fällen (Rückverweisung im engeren Sinne, Weiterverweisung, Zirkelverweisung etc.)*.' Without such strict definition forum shopping is likely to occur and the uniformity of decisions is at stake. See Knot 2008, p. 126 for an overview of the different positions taken with respect to *renvoi*.

[167] See also Report on the Convention on the law applicable to contractual obligations (Giuliano-Lagarde Report), [1980] OJ C 282/1, at Article 15: '*the exclusion of renvoi is justified in international conventions regarding conflict of laws. If the Convention attempts as far as possible to localize the legal situation and to determine the country with which it is most closely connected, the law specified by the conflicts rule in the Convention should not be allowed to question this determination of place*.' Cf., with regard to Dutch private international law, Ten Wolde 2009, p. 66.

[168] Kropholler 2000, pp. 393–394. See also Rüberg 2005, pp. 104–105.

[169] Cf., Kropholler 2000, p. 394: '*Für den Ausschluss des Renvoi lässt sich außerdem anführen, dass er die Rechtsanwendung vereinfacht und der Rechtsklarheit dient*.'

[170] See Article 13 of the Hague Protocol on the law applicable to maintenance obligations, Article 20e of the Brussels II*ter*-Proposal and Article 27 of the proposed Succession-Regulation.

non-discrimination and subsidiarity.[171] However, it is not clear whether or not there is a specific European public policy requiring the defence of European values and interests, to the extent that they do not coincide with those of the forum.[172]

Consequently, in the present absence of a specific European public policy the European legislature has no other option but to refer to the public policy of the Member States. In the future this reference should be reconsidered, as it leaves (too) much room to their national preferences.[173]

8.4.4.3 Role of the Hague Conference on Private International Law

The European Union is not the only actor in the field of the unification of private international law. The most important other actor is undoubtedly the Hague Conference on Private International Law, which was established in 1893 with the mandate 'to work on the progressive unification of the rules of private international law.'[174] The result of this work is demonstrated in form of numerous Hague Conventions that have been adopted in the course of the years.

All the EU Member States are equally members of the Hague Conference on Private International Law. Since the entry into force of the Treaty of Amsterdam in 1999, the European legislature is competent to adopt measures in the field of private international law (Article 65 EC-Treaty, now Article 81 TFEU). This transfer of power equally influences the external competence of the European Union.[175] Initially the transfer of competence to the European Union was feared to stab the Hague Conference to the heart.[176] Fortunately the two organisations have sought cooperation: in 2007 the (at that time still) European Community has acceded to the Hague Conference.[177]

The Hague Conference and the European Union share the same goals to a certain extent. The ultimate goal of the Hague Conference is to strive for a world in which, despite the differences between legal systems, persons — individuals as

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[171] See on this issue: Thoma 2007, p. 120 ff; Reichelt 2007, pp. 7–11.

[172] Cf., De Boer 2008a, p. 328.

[173] Cf., *supra* Sect. 5.7 on the protection provided by the public policy exception of the Brussels II*ter*-Proposal.

[174] See Article 1 of the Statute of the Hague Conference on Private International Law.

[175] See *supra* Sect. 4.4.3.

[176] Cf., Jayme 2000, p. 167, speaking of a possible '*Todesstoß*'.

[177] See Council Decision on the accession of the EU to the Hague Conference on Private International Law, [2006] OJ L297/1. The Statute of the Hague Conference had to be amended so as to make membership of the Conference possible for the European Union as well as for any other Regional Economic Integration Organisation to which its Member States have transferred competence over matters of private international law. See *inter alia* Preliminary Document No. 32B of May 2005 for the attention of the Twentieth Session of the Hague Conference on Private International Law on the Admission of the European Community to the Hague Conference on Private International Law, p. 3; Schulz 2007; Bischoff 2008; Van Loon and Schulz 2008.

well as companies — can enjoy a high degree of legal certainty.[178] The EU equally aims — in addition to a number of other objectives — for legal certainty and uniformity of decisions.

However, the largest difference is the model of integration of private international law that characterises these two organisations: the European Union strives for regional integration, whereas the integration pursued by the Hague Conference is global in character.[179] The cooperation between these two organisations should, therefore, be designed in such a way that the regional integration does not interfere with or impede the global integration of private international law.[180]

The accession of the European Union to the Hague Conference has provided the Union the opportunity to play a role in the global integration of private international law. Ultimately, this guarantees that the regional integration of private international law is incorporated into its global integration.

Van Loon — the Secretary General of the Hague Conference — has rightly argued in favour of a functional Europeanisation of private international law: a Union instrument in the field of private international law should only be adopted if it is strictly necessary and if it has a specific surplus value. In all other cases preference should be given to the establishment of Hague Conventions.[181] This view is to be endorsed to the extent that if there is no (concrete view on a) Hague Convention in a particular field of law that can be ratified by the Member States, the Union legislature has a free hand to develop a Union instrument in that specific area.[182]

Suppose that the EU legislature intends to establish a Union instrument in the field of registered partnerships: the developments in the Hague Conference do not indicate that there is a view of a Hague Convention in this field. The law applicable in respect of 'unmarried couples', a subject broader than registered partnerships alone, has been set on the Agenda of the Hague Conference on Private International Law. However, no priority has been given to the setting up of an instrument in this field of law by the Member States of the Hague Conference.[183] Consequently, in such situations the Union legislature should thus be able to establish a European instrument.

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[178] See Recommendation of the European Parliament on the proposal for a Council decision on the accession of the European Union to the Hague Conference of Private International Law, A6-0250/2006, p. 6.

[179] See Traest 2003, p. 463.

[180] Cf., Boele-Woelki 1999, p. 372; Traest 2003, p. 463.

[181] Van Loon 2006, p. 101. See also already Gaudemet-Tallon 2001, pp. 332–338.

[182] Cf., Kreuzer 2008b, spec. pp. 142–143: '*Von fehlendem universalem Kollisionsrecht ist dabei auch dann auszugehen, wenn zwar eine kollisionsrechtliche Konvention mit universalem Geltungsanspruch* de iure *existiert, sich jedoch* de facto *über längere Zeit überhaupt nicht oder doch nicht über Europa hinaus durchgesetzt hat, so dass mit einer* universalen *Geltung auch in Zukunft nicht gerechnet werden kann*.'

[183] In April 2009 it was lastly confirmed that The Hague Conference leaves the issue without priority on the Agenda, see Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference of 31 March–2 April 2009. See further *supra* Sect. 3.2 for which reasons no Hague Convention in this field has been established yet.

The cooperation between the Hague Conference and the European Union has already achieved a success in the field of international family law. In November 2007 the Hague Protocol on the Law Applicable to Maintenance Obligations was agreed upon.[184] The European Union will ratify this Protocol, which will then determine the applicable law (see Article 15 Maintenance Regulation), and the European rules on jurisdiction and recognition and enforcement on maintenance obligations are provided for in the Maintenance Regulation.[185] Furthermore, in 2010 the 1996 Child Protection Convention will probably take effect throughout the EU, as the EU Member States shall 'take the necessary steps to deposit simultaneously their instruments of ratification or accession […] if possible before 5 June 2010.'[186]

One of the main reasons the global integration approach of the Hague Conference should be preferred is that the field of international family law is truly global in character: families with links to the territory of the European Union are split all over the world. Many European Member States have a large foreign population originating from third countries, i.e. non-EU Member States. According to recent statistics yearly more than one and half million third country nationals immigrate into the European Union.[187] This foreign population will often possess the nationality of their country of origin. In turn, many citizens of the Member States are living more or less permanently in third countries, such as the United States of America, Canada or China. Therefore, global cooperation addressing the resulting legal problems should take high preference; the European Union should thus give priority to the development of Hague Conventions to the largest possible extent.[188]

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[184] See The Hague Protocol on the Law Applicable to Maintenance Obligation, The Hague, 23 November 2007. See on the development of this Hague Protocol and the Hague Convention of 5 November 2007 on the International Recovery of Child Support and other Forms of Family Maintenance in general: McEleavy 2008.

[185] See Vlas 2009, pp. 293–295.

[186] See Article 3 of Council Decision No 431/2008 of 5 June 2008 authorizing certain Member States to ratify, or accede to, in the interest of the European Community, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and authorizing certain Member States to make a declaration on the application of the relevant internal rules of Community law, [2008] OJ L151/36.

[187] Information gathered in 2008 by Eurostat: http://epp.eurostat.ec.europa.eu.

[188] Cf., the Explanatory Memorandum to the Proposal for a Succession Regulation, p. 4, where is stated: '[*T*]*he Hague Convention of 5 October 1961 on the conflicts of laws relating to the form of testamentary dispositions has been ratified by 16 Member States. It would be desirable for the other Member States to ratify the Convention in the interests of the Community*.' See in general also the Stockholm Programme, p. 33: '*The Union should use its membership of The Hague Conference to actively promote the widest possible accession to the most relevant Conventions and to offer as much assistance as possible to other States with a view to the proper implementation of the instruments. The European Council invites the Council, the Commission and the Member States to encourage all partner countries to accede to those Conventions which are of particular interest to the Union*.'

8.5 Synthesis: Recommendations to the EU Legislature

The preceding analysis of the establishment of an EU system of international family law yields a number of recommendations that can be made to the Union legislature.

- *Decide on an EU choice of law methodology*

From the failed Brussels II*ter*-Proposal it is clear that the lack of agreement on the choice of law methodology to be employed is the principal reason for its failure. Consequently, an agreement on the choice of law methodology needs to be reached. Such a methodology should ideally be discussed independent from any concrete legislative project. This would permit the Member States to have a general debate on the issue without the pressure of having to serve their specific national interests in a particular field of family law. Such a debate should expressly address the 'foreign law problem'.

In the establishment of a proper EU methodology of international family law two balances are of particular importance in this respect: in the first place, that between unity and diversity and, secondly, that between certainty and flexibility. Especially the latter balance is particularly important so as to ensure that the European private international law system shows traits of both common and civil law systems, as the EU involves legal systems of both these traditions. By means of a combination of strict rules and a flexible possibility to displace the presumptively applicable law in favour of the principle of the closest connection, the European choice of law on family issues should attempt to attain an appropriate balance between certainty and flexibility and, accordingly, between the common and civil law traditions.

- *More transparency is required*

The failure to reach a compromise on the Brussels II*ter*-Proposal has also shown that transparency of the reasons behind the proposal is of vital importance. Therefore, in sensitive areas of law, such as the choice of law on family matters, a clear and reliable reasoning behind the Union action is required. The absence of such reasoning makes Union legislative proposal very vulnerable, which in turn harms the credibility of its basis. More — and preferably full — transparency will remove some of the aversion that a number of Member States currently feel towards any Union activity in the field of international family law.

Furthermore, once an EU instrument containing private international law rules has been established, more transparency can be attained by the development of a more elaborate Explanatory Memorandum or 'Guide to Good Practice' that accompanies the respective instrument. The application and ease of use of the instrument will be greatly advanced by such aid.

- *More coherence is required*

The European system of international family law is currently not developed in a coherent manner, mainly because the Commission adheres to a very fragmented approach. Although this approach can very well be explained by the fact that it will be easier to achieve consensus on these issues taken in isolation than it would have been had work been undertaken on a wider area of family law, it is not very conducive to legal certainty and predictability. A more systematic approach is thus called for, as unnecessary overlap and contradiction should be avoided.[189]

It should be noted, moreover, that the current fragmented approach supplies the European legislature with an enormous amount of extra work. It could namely well be that, ultimately, once the EU's unification programme has ended, a series of streamlining reforms of the various sectors individually unified is needed in order to coordinate them. In the end the European system of private international law should ideally display the following features: coherence, logical structure, absence of contradiction, completeness, clarity and ease of use.[190]

- *The sole Europeanisation of the choice of law should not be a goal in itself*

The sole goal of Europeanisation of the choice of law rules should not take place at the expense of the content of these rules.[191] This might sound very obvious. However, the Union legislature tends to adhere to a very functional approach of the unification of the private international law rules: the Europeanisation of this field of law is aimed at European integration. The Union legislature should make sure not to fully subordinate the Europeanisation of international family law to the sole goal of European integration. For the danger exists that legal practice might otherwise be burdened with choice of law rules that are very hard to apply.

- *Participate as much as possible in the Hague Conference*

Since most family disputes are global in character, the European Union should cooperate as much as possible with the Hague Conference on Private International Law and give the ratification of Hague Conventions priority over the establishment of Union instruments.

The Union legislature should, therefore, uphold Kreuzer's maxim:

> soviel Universalität der Regelung (*ius commune universale*) wie möglich, soviel (vorrangige) europäische Regionalität der Regelung (*ius particulare europeaum*) wie nötig, um die verbindlichen Ziele der EG zu erreichen.[192]

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[189] Cf., Dethloff 2007, p. 998: '*Ziel muss es sein, der durch "Rom I, II und III"bzw". Brussel II fortfolgende" drohenden Fragmentierung entgegenzuwirken und ein kohärentes europäisches IPR-Gesetzbuch zu schaffen*.'

[190] Cf., Fiorini 2008a, pp. 7–8.

[191] See also Boele–Woelki 2008, p. 786.

[192] Kreuzer 2006, p. 65.

8.6 To Conclude

It is clear that establishing a European system of international family law is altogether not an easy task: fundamental issues underlying such a system need to be cleared up. Although European international family law will sooner or later be realised, this will certainly still require great effort. For the development of the European system of international family law it can, therefore, in full agreement with Siehr, be concluded that:

> [D]as Ziel ist klar, es zu erreichen fordert noch viel Mühe, Zeit und Geduld.[193]

It is to be hoped that all the effort, time and patience will eventually result in a transparent and coherent system of European international family law.

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[193] Siehr 2008, p. 83. It is to be observed that Siehr made this statement for the whole area of European private international law, not only for European international family law.

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