The Financial Consequences of Divorce in a European Perspective

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1. Introduction and overview

This chapter deals with the substantive law of the financial consequences of divorce. These consequences can (but do not have to) include a division of property, certain periodical or lump sum payments, a sharing or division of pension rights (and similar) and the allocation of the use of the marital home and other assets. No ‘top-down’ European Family Law exists in relation to any of these, as the European Union has no competence to regulate such matters, and no cases on the financial consequences of divorce have yet been decided by the European Court of Human. This chapter therefore is a purely comparative one.

The financial consequences of divorce are regulated in very different ways amongst the European jurisdictions. Even the very basic understanding of the nature and structure of the financial consequences of divorce appears to be fundamentally different. The most obvious contrast here is between the common law jurisdictions of England and Wales, Northern Ireland and Ireland and the continental European jurisdictions of the civilian tradition. Only the latter know statutory matrimonial property regimes which play a pivotal role in the financial consequences of divorce. Without doubt, the division/allocation of (matrimonial and other) property upon divorce is also central to the common law jurisdictions but it is embedded in a wholly different system and approach; it is part of a holistic exercise which considers all the financial consequences of divorce at the same time.

By contrast, jurisdictions with a matrimonial property regime (irrespective of whether the regime applies by default or was chosen by the spouses) separate the various consequences outlined above into different remedies, usually beginning with a division of (matrimonial) property. The financial

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1 For Private International Law instruments see the chapter by Dieter Martiny in this volume.
2 Much and, in some cases, most or even all of what is described and analysed in this chapter also applies to certain other legal regimes like the civil partnership of the jurisdictions of the United Kingdom or the registered partnerships of the Netherlands and the Nordic Countries.
3 Mostly so-called spousal maintenance, which often also is referred to as alimony. In the following the term maintenance will be used.
5 On which see 2.3. below.
6 On which see 2.1. and 2.2. below.
consequences of divorce in these jurisdictions is therefore commonly said to rest on several ‘pillars’, 7 whereas in the common law jurisdictions the financial consequences of divorce are delivered as a ‘package’ 8 (for a further discussion of this see 2.3. below).

Another obvious difference amongst the European jurisdictions relates to whether property consequences flow from the fact of marriage itself or only at the point of divorce. In most European jurisdictions, the act of marriage creates some form of community property (or at least the potential for one) whereas in other jurisdictions, notably the jurisdictions of the Germanic legal tradition and the Nordic Countries as well as the common law jurisdictions, marriage as such does not change the property relations of the couple. However, all jurisdictions in Europe have what are commonly referred to as ‘default rules’ for the financial consequences of divorce, i.e. legal rules that apply in the absence of an agreement or contract, 9 and these rules are dealt with in this chapter first. Because the modalities of the division of property are the central distinguishing feature of these default rules, the jurisdictions are classified according to their default rules on this matter and property division on divorce is the main focus of this chapter.

2. The Default Rules on Financial Consequences of Divorce

Focusing on the division of property in case of divorce, three distinctive approaches can be found in the European jurisdictions: those that create some form of community of property upon marriage (2.1. below), those where no such community is created but where there is a statutory regime governing the participation in the property of the other spouse in case of divorce (2.2. below) and those where all financial consequences of divorce, including the division of property, are subject to the discretion of the court (2.3. below). These three distinct approaches are now discussed in turn.

In addition, two approaches are considered that are more ‘European’ insofar as they both are meant to provide a potential basis for a common European approach to the financial consequences of divorce.

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9 On which see 3. below.
divorce: the Franco-German Agreement on an elective 'community of accrued gains' matrimonial property regime (2.4. below) and the Commission on European Family Law’s ‘Principles on European Family Law Regarding Property Relations Between Spouses’ (2.5. below).

2.1. Community of Property Jurisdictions

In the majority of European jurisdictions the act of marriage creates some form of community of property and marriage therefore has an immediate proprietary effect. The most extreme form of such a community is the Dutch universal community of property (2.1.1. below). However, by far the most common form is a community limited to the marital acquest (2.1.2. below).

2.1.1. Universal Community of Property

After Portugal abolished the universal community of property regime and replaced it with the community of acquest,\(^{10}\) the Netherlands now is the only European jurisdiction to retain this regime. Several attempts to change and/or modernise the default regime have failed but it is not entirely unlikely that further attempts will follow.\(^{11}\)

Under a universal community of property regime, all assets owned on the day of marriage in principle become community property. Everything acquired during the marriage, even through inheritance or gift, also becomes community property – unless the deceased or the donor has stipulated otherwise.\(^{12}\)

In case of divorce the community property is divided equally. This, in theory, makes the Netherlands seem like a ‘gold-diggers paradise’, inviting people to ‘marry into money’ and then divorce relatively quickly. But while the courts can only deviate from equal sharing of the community property in

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\(^{12}\) Boele-Woelki/Braat (n. 11 above) 234.
exceptional cases, the socially accepted possibility to enter into binding matrimonial property agreements presumably prevents this ‘paradise’ from actually materialising.13

In the Netherlands pension rights are treated separately from other assets, but if such rights accrue during the marriage, they are shared equally as well. With regard to spousal maintenance the Dutch courts have a wide discretion, which is guided by a general principle of ‘fairness’ and two further principles, namely ‘lack of means’ and ‘ability to pay’.14 Unless there is a case of hardship, maintenance claims are limited to a maximum of five years in case of short, childless marriages, and to twelve years in other cases.15

2.1.2. Community of Acquests

The most common default matrimonial property regime in Europe is the community of acquests (sometimes also called ‘community of acquisitions’). It is the default matrimonial property regime in most Romanic jurisdictions (e.g. Belgium,16 France,17 Luxembourg18 and Portugal,19 in Spanish general law (derecho común), Aragon, Galicia, Navarre and the Basque Country20), as well as in most jurisdictions in Middle and Eastern Europe.21 Needless to say, there are differences of details in the separate jurisdictions, so in the following passages the focus is on common structures and principles.

The community of acquests essentially is a limited community of property and, as the name indicates, applies to the ‘marital acquest’ – i.e. that which was generated during the marriage. Hence pre- (and

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13 Boele-Woelki/Braat (n. 11 above) 230 ff., 248 ff.
14 Boele-Woelki/Braat (n. 11 above) 241 ff.
15 Boele-Woelki/Braat (n. 11 above) 243.
17 Ibid.
19 de Oliveira, Martins and Vitor (above n. 10).
21 See the national reports, especially the answers to Questions 16 and 18a in Boele-Woelki, Braat and Curry-Summer (above n. 10); Pintens (above n. 18) 23 and Pintens (above n. 20) 269 ff. Notably Italy does not follow this approach but has a rather different regime which distinguishes between the personal property of the spouses, the communal property and the communal property de residuo (Art 177–79 Codice civile). Italy will not be discussed further in this chapter, but see the answers by S Patti et al for Italy Boele-Woelki, Braat and Curry-Sumner (above n. 10).
post-) marital property is excluded from the community. There is also a general exclusions of money received through gift or inheritance during the marriage. These assets remain the separate or personal property of the spouses. Therefore, in a marriage to which the matrimonial property regime of a community of acquest applies, there are three groups of property: the communal (or joint) property and the personal property of each spouse.

Assets connected very closely to one spouse, such as clothes and other personal items, are also personal/separate property. In some jurisdictions damages received for pain and suffering are deemed to be part of the community property if they are received during the marriage. In other jurisdictions, however, this is not the case. A further main distinguishing factor is whether income generated by personal/separate property (such as interest, dividends and rents) during the marriage becomes community property (as is the case for example in Belgium, France, Spain and Portugal)\(^22\) or not (as for example in Slovenia, Serbia and Croatia)\(^23\). Indeed, it does seem debatable whether such income really is a ‘fruit of the marriage’ in all cases and thus should be considered a marital acquest. On the other hand, such income might well have a material impact on the marital standard of living and how the couple conduct their financial affairs.

The rules on whether debts incurred during the marriage count as personal or community ‘property’ differ greatly, but if these debts are incurred ‘for the family’ rather than in pursuit of a separate interest, they generally fall within/are subtracted from the community property. It is worth noting, however, that even where the debts are personal/separate, the creditors can of course go after the community property if the debtor defaults – which might be seen as the ‘downside’ of a matrimonial property regime based on a community of property. Indeed, this potential risk is often a reason why couples enter into a matrimonial property agreement (on which see 3. below).

When the marriage comes to an end through divorce, each spouse in principle retains his or her personal/separate property and the community property is divided equally. With very few and

\(^{22}\) For Belgium (Art 1405 Civil Code) and France (Art 1401 Civil Code) see Pintens (above n. 16) 72 ff.; for Spain (Art 1347 Civil Code) see Ferrer-Riba (above n. 20) 35s f.; for Portugal (Art 1728 Civil Code) see the answers to the questionnaire provides de Oliveira, Martins and Vítor (above n. 10); see generally Pintens (above n. 18) 23.

\(^{23}\) See the answers to the questions for those jurisdictions in Boele-Woelki, Braat and Curry-Sumner (above n. 10) and Pintens (above n. 18) 23 et seq.
limited exceptions, the courts are not afforded any discretion, even if the outcome is potentially unfair and/or creates hardship.

The court’s role in dividing up the assets is limited to determining what the community assets are and then allocating them equally to the parties. That is often easier said than done because, in reality, the three groups of assets are often not as distinct as the underlying theory makes them sound. Frequently, payments will have been made from one group of assets to another, for example a spouse may pay the deposit for the purchase of the family home (which is in the couple’s joint names and is, thus, community property) from his or her assets, or contributed to the upkeep or renovation of such property. In such situations, there is a need to calculate what the community property owes the separate property, and that then must be subtracted before an equal allocation of the community property takes place. The same of course applies if the community property was used for the benefit of the personal/separate property, and, indeed, when one spouse pays of the personal debts of the other. Again, there are slight differences between the jurisdictions, namely whether any gain (or indeed any loss) as part of the ‘investment’ into another property group is to be shared. For example, if a house is bought for 500,000 euro, and the wife contributes half of the purchase price from money she inherited before the marriage, the question is whether she should receive just ‘her money back’ (i.e. 250,000 euro, potentially plus some inflation adjustment, would be considered her personal/separate property) in case of divorce, or whether she should benefit from a value increase of the property purchased (e.g. if the property is worth 600,000 euro at divorce, 300,000 euro would be deemed her personal/separate property). This depends on whether the respective jurisdiction deems the contribution to be some sort of ‘investment’ leading to the acquisition of an (abstract) ‘share’ in the property (as would be the case for property purchases in France or Belgium) or just a financial contribution.

It also worth noting that most community acquest jurisdictions allow the courts to allocate specific assets to a spouse, for example the matrimonial home might go to the spouse who will be the primary carer of the couple’s children, or specific assets may be assigned to one spouse who particularly needs them for his or her profession. However, the recipient of such preferred allocation needs to compensate the other spouse so that he or she still nominally receives an equal share of the divided community property. Alternatively, the courts can frequently also order the use of the

24 Poland and Serbia allow for a limited discretion, but apparently, in practice, the courts do not very often depart from equal sharing; cf Pintens (above n. 18) 26.
25 Pintens (above n. 16) 72 ff.
property by one spouse (which might or might not require payments to be made in return) rather than transferring the property.

As said at the beginning, the division of property merely is a ‘pillar’ and generally the starting point for the courts to determine the financial consequences of divorce. In addition to the division of property, all community of acquest jurisdictions allow for additional payments to be ordered, and it is these payments that are meant to compensate for any hardship or insufficiencies that the rather static division of property, according to the matrimonial property regime, might create. These payments can be periodical (then often referred to as ‘maintenance’ although their function can extend further) or in a lump sum, which is the case, for example, in France (prestation compensatoire)\(^{26}\) and the federal law of Spain (pension compensatoria)\(^{27}\). These payments can have a maintenance and/or compensation (for marriage-generated disadvantages) function. The courts’ consideration will in many jurisdictions take into account the loss of pension rights due to the marriage.\(^{28}\) The courts, in this regard, generally have a wide discretion, but will take into account the position of the spouses after the division of community property as just described.

### 2.2. Separation of Property/Participation Systems

Unlike those jurisdictions discussed in the previous section, for many European jurisdictions the default regime does not create any form of community of property, and the property of the spouses remains separate during the marriage (unless agreed otherwise at acquisition or by other contractual arrangement). However, this does not mean that the marriage has no subsequent proprietary consequences where one of the spouses dies (not dealt with in this chapter) or upon divorce. To the contrary, the spouse then participates in the property of the other according to specific statutory rules. Pintens therefore labels these jurisdictions as having ‘participation systems’ as their default matrimonial property regime.\(^{29}\)

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\(^{26}\) Pintens (above n. 16) 76 f.

\(^{27}\) Ferrer-Riba (above n. 20) 356 ff.

\(^{28}\) Provided such pension rights were not already considered as part of the division of assets according to the matrimonial property regime.

\(^{29}\) Pintens (above n. 20); Walter Pintens, ‘Ehegüterrecht’ in J Basedow, KJ Hopt and R Zimmermann (eds), *Handwörterbuch des Europäischen Privatrechts* (Tübingen, Mohr Siebeck, 2009) vol I, 350 ff.; Pintens (above n. 18) 19 et seq; see also in the same volume K Boele-Woelki and M Jänterä-Jareborg, ‘Initial Results of the Work of the CEFL in the Field of Property Relations Between Spouses’, 47 et seq.
These jurisdictions can roughly be divided into those of the Nordic Countries, where a community of property is created in the event of divorce and the system therefore is a ‘deferred community of property’ (on which see 2.2.1. below), and those where no such community is created but the law stipulates that certain compensation payments need to be made (provided that specific statutory requirements are fulfilled). This is the case, for example, in the jurisdictions of the Germanic legal family (on which see 2.2.2. below).30

### 2.2.1. Deferred Community of Property

In the Nordic Countries, i.e. Denmark, Finland, Iceland, Norway and Sweden, the default matrimonial property regime is that of a deferred (and universal) community of property. 31 During marriage the spouses live in a separation of property. However, upon divorce all the assets of the spouses (including pensions etc.) become community property – unless they were acquired by gift or inheritance, and the donor or the testator has expressly stated that the property should remain the separate property of one of the spouses.

Upon divorce the community property is in principle to be divided equally, but all of the Nordic jurisdictions give the courts discretion to deviate from equal sharing when not doing so would be inequitable.32 However, the statutory provisions guiding the courts’ discretion on when and how to deviate vary somewhat. In Denmark, such discretion is most restricted, allowing for a deviation from equal division only when the marriage was short (this is understood to be less than five years) and where there either was a considerable asset disparity between the parties at the beginning of the

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30 Space precludes a description and discussion of ‘hybrid systems’ such as Italy (on which see the answers by Salvatore Patti et al. for Italy in Boele-Woelki, Braat and Curry-Sumner (above n. 10)) or of the separation of property systems of Catalonia, the Balearic Islands or Valencia (on which see Ferrer-Riba (above n. 20); Martín-Casals/Ribot in Boele-Woelki, Braat and Curry-Sumner (above n. 10).

31 The matrimonial property regimes in the Nordic countries are quite similar and go back to the Nordic cooperation around 1910, there are some differences and, recently, significant efforts to modernise the law, particularly in Norway and Denmark. On the matrimonial property regimes in Nordic Countries generally see Å Gell, Nordisk äktenskapsrätt (Copenhangen, Nordiska Ministerrådet, 2003). See also Maarit Jänterää-Jareborg, ‘Marital Agreements and Private Autonomy in Sweden’, in: Jens M. Scherpe (ed.), Martial Agreements and Private Autonomy in Comparative Perspective (Hart Publishing 2012), pp. 370-402; JM Scherpe, ‘Privatautonomie im Familienrecht der nordischen Länder’ in S Hofer, D Schwab and D Henrich (eds), From Status to Contract?—Die Bedeutung des Vertrages im europäischen Familienrecht (Gieseking 2005) 209-254, esp. 212–219.

32 For details see see Gell (above n. 31) 373 ff. and the answers to Question 127 for Denmark (I Lund-Andersen and I Magnussen), Finland (K Kurki-Suonio), Norway (T Sverdrup) and Sweden (M Jänterää-Jareborg, M Brattström and K Walleng) in Boele-Woelki, Braat and Curry-Sumner (above n. 10).
marriage or such a disparity arose during the marriage through an inheritance of gifts received by one of the spouses. This latter condition is not fulfilled if the disparity arose through other income generated during the marriage. In the East Nordic jurisdictions of Finland and Sweden, the deviation rules are broader and simply allow for a departure from equal sharing if sharing the assets equally would be inequitable. Icelandic law does the same when equal sharing would be ‘unreasonable’. In all these jurisdictions, however, departure from equal sharing is seen as an exception, and is generally only applied if the assets are ‘non-matrimonial’ in the sense that they were acquired before the marriage of by gift or inheritance.

Norway reformed its law in 1991 and the statutory provisions expressly give a spouse the right to ask for non-matrimonial property (i.e. pre-marital and inherited property and property received as a gift) to be exempted from equal sharing. However, a court may include these assets in the sharing if not doing so would be inequitable. So, in essence, the burden of proof in Norway (once it is shown that the assets indeed are non-matrimonial) lies on the spouse who wants the assets to be included, whereas in the other Nordic Countries it is the spouse who wants assets to be exempt who needs to argue that case. This may have the general effect that the deferred universal community of property in Norway essentially has been limited to what was acquired during the marriage, and the system therefore could be described as a deferred community of acquest.33

Maintenance payments for spouses play a very limited role in the Nordic countries. If they are awarded at all, it is usually for a very limited period of time. The law tries to avoid continuing financial ties between the spouses and promotes a ‘clean break’. This reflects the attitudes on individuality, autonomy and gender equality in the Nordic Countries. Spouses are not considered as insurers for each other, and marriage not as a ‘meal ticket for life’ or a pension insurance. Cases of hardship therefore are dealt with by the (comparatively very generous) social welfare system and are not resolved by putting the burden on the ex-spouse (unless there are special circumstances).

2.2.2. Statutory Compensation Jurisdictions

In the jurisdictions of the Germanic legal family, marriage as such does not alter the property relations of the spouses. Property remains separate during the marriage. But, unlike in the matrimonial property regimes of the Nordic Countries, not even at divorce is a community of

33 Cf. Scherpe (above n. 8) 455.
property created. Instead the matrimonial property regimes operate with statutory rules that allow the spouses to bring monetary claims upon divorce.

2.2.2.1. Community of Accrued Gains (Zugewinngemeinschaft)

The name of the German default matrimonial property regime, the community of accrued gains (Zugewinngemeinschaft) is actually a complete misnomer. Contrary to what the name seems to indicate, at no time during (or after, of course) the marriage is a community of property created. The mechanism used by the statutory matrimonial property regime is one that allows the spouse to claim his or her share of the gains accrued during the marriage (the Zugewinn). In principle, this system is mathematically precise and determines with certainty who receives what (or rather who can claim what) in case of divorce, although there may well be problems regarding the valuation of certain assets.

In order to achieve this result, German law looks at the assets and debts of each of the spouses at two different points in time: the day of the wedding (initial assets) and the day a spouse has received the other’s petition for divorce (final assets). However, gifts and inheritances received during the marriage are counted as initial assets, and debts are included in this calculation as well. This means that a reduction of debts during the marriage will count as a gain. As it is, therefore, in the interest of each spouse to have his or her assets regarded as initial assets, the burden of proof lies on that spouse to show that the assets indeed are ‘initial’. In order to ensure that all assets are included, there are mutual duties of disclosure. The overall sum of the initial assets of a spouse is then subtracted from the overall sum of his or her final assets to determine the accrued gain. The underlying idea of the German default matrimonial property regime is that each spouse should participate equally in the gains accrued during the marriage. So if one spouse has a higher gain than the other, this spouse then owes the other spouse an equalisation payment. For example, if X’s accrued gain is 70,000 euro and Y’s gain is 50,000 euro, then X must pay Y 10,000 euro so that the spouses both leave the marriage with the same accrued gain.

--- Insert Picture 29-4 here ---

34 The actual sum is adjusted according to an index in order to reflect inflation etc.; on this see Scherpe (above n. 7; a Spanish translation published as ‘Estudio comparativo del tratamiento de los bienes no matrimoniales, de su indexación y de sus aumentos de valor’, in Revista para el análisis del Derecho (Indret) No. 2, 2014, is available at http://www.indret.com/pdf/1050___es..pdf).
Apart from very extreme cases (e.g. one spouse trying to kill the other) the German courts cannot deviate from this equal sharing of the accrued gain. This can of course lead to hardship and also, in some cases, might be seen as manifestly unfair (e.g. if the accrued gain is only due to a value increase of a pre-marital property or payments received as damages for pain and suffering). Yet, in recent reforms, the German legislature decided to maintain this aspect of the default regime and it must therefore be deemed to represent the German understanding of marital financial solidarity.

Germany has a rather sophisticated (or one might say complicated) system of dealing with pensions, which is completely detached from the division of assets under the matrimonial property regime, but the underlying principle is also one of (more or less) equal sharing.

Hardships and/or needs are to be dealt with by (periodical) maintenance payments and, thus, such payments continue to play a central role in the German law on the financial consequences of divorce. The circumstances under which the court can exercise its (wide) discretion for such payments are defined in statute and comprise, for example, maintenance needs because of ongoing childcare duties, old age, illness, unemployment, retraining etc. It is worth noting that the needs do not have to be generated by the marriage. Furthermore, at least in theory, the payments can also have a compensatory function.

2.2.2.2. Participation in Acquests
The matrimonial property regime of the participation in acquests (sometimes also referred to as participation in acquisitions; Errungenschaftsbeteiligung) is the default regime in Switzerland (and, in a slightly different form, in Greece). It is in essence a combination of a ‘community’ of accrued gains and the community of acquest, but with an emphasis on the former model. Like in the ‘community’ of accrued gains, there never actually is a community of property. The property of the spouses remains separate at all times, but in the case of divorce each spouse is entitled to participate in the marital acquest of the other.

35 § 1381 BGB. See e.g. the commentary by Brudermüller on this § in Palandt, Bürgerliches Gesetzbuch, C.H. Beck, 73rd edition 2013.
36 See e.g. J Hauß and R Eulering, Versorgungsausgleich und Verfahren in der Praxis (Bielefeld, Gieseking, 2009); P Friederici, Praxis des Versorgungsausgleiches (Cologne, Luchterhand, 2010); F Ruland, Versorgungsausgleich: Ausgleich, steuerliche Folgen und Verfahren (Munich, Beck, 2011).
37 §§ 1570 ff. BGB
38 See Eleni Zervogianni, in this volume, p. 295.
This matrimonial property regime is generally regarded as somewhat complicated, as there are four groups of assets (the separate property of each spouse and the acquest [Errungenschaft] of each spouse), and contributions from each of these groups of assets to other groups of assets need to be calculated. This can involve a lot of difficult (and sometimes impossible) tracing and valuing of assets.\(^{39}\) The system avoids the difficulties that the German ‘community’ of accrued gains encounters (e.g. value increases of initial property which are counted as accrued gains). But it appears that while this is appealing on a theoretical level, there are considerable practical difficulties with this.\(^{40}\)

In any event, once these calculations are done and the values of the acquests of each spouse have been determined, in Switzerland each spouse may claim one half of the acquest of the other. As these are monetary claims only, the respective claims are set off against each other and effectively only the spouse with the lower acquest can make a claim. Switzerland recently introduced pension splitting as a pillar separate from matrimonial property issues (although a further reform is pending), and now all pensions acquired during the marriage are to be shared equally between the spouses.\(^{41}\) Spousal maintenance can be awarded and, despite a somewhat awkward statutory provision, the court essentially has full discretion.

Curiously, in Greece, spouses cannot claim half of the acquest but there is a (rebuttable) presumption that each spouse contributed one third to the acquest of the other. This means that Greece is the only jurisdiction in Europe where there is a deviation from the general notion of equal sharing of the fruits of the marriage – as apparently the (admittedly rebuttable) presumption is that only one third of the gain/acquest of the spouse is such a ‘fruit’. It is also noteworthy that Greek law takes a rather harsh position regarding the family home and household goods as it makes no special provision for the primary carer of the children regarding these assets/items. Similarly, spousal maintenance (which can be awarded at the court’s discretion) does not appear to be particularly generous.\(^{42}\)

\(^{39}\) See Ingeborg Schwenger and Tomie Keller, in this volume, p. ■■■.
\(^{40}\) Ibid, ■■■.
\(^{41}\) Art. 122(1) Civil Code. See Ingeborg Schwenger and Tomie Keller, in this volume, p. ■■■.
\(^{42}\) Zervogianni, in this volume, p. ■■■.
2.2.3. The Hybrid System of Austria – Rule-based discretion

The default matrimonial property regime of Austria is also based on a separation of property during the marriage and perhaps therefore is often wrongly classed together the other Germanic legal systems. But Austrian law is conceptually distinct as the division of assets does not follow strict statutory rules but, in principle, is discretionary.\(^43\) This has led some\(^44\) to compare the Austrian system with a deferred community of property, which indeed is quite apt given that in the Nordic default regimes the courts also retain a discretion to divide the matrimonial assets other than 50/50 between the spouses. However, the Austrian default matrimonial property regime actually has more in common with the default rules applied in common law jurisdictions, such as Singapore, New Zealand, some of the US-jurisdictions and the mixed jurisdiction of Scotland.\(^45\)

The reason for this is that, unlike in the Nordic jurisdictions (perhaps with the exception of Norway, see above 2.2.1.), in Austria and the jurisdictions just mentioned not all property is considered to be sharable community property in case of divorce, but just certain assets/property as defined in the statute. In Austria this is defined\(^46\) as comprising property used during the marriage (\textit{eheliches Gebrauchsvermögen})\(^47\) and marital savings (\textit{eheliche Ersparnisse})\(^48\). The former particularly includes the household goods and the family home, but also anything that the spouses had at their disposal during the marriage (which has been held to include horses, holiday homes and even a castle).\(^49\) ‘Marital savings’ are defined to include any form of savings or investment accumulated during the marriage.\(^50\)

Specifically omitted from the ‘sharing pool’ are assets that were acquired before marriage (or indeed after separation), received as personal gifts or through inheritance, items that are for the personal or professional use of a spouse, and, curiously, assets that are owned by a business or shares of a company (provided that they are not merely an investment).\(^51\) However, if the family home and/or the household goods were owned by one of the spouses before the marriage or acquired during the marriage through gift or inheritance (and therefore not normally included in the sharing pool), they

\(^43\) § 83(1) EheG.
\(^44\) E.g. Pintens (above n. 18).
\(^45\) Cf Scherpe (above n. 8) 467 ff.
\(^46\) § 81(1) EheG.
\(^47\) § 81(2) EheG.
\(^48\) § 81(3) EheG.
\(^50\) In practice this has been held to include not only savings and investments in the narrower sense, but also real estate, works of art and even a stamp collection, cf. Ferrari (above n. 49) 53.
\(^51\) § 82 (1) EheG.
can, in contrast with community of acquest jurisdictions, be included in the sharing pool if they are required by one spouses to maintain their standard of living, particularly where the spouses’ child has a need for them. So, if one were to make a comparison with other matrimonial property regimes, the Austrian system is better described as a ‘deferred limited community of property’, as the label ‘deferred community of acquest’ does not sufficiently capture the fact that assets, like the family home and household goods, can be included in the sharing, irrespective of when and how they were acquired.

In any event, the defining feature of the default Austrian matrimonial property regime is that the division of assets in the end remains discretionary, although in practice it seems to be the case that the assets are divided equally. The statute offers certain criteria to guide the equitable exercise of the discretion. A court, therefore, ought to consider the contributions of the spouses to the acquisition of the assets, which expressly is defined to include housework, unpaid working in the other spouse’s/the family business and child care, and especially the welfare of the children. Interestingly, the statute even contains a provisions stating that the division of assets should, if possible, be done in a way that the couple need not have any contact, so there is essentially a ‘clean break principle’ comparable to the Nordic Countries or England and Wales. Nevertheless, the aim appears to be that the spouses are to maintain their marital standard of living as far as is possible.

The courts do not only have considerable discretion regarding the division of assets (i.e. to allocate the shares) but also as to how the sharing should be undertaken. A court can actually order property transfers etc. In principle, the division should be effected by allocating specific assets to a spouse (i.e. distribution in kind), and monetary claims (to compensate for the allocation of an asset to the other spouse) are regarded as an exception.

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52 § 82 (2) EheG.
53 Ferrari (above n. 49) 54; Pintens (above n. 16) 29.
54 § 83 (2) EheG. It is important to note that the Austrian Civil Code (ABGB) contains an additional provision according to which a spouse is entitled to appropriate compensation (Abgeltung) for the work he or she undertakes in the business of the other spouse (§ 98). The amount of compensation is at the discretion of the court, and the criteria listed that the court should consider is the length and nature of the work undertaken, the standard of living and particularly maintenance received.
55 § 84 EheG.
56 Susanne Ferrari and Gerhard Hopf and Georg Kathrein, Eherecht (2nd ed, Vienna, Manz, 2005) § 83 EheG, Anm. 16.
57 See §§ 85 ff.
58 See § 94 EheG.
As already mentioned, while there is no such rule in the statute, in practice the division of the assets concerned appears to be common. But, and this a crucial difference compared to the majority of the civil law jurisdictions in Europe, the court retains the discretion to decide otherwise. It appears that the Austrian Supreme Court tend to divide the assets differently if one of the spouses (in all decided cases it was the wife) not only took care of the household and the education of the children but also held a full-time job. Here the division was 2:1 in favour of that spouse, the obvious reason being that the spouse concerned really had two jobs (one inside and one outside the marital home) whereas the other only had one. Since the contributions therefore were very different, this had to be reflected in the award.59

Spousal maintenance in Austria is, in principle, paid for life60 and it is determined without taking into consideration the division of assets. Whether a spouse is ‘at fault’ for the divorce still plays a considerable role for the amount to be awarded, and a spouse who is at fault cannot expect to be maintained – unless that spouse continues to be the primary carer or cared for a child or a relative during the marriage.61 If maintenance is to be paid, the marital standard of living serves as a guideline.62 However, in case law further guidelines have been developed, and generally a maximum of 1/3 of the income of the other spouse is deemed to be appropriate.63 Where both spouses are deemed to be at fault for the marriage coming to an end, then the economically weaker spouse can claim equitable maintenance provided that he or she cannot self-maintain, although the courts can impose a time-limit for such maintenance payments.64 Where no spouse is at fault, maintenance claims can be made under certain circumstances for reasons of equity.65

2.3. Jurisdictions Without a Matrimonial Property Regime

While in Austria (and indeed the Nordic Countries) the division of assets in case of divorce is at the court’s discretion, there is no doubt that these jurisdictions nevertheless have a default matrimonial property regime. Despite certain similarities, this is not the case in the common law jurisdictions. It is true that in England and Wales, Northern Ireland and Ireland marriage as such does not change the

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59 Ferarri/Hopf/Kathrein (above n. 56) § 83 EheG Anm. 17 with further references.
60 § 77 EheG.
61 § 68a EheG. In the latter case the maintenance usually is limited to three years, § 68 (2) EheG. Maintenance claims under § 68 can also be barred completely if it would be inequitable considering the ‘matrimonial offence’/behaviour of the claimant spouse, § 68a (3) EheG.
62 § 66 EheG.
63 Ferrari (above n. 49) 54. See also M Schwimann and S Ferrari, in M Schwimann and B Verschraegen (eds), *Praxiskommentar zum Allgemeinen bürgerlichen Gesetzbuch I* (3rd ed., Vienna, LexisNexis, 2005) § 94 Rz 16 ff
64 § 68 EheG.
65 § 69 (3) EheG.
proprietary relations of the spouses; it is also true that in case of divorce the courts have the power to redistribute this property.

However, to assume that these jurisdictions have a matrimonial property regime based on ‘separation of property’ is incorrect. Indeed, the case law is very explicit on this. In *Sorrell v Sorrell*[^Sorrell v Sorrell|2005 EWHC 1717 [96]](https://www.bailii.org/ew/cases/EWHC/Fam/2005/1717.html), Bennett J expressly rejected the suggestion, advanced by Prof. Stephen Cretney[^Stephen Cretney, 'Community of Property Imposed By Judicial Decision' (2003) 119 LQR 349, commenting on Lambert v Lambert [2002] EWCA Civ 1685|2005 EWHC 1717 [96]](https://www.bailii.org/ew/cases/EWHC/Fam/2005/1717.html), that a community of property system had been ‘imposed by judicial decision’. Baroness Hale, in *Miller v Miller; McFarlane v McFarlane* expressly held that ‘[w]e do not yet have a system of community of property, whether full or deferred’[^2006 UKHL 24 [151]].

Nevertheless it seems that particularly lawyers from the continental European jurisdictions find the idea that there could be jurisdictions without a matrimonial property regime inconceivable. Yet it is true. England and Wales, Northern Ireland and Ireland do not have a matrimonial property regime. Where a matrimonial property regime exists, it is looked at and the division of property dealt with separately and distinctly. This is emphatically not the case in England and Wales, Northern Ireland or Ireland. In these jurisdictions, the discretion of the court is exercised holistically, looking at the entirety of the facts and the circumstances of the case. No fixed rules or necessary distinctions between matrimonial property, maintenance, pensions and other financial remedies exist. Certainty and predictability are therefore not regarded as crucial elements of the law of financial consequences of divorce. On the contrary, the common law jurisdictions strive to be able to deliver a ‘tailor-made package’ for each individual case, and these packages may or may not contain transfer of property, pensions or periodical payments etc. Which exact remedies the courts award varies from case to case, depending on the individual circumstances. This is essential to the understanding of the financial consequences of divorce in these jurisdictions and indeed to any meaningful comparison.

The approach taken by the common law jurisdictions of Europe has been described by Lord Denning (with regard to English law,[^Lord Denning|2005 EWHC 1717 [96]] but his comments actually are equally apt for the other jurisdictions) as follows:

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[^Any reference to ‘English law’ is meant to be a reference to the law of England and Wales|2005 EWHC 1717 [96]](https://www.bailii.org/uk/rulings/2005/1717.html)
The Family Court takes the rights and obligations of the parties all together and puts the pieces into a mixed bag. Such pieces are the right to occupy the matrimonial home or have a share in it, the obligation to maintain the wife and children, and so forth. The court then takes out the pieces and hands them to the two parties—some to one party and some to the other—so that each can provide for the future with the pieces allotted to him or to her. The court hands them out without paying any too nice a regard to their legal or equitable rights but simply according to what is the fairest provision for the future—for mother and father and the children.  

‘Fairness’ however, is a rather difficult and elusive concept as the one and only yardstick, as Lord Nicholls (again, with regard to English law) has pointed out:

Everyone would accept that the outcome on these matters, whether by agreement or court order, should be fair. More realistically, the outcome ought to be as fair as is possible in all the circumstances. But everyone's life is different. Features which are important when assessing fairness differ in each case. And, sometimes, different minds can reach different conclusions on what fairness requires. Then fairness, like beauty, lies in the eye of the beholder.  

2.3.1. **England and Wales**

In English law the understanding of fairness has undergone a radical change. The Matrimonial Causes Act 1973 contains some limited guidance as to how overall fairness is to be achieved. According to section 25(1) first consideration is to be given to the welfare of any child of the family. This criterion is taken very seriously and indeed in practice is given a very strong priority over other concerns. Nevertheless, all the circumstances of the case are to be taken into account, and section 25(2) then contains a list of non-exhaustive factors of which the court is ‘to have regard’:

(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case

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71 White v White 2000] UKHL 5 at [1].
72 The Matrimonial Causes (Northern Ireland) Order 1978 is very similar to the Matrimonial Causes Act 1973 of England and Wales and will therefore not be discussed separately here.
74 It is important to note that ‘child of the family’ includes children that have been treated by the couple as child of their family, s 52(1)(b) Matrimonial Causes Act 1973, and thus can include children that are not the joint children of the couple.
of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;

(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(c) the standard of living enjoyed by the family before the breakdown of the marriage;

(d) the age of each party to the marriage and the duration of the marriage;

(e) any physical or mental disability of either of the parties to the marriage;

(f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;

(g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it.

There is no hierarchy or priority set out in the provision, and in addition the court is under a duty to consider a ‘clean break’, i.e. ending all ongoing financial relations between the spouses (section 25A).

This of course does very little to elucidate what ‘fairness’ might mean in an individual case, so it was for the judiciary to develop further guidance in the absence of legislative intervention. Indeed, the approach to what is ‘fair’ changed radically at the beginning of this century through the decision in White v White. In that case, the previous ‘cap’ or ‘glass ceiling’ of only awarding the financially weaker spouse his or her (but usually her) ‘reasonable requirements’ was abolished and replaced by a view of fairness which values the spouses’ contributions equally:

‘… there is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. (...) There should be no bias in favour of the money-earner and against the home-maker and the child-carer.’

Anne Barlow, ‘England’ Boele-Woelki, Braat and Curry-Sumner (above n. 10), answer to Question 161.


Ibid, at [24].
In the following years, the courts then developed this approach further in a string of cases,\(^79\) culminating in the House of Lords decision in *Miller v Miller, McFarlane v McFarlane*.\(^80\) Here, three ‘strands’ or ‘rationales’ of fairness were identified: needs, equal sharing and compensation (for relationship-generated disadvantages).\(^81\) As Jo Miles rightly has pointed out, these ‘strands’ are difficult to reconcile, as each represents a different (and sometimes contradictory) view of the function of marriage. Moreover, the concepts overlap, so applying them consistently and clearly in practice appears difficult if not impossible.\(^82\)

That said, certain trends in their application are discernable from subsequent case law. Crucially, it appears that ‘needs’ is the dominant ‘strand’ in ‘normal’ cases, notwithstanding the difficulties in defining what ‘needs’ actually should entail.\(^83\) As mentioned above, the welfare of the children of the family is the first consideration, and in practice this usually means that the needs of the children and thus those of the primary carer are met first. It is interesting to note that ‘needs’ in this context does not appear to be limited to ‘relationship-generated needs (as for example in the Nordic countries).\(^84\) So in England and Wales, ‘fairness’ first and foremost seems to mean covering the needs of the children and the spouses, particularly the primary carer. Hence, the other ‘strands’, and particularly ‘equal sharing’ really only come into play where the assets exceed the needs of parties.

In relation to ‘equal sharing’, both leading speeches in *Miller v Miller, McFarlane v McFarlane* distinguished between two groups of assets. Lord Nicholls termed them ‘matrimonial and non-matrimonial assets’ while Baroness Hale referred to them as ‘family assets’\(^85\) and ‘other assets’. Subsequent case law seems to have adapted Lord Nicholls’ terminology.\(^86\) The leading speeches also

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\(^79\) On this see Miles (above n. 73) 93 ff.; Barlow (above n. 75); Joanna Miles, ‘Charman v Charman (No 4)—Making Sense of Need, Compensation and Equal Sharing after Miller/McFarlane’ (2008) 20 Child and Family Law Quarterly 378; Scherpe (above n. 7).

\(^80\) [2006] UKHL 24.

\(^81\) *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24 [11]–[16] (Lord Nicholls) and [138]–[141] (Baroness Hale).

\(^82\) Miles (above n. 73) 93 ff.; Miles (above n. 79). See also J Miles, ‘Principle or Pragmatism in Ancillary Relief: The Virtues of Flirting with Academic Theories and Other Jurisdictions’ [2005] International Journal of Law, Policy and the Family 242 et seq.

\(^83\) On this see also the Law Commission report (above n. 76).

\(^84\) *Miller v Miller and McFarlane v McFarlane* [2006] UKHL 24 [11] per Lord Nicholls. Baroness Hale at [137-138] while focusing on relationship-generated needs also includes needs because of a disability if it arose during the marriage, and generally seems to accept that a temporal link rather than a causal link is sufficient.

\(^85\) Building on a distinction developed by Lord Denning in *Wachtel v Wachtel* [1973] Fam 72 at 90, see *Miller v Miller and McFarlane v McFarlane* [2006] UKHL 24 at [149].

appear to concur that the longer the marriage, the less important the distinction between the
groups of property would be. While the exact definitions of what constitutes each group of assets
appears to differ, there was a consensus between the leading speeches as to the policy issues which
underlie the distinction. In the cases, there is a total of nine references to the ‘fruits’ of the
marriage(matrimonial partnership/the couple’s labours87 and three to the ‘joint/common
endeavours’88 of the spouses when describing the marital/family assets. Hence the underlying policy
is that only what was achieved jointly should, in principle, be subject to equal sharing, which
excludes pre-(and post-) marital assets as well as gifts and inheritances received during or after the
marriage.89 However, both speeches agree that the family home should always be in the sharing
pool, irrespective of how and when it was acquired.90 So it appears that, while not having a
matrimonial property regime as such, England and Wales now has embarked on a path that in
practice distinguished between matrimonial and non-matrimonial property – but unlike in the
continental European jurisdictions this approach is not fixed and formulaic but rather flexible and
always subject to the needs of the spouses and the children. But where the needs are covered, non-
matrimonial assets do not appear to be shared in practice anymore (if they ever were).91 As Wilson
LJ (as he then was) pointed out in K v L, until now there does not seem to be a single ‘reported
decision in which the assets were entirely non-matrimonial and in which, by reference to the sharing
principle, the applicant secured an award in excess of her or his needs’.92

87 At paras [17], [19], [20], [21], [85], [141], [149] and [154] (twice).
88 At paras [22], [91] and [143].
89 On this see also Scherpe (above n. 7). For an example of the practical application see e.g. S v AG (Financial
Remedy: Lottery Prize) [2011] EWHC 2637 (Fam) a recent lottery win was held to be non-matrimonial property
rather than result of a joint endeavour – an interesting contrast to the decision by the German Federal Court
of Justice (Bundesgerichtshof) (16.10.2013) XII ZB 277/12, NJW 2013, 3645 where the court held – somewhat
formulaically – that a lottery gain even after separation but before the actual divorce constituted an accrued
gain that needed to be shared in case of divorce.
90 Given property prices and the tradition of house ownership in England, the matrimonial home often is the
most valuable asset of the spouses, and excluding it from the matrimonial pool (and from equal sharing) would
often lead to needs not being covered. Cf. Joanna Miles/ Jens M. Scherpe, ‘The Future of Family Property in
423-432.
91 See e.g. B v B (Ancillary Relief) [2008] EWCA Civ 543; McCartney v Mills McCartney [2008] EWHC 401 (Fam),
[2008] 1 FLR 1508; AR v AR (Treatment of Inherited Wealth) [2011] EWHC 2717 (Fam), [2012] 2 FLR 1; Robson v
2 FLR 533; Jones v Jones [2011] EWCA Civ 41, [2011] 1 FLR 1723; S v AG (Financial Orders: Lottery Prize) [2011]
EWHC 2637 (Fam), [2012] 1 FLR 651. For a discussion of this the excellent summary and analysis by A Chandler,
“The Law is now reasonably clear”: the courts’ approach to non-matrimonial assets’ [2012] Fam Law 163, and
Scherpe (above n. 7).
The third ‘strand’ of fairness, compensation, receives little attention in practice and appears to be subsumed into either ‘needs, generously assessed’ or as achieved through equal sharing.\(^{93}\)

As the author of this chapter has suggested elsewhere,\(^{94}\) this in practice appears to lead to the following approach regarding the division of property in case of divorce:

- **Matrimonial property** is to be shared upon divorce unless considerations of fairness demand otherwise. Such considerations can include the (short) duration of the marriage and, very exceptionally, ‘stellar’ contributions, but primarily will be the aspects of needs and compensation.

- **Non-matrimonial property** is not to be shared unless considerations of fairness demand otherwise. Again, such considerations can include the duration of the marriage, but also the contributions made to the overall welfare of the family, particularly past and future child-care and related sacrifices, as well as other relationship-generated advantages and disadvantages and, of course, the needs of the spouses.

In any event, it is essential to keep in mind that the courts in England and Wales nevertheless not only retain full discretion regarding the division of assets in case of divorce, but regarding the entirety of the financial remedies. As mentioned at the outset of this section, the financial consequences of divorce are considered holistically and not separately. So, for example, it might well be that in a suitable case the primary carer of the children is awarded the family home (which represents 100% of the family’s assets) but then is not awarded any maintenance payments.

Interestingly this will in many cases lead to the primary carer of children being better off in low-money cases compared to his or her continental European counterparts where the available matrimonial assets would merely be shared equally. Conversely, the financially weaker spouse may often be worse off in comparison in big-money cases where an equal sharing would give him or her a larger share of the assets, but considerations of fairness demand not sharing the assets equally. However, this is of course perfectly in line with the fact that the children are to be the ‘first consideration’ according to section 25(1) of the Matrimonial Causes Act 1973.

### 2.3.2. Ireland

As is well known, Ireland only introduced divorce in 1996. Therefore much of the law on the financial consequences of divorce has to be seen against the social, historical and constitutional

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\(^{93}\) See eg *Lauder v Lauder* [2007] EWHC 1227; *VB v JP* [2008] EWHC 112; *McFarlane v McFarlane (No 2)* [2009] EWHC 891. See Miles (above n. 73) 95.

\(^{94}\) Scherpe (above n. 7 and 8).
background.  Similarly to England and Wales (and Northern Ireland), the determination of the financial consequences of divorce essentially is at the court’s discretion, and section 20(2) Irish Family Law (Divorce) Act 1996 contains a list of factors that the court ‘shall have regard to’ when exercising its discretion:

(a) the income, earning capacity, property and other financial resources which each of the spouses concerned has or is likely to have in the foreseeable future,
(b) the financial needs, obligations and responsibilities which each of the spouses has or is likely to have in the foreseeable future (whether in the case of the remarriage of the spouse or otherwise),
(c) the standard of living enjoyed by the family concerned before the proceedings were instituted or before the spouses commenced to live apart from one another, as the case may be,
(d) the age of each of the spouses, the duration of their marriage and the length of time during which the spouses lived with one another,
(e) any physical or mental disability of either of the spouses,
(f) the contributions which each of the spouses has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution made by each of them to the income, earning capacity, property and financial resources of the other spouse and any contribution made by either of them by looking after the home or caring for the family,
(g) the effect on the earning capacity of each of the spouses of the marital responsibilities assumed by each during the period when they lived with one another and, in particular, the degree to which the future earning capacity of a spouse is impaired by reason of that spouse having relinquished or foregone the opportunity of remunerative activity in order to look after the home or care for the family,
(h) any income or benefits to which either of the spouses is entitled by or under statute,
(i) the conduct of each of the spouses, if that conduct is such that in the opinion of the court it would in all the circumstances of the case be unjust to disregard it,
(j) the accommodation needs of either of the spouses,
(k) the value to each of the spouses of any benefit (for example, a benefit under a pension scheme) which by reason of the decree of divorce concerned, that spouse will forfeit the opportunity or possibility of acquiring,

(l) the rights of any person other than the spouses but including a person to whom either spouse is remarried.

As in the other common law jurisdictions, there is no express hierarchy among these criteria, however it has been held that their consideration is mandatory.96

Unlike in England and Wales as well as Northern Ireland, the overarching principle is not one of ‘fairness’ but rather ‘proper provision’ for spouses and children.97 This not only emphasises the protection of financially weaker family members (and thus ‘needs’) even more expressly than English law, but also makes express that the discretionary exercise is not focused on division (of property) but on provision, as was held in T v T.98 In the same case, any notion that the financial consequences of divorce should be concerned with equality or equal sharing (and thus a more structured approach) was expressly rejected,99 and it was affirmed that each case needed to be decided on the basis of its own particular circumstances.100

However, it has also been held that is not restricted to basic needs but should ‘reflect the equal partnership of the spouses’ and

‘... should seek, so far as the circumstances of the case permit, to ensure that the spouse is not only in a position to meet her financial liabilities and obligations and continue with a standard of living commensurate with her standard of living during marriage but to enjoy what may reasonably be regarded as the fruits of the marriage so that she can live an independent life and have security in the control of her own affairs, with a personal dignity that such autonomy confers, without necessarily being dependent on receiving periodic payments for the rest of her life from her former husband.’101

‘Proper provision’ in Ireland therefore includes participation in the ‘fruits of the marriage’ as well. In any event, as in the other European common law jurisdictions, there is no separate consideration of various remedies upon divorce, but the financial consequences are decided holistically and ‘in a package’.

96 MK v JPK [2003] 1 IR 326.
97 Crowley (above n. 95) 204 ff.; Sloan (above n. 95) ■■■; G Shannon, ‘Ireland’, in: Boele-Woelki, Braat and Curry-Sumner (above n. 10), answer to Question 161.
98 3 IR 321, 383 (Denham J), and 398 (Murphy J).
99 Ibid, 398 (Murphy J), 417 (Fenelly J), and 407 (Murray J).
100 Ibid, 418 (Fenelly J), and 409 (Murphy J). See also Crowley (above n. 95) 208 ff.
101 Ibid, 408 (Murray J). See Crowley (above n. 95) 208 ff.
2.4. **Franco-German Agreement on an optional matrimonial property regime of a community of accrued gains**

On 4 February 2010, France and Germany concluded an agreement on an optional matrimonial property regime (referred to hereafter as the ‘FGA’).\(^{102}\) It entered into force on 1 May 2013,\(^{103}\) and is the first bilateral agreement on substantive matrimonial property law in Europe. But it need not

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\(^{103}\) In Germany the agreement has been incorporated into the Civil Code: § 1519 BGB.
remain bilateral, as Art. 21 FGA expressly allows all Member States of the European Union to accede to the agreement, and at least one, Luxembourg, already has expressed an interest in doing so.104

The FGA provides an optional regime, i.e. the couple can choose this regime instead of the default regime that would otherwise apply to their marital relationship. That being so, it might more appropriately have been discussed below in the section on marital agreements (3. below); but it is addressed here owing to its comprehensive nature.105 Spouses can choose this matrimonial property regime before or during their marriage, provided that the substantive law of a Contracting State of the agreement is applicable to their relationship (Art. 1 FGA) by virtue of the relevant rules of private international law.106 The optional regime is therefore not limited to German or French nationals or to cross-border cases.

For the optional regime to apply the spouses must enter into a marital agreement/marriage contract choosing this regime for their matrimonial property relationship. No specific formal requirements are contained in the FGA for this, so it is the lex loci contractus which determines the required form; in both Germany and France this is a notarised agreement.107

The matrimonial property regime of the FGA is a ‘community of accrued gains’.108 The fact that such a matrimonial property regime was already known in both jurisdictions (as the default regime in Germany and an optional regime in France, the participation aux acquêts) made it easier to agree that it should be the basis for the new optional regime.109 The regime is therefore one of a separation of property during the marriage but one which then allows the spouses to make monetary claims when the marriage ends (in principle for half of the accrued gain). The German default regime served as a basis for the new regime, subject to certain modifications reflecting the

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104 Meyer (n. 102) 617 and Klippstein (n. 102) 511.
105 Furthermore, none of the other optional regimes available in the European jurisdictions are discussed in this chapter, but if they had been they would have been included in part 2. as well.
106 Cf. Klippstein (n. 102) 512 and Jäger (n. 102) 805 f. for the possible applications combinations.
108 The name was kept despite the fact that there is general agreement that it is somewhat inappropriate as there is no community of property at any time in this regime, cf. Becker (n. 102) 109f.
109 On these see the short descriptions by Becker (n. 102) 106-109 and the EU Directorate-General for Internal Policies (n. 102) 7-10.
French law and legal traditions and, at least in the view of some observers, the modernisation of some certain provisions.\textsuperscript{110} Since the German regime was already described above (2.2.2.1.), this part will focus on how this FGA differs from German law.

One of the central ‘concessions’ to the French legal tradition was the inclusion of specific protection for the family home and the family’s household goods. According to Art. 5 FGA neither spouse can enter into binding agreements concerning such assets without consent (or later approval) from the other spouse.\textsuperscript{111} This very much reflects the French \textit{régime primaire}\textsuperscript{112} whose rules cannot be altered by the spouses by marital agreement. Therefore adhering to this was essential for the FGA, which otherwise really only deals with matters which from a French perspective concern the \textit{régime secondaire}. But the special protection of the family home was welcomed by the German delegation in any event and not controversial.\textsuperscript{113}

Art. 6 FGA allows each spouses to enter into contracts binding both of them regarding the management of the household and the needs of the children. The latter was particularly important for the French and reflects a modified version of the general French rules.\textsuperscript{114}

Another crucial difference from the German community of accrued gains concerns the calculation and valuation of the assets. As described above (2.2.2.1.), the gain is calculated by determining the initial assets (assets at the time of marriage) and the final assets (assets at the point when the divorce petition was made pending in a court of law). Assets acquired by inheritance and gift count as initial assets. But the difference between the German scheme and the FGA lies in the valuation of the assets.\textsuperscript{115} In the German \textit{Zugewinngemeinschaft} all assets are valued at the relevant points in time (day of marriage\textsuperscript{116} and day of divorce petition) whereas in the French \textit{participation aux acquêts}, the valuation is always undertaken on the day the matrimonial regime actually comes to an end. A ‘compromise position’ was adopted for the FGA: the German approach is followed, except for

\begin{itemize}
\item \textsuperscript{110} See e.g. Becker (n. 102).
\item \textsuperscript{111} The consequences of the ineffectiveness of such agreements are left to the respective applicable national law.
\item \textsuperscript{112} Esp. Art. 215, 217 Code Civil.
\item \textsuperscript{113} EU Directorate-General for Internal Policies (n. 102) 11 f.
\item \textsuperscript{114} Esp. Art. 220 Code Civil; see Klippstein (n. 102) 513 and Jäger (n. 102) 808.
\item \textsuperscript{115} Like the German \textit{Zugewinngemeinschaft} the optional regime takes into account inflation etc. when determining the value of the initial and final assets by adjusting them by the average price-change rates for overall consumer prices in the contracting States (Art. 9(3), 11(3) FGA). On this see also Scherpe, A comparative overview of the treatment of non-matrimonial assets, indexation and value increases, [2013] Child and Family Law Quarterly 61-79.
\item \textsuperscript{116} Or day of acquisition if acquired during the marriage.
\end{itemize}
real property/immovables, in relation to which the French valuation rule prevailed (Art. 9 FGA). This means that an increase in the value of real property owned before the marriage or acquired during the marriage by gift or inheritance will not have to be shared. However, if the value increase is due to the actions of the spouses (such as building an extension, renovations etc.) this value increase nevertheless will be considered as a gain under the FGA.

This has been a contentious point about the German regime for some time. The approach of the optional regime may be said to meet spouses’ actual expectations in contemporary society better, as ‘pure’ increases in value, which are external to the spouses’ relationship, cannot really be considered as ‘fruits of the marriage’. Therefore it is somewhat surprising that according to Art. 8(3) FGA the fruits of such real estate, for example rent income etc., expressly are included in the sharing (by not including them in the initial assets), as for these the same reasoning seems to apply.

A minor but important difference is the treatment of damages received for pain and suffering. In the German regime, these are given no special treatment so any such damages are treated as an accrued gain which needs to be shared. Given the deeply personal nature and purpose of such payments, this seems absurd. Therefore it is to be welcomed that the FGA adopts the French approach of including such payments in the initial assets (Art. 8(2) FGA) and thus exempts them from sharing.

A final and fundamental difference from the German regime is contained in Art. 14. The payments any spouse has to make as a result of the end of the matrimonial regime is capped at 50% of the value of that spouse’s assets (i.e. after deduction of liabilities, and with safeguards against inappropriate behaviour such as squandering etc., see Art. 10). Such a rule – which protects the payor by enabling him or her to retain at least half of his or her assets – was considered during the recent reforms in Germany but not implemented. It was included in the FGA at the request of the French delegation.

It needs to be added that matters such as pension sharing and maintenance are not covered by the FGA, and so the relevant national law applies.

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117 Cf. Becker (n. 102) 112.
118 A further difference is that according to the same provision gifts made to lineal relatives are not included in the calculation of the initial assets (but see Art. 10(3) on valuation in certain cases).
119 See e.g. Bundesgerichtshof NJW 1974, 137, and in the recent reforms it was decided not to address this issue/change the law, cf. EU Directorate-General for Internal Policies (n. 102) 12.
120 Becker (n. 102) 112; Klippstein (n. 102) 514.
121 EU Directorate-General for Internal Policies (n. 102) 12.
2.5. Principles of European Family Law Regarding Property Relations Between Spouses

In 2013, the Commission on European Family Law (CEFL) published its ‘Principles of European Family Law Regarding Property Relations Between Spouses’. Like the earlier CEFL Principles, they are based on extensive comparative research and discussion amongst the national experts, particularly the members of the Organising Committee. Unlike previous Principles, and perhaps necessitated by the subject matter, the Principles do not merely offer one but actually two options for matrimonial property regimes: a participation in acquisitions (Principles 4:16-4:32) and a community of acquisitions (Principles 4:33-4:58). Both regimes are subject to the same rules on the General Rights and Duties of the Spouses (Principles 4:1-4:9) and Marital Property Agreements (4:10-4:15). But, importantly, these rules have to be seen in conjunction with the other remedies available to a spouse in case of divorce, which are not dealt with by the Principles discussed here, including maintenance, pension rights etc. In that sense, the Principles only deal with one aspect of the financial consequences of divorce.

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122 On the commission, its working method and the Principles in general see the chapter by Boele-Woelki in this volume, and www.ceflonline.net where the national reports and the Principles (with translations into French, German, Spanish, Swedish and Dutch can be accessed).
125 For the reasons for doing so see Boele-Woelki et al., Principles (n. 123), Introduction, p. 24-27.
It is interesting to note at the outset that both matrimonial property regimes offered by the Principles expressly exclude from the sharing pool upon divorce property acquired (and debts incurred) before the marriage, as well as gifts or inheritances received during the marriage (Principles 4:19 and 4:36). This is an expression of a ‘modern’ view of marriage, where only ‘marital contribution justifies marital solidarity’, one of the cornerstone of the Principles.\(^{128}\)

2.5.1. General Rights and Duties
The ‘general part’ of the Principles establishes the general equality of the spouses with regard to rights and duties (4:1-4:4). In line with the law in most European jurisdictions and the optional matrimonial property regime established by the Franco-German Agreement (above 2.4.), the Principles also provide a strong protection for the family home. This protection is outside the matrimonial property regime as such; it is achieved not by subjecting it to the sharing exercise, but instead by limiting each spouses’ ability to dispose of the family home (or to terminate or modify any lease of it) without the other spouse’s consent (Principles 4:5-4:6). The general part also establishes spousal duties to inform each other about their assets and debts (Principle 4:8) and provides that spouses are free to enter agreements determining their marital property relations (Principles 4:9-4:15).

2.5.2. The Participation in Acquisitions Regime
The first regime offered by the Principles is that of a participation of acquisitions (Principles 4:16-4:32). The CEFL chose the term ‘acquisitions’ rather than ‘acquest’, but in substance the regime is based on the same principles as the Swiss default regime described above (2.2.2.2.): a separation of property during the marriage and a participation in the acquisitions/acquest in case of divorce. So, during marriage there are four different groups of property: the acquisitions of each spouse and the ‘reserved property’ of each spouse.\(^{129}\) While the participation of acquisitions regime is not one of the most common matrimonial property regimes in Europe, in many ways it reflects modern views on marriage adopted by those jurisdictions where separation of property is the default position.\(^{130}\)


\(^{129}\) The latter is the functional equivalent of separate or personal (or ‘non-matrimonial’) property as described above, cf. Martiny (n. 123), p.28.

\(^{130}\) Cf. Martiny (n. 123), p. 27.
The underlying policy is that by having separate property each spouse in principle is independent, has an incentive to be ‘gainfully active’ and has a duty to contribute equally to the welfare of the family. This by many is deemed (despite criticism) to promote self-sufficiency, autonomy and gender equality.\(^{131}\) However, in order to ensure the ‘necessary inter-spousal solidarity’, the marital acquisitions/acquest in principle is to be shared equally in case of divorce (Principle 4:31).\(^{132}\) The regime expressly recognises both spouses’ contributions to the acquisitions, and provides for monetary compensation for such contributions in case of divorce (Principle 4:28).

Acquisitions are defined in Principle 4:18(1) to comprise all assets acquired during the marriage other than reserved property, and expressly include:

‘(a) each spouse’s income and gains whether derived from earnings or property;
(b) assets acquired by means of either spouse’s income or gains.’

Hence it does not matter how the assets were acquired (unless the property/method of acquisition falls into one of the reserved property-categories), and – crucially – income derived from reserved property is treated as an acquisition.\(^{133}\) This is not the position taken by all jurisdictions with comparable regimes, but was deemed to be the ‘better law’ by the CEFL.\(^{134}\) Importantly, pure value increases due to market fluctuations of ‘reserved’ (i.e. separate/non-matrimonial) property are not included as an acquisition. But value increases that are the result of an ‘investment’ of the other spouse etc.\(^{135}\) are included, which is clarified by Principle 4:19(e). Therefore the property to be shared is narrower than in the German default regime or the optional Franco-German regime.\(^{136}\)

Reserved property is defined in Principle 4:19 as follows:

‘(a) assets acquired before the commencement of the regime;
(b) gifts, inheritances and bequests acquired during the regime;
(c) assets substituting reserved property;
(d) assets that are personal in nature;
(e) assets exclusively acquired for a spouse’s profession;
(f) increases in value of the property included in (a) to (e)’

\(^{132}\) The exact wording of Principle 4:31(1) is: ‘If one spouse’s net acquisitions exceed the value of that of the other, the latter participates in the surplus to the amount of one half’.
\(^{134}\) Ibid.
In line with the Franco-German optional regime, but unlike the German default regime, assets that are personal in nature include damages received for pain and suffering. The burden of proof that property falls into the ‘reserved’ category rests on the spouse claiming such property, cf. Principle 4:18(2).

As already mentioned above, the marital acquisitions/acquest is in principle to be shared equally in on divorce under Principle 4:31. However – and this is a novelty for most continental European jurisdictions – Principle 4:32 allows the competent authority to make an adjustment from equal shares in cases of ‘exceptional hardship’. This implies that no deviation from equal sharing will be made in cases of merely ‘ordinary hardship’ – but one must of course keep in mind that there are other mechanisms in place (particularly maintenance payments) that may address such hardships. The Principles envisage that such an ‘exceptional hardship’ will arise if the marriage was ‘extremely short’ or in case of ‘patrimonial damage based on extreme unfair behaviour of the other party’. This is not particularly enlightening, but the commentary adds that the ‘behaviour’ exception to equal sharing is meant to be of very limited importance in practice. Thus the exception is probably comparable to the German § 1381 BGB, where relying on behaviour of the other spouse rarely succeed (successful examples include such extremes as attempts to kill the other spouse!). Nevertheless, it is remarkable that the CEFL has allowed for an element of discretion regarding the property division, which, while present in the Nordic jurisdictions and Austria, is generally associated with common law jurisdictions and so jurisdictions without a matrimonial property regime as such.

2.5.3. The Community of Acquisitions Regime
The other regime offered by the Principles is a community of acquisitions (Principles 4:33-4:58). The CEFL opted for the term ‘community of acquisitions’, but the term ‘community of acquests’ is commonly used to describe this type of matrimonial property regime, which is the prevalent regime in Europe and described above at 2.1.2. In essence, this regime is a limited community of property, namely a community limited to the marital acquest/acquisitions. It creates community property for these assets from the day of the marriage and so is deemed to be appropriate particularly where there is economic inequality between the spouses, for example given their income, their financial situation and their access to employment, or when the spouses have organised their marriage such

\[139\] Ibid and Martiny (n. 123), p. 35; Ferrand (n.123) p. 60.
\[140\] See above n. 35.
that one of them is employed full-time while the other is a homemaker or only working part-time.\textsuperscript{142} The marital solidarity, it is argued, is immediate because the assets are shared from the very beginning of the marriage and not merely on divorce.\textsuperscript{143} However, since the CEFL also wanted its Principles to also strike a balance between solidarity and each spouses’ independence and self-sufficiency, the assets comprised by the community are somewhat more restricted than in most existing community of acquests/acquisitions regimes. The second regime offered by the Principles therefore is considered a ‘modernised’ version of these regimes.\textsuperscript{144} This is particularly evident in the possibility given to the competent authority (usually the court) to deviate from equal sharing of the community property in cases of ‘exceptional hardship’ in Principle 4:57 (similar to the Principle 4:32 discussed above). As already pointed out above, this element of discretion is alien to most\textsuperscript{145} jurisdictions based on a community of acquest and so is a true innovation for this type of regime.

The community property is defined in Principle 4:34(2) and 4:35(1) to comprise everything acquired during the marriage which is not the ‘personal property’ of the spouses, and according to Principle 4:35(2) includes in particular:

(a) the spouses’ income and gains whether derived from earnings, community property or personal property;

(b) assets acquired either jointly or individually by the spouses during the community of acquisitions by means of the spouses’ income and gains;

(c) gifts and bequests to both spouses or to one spouse on the condition that they belong to community property.

As in the participation of acquisitions offered by the Principles, income deriving from ‘personal property’ is deemed to be part of the community property. This is not the norm among the existing regimes of a community of acquests/acquisitions, but was held by the CEFL to be the ‘better law’.\textsuperscript{146}

‘Personal property’ is then defined in Principle 4:36 as follows:

(a) assets acquired before entering into the community of acquisitions;

(b) gifts, inheritances and bequests acquired during the regime;

(c) assets acquired through substitution, investment or reinvestment in accordance with Principles 4:37 and 4:38;

\textsuperscript{142} Ferrand (n.123) pp. 39 f.
\textsuperscript{143} Ibid. See also Pintens (above n. 18) 42.
\textsuperscript{144} Ferrand (n.123) pp. 40 f.
\textsuperscript{145} But not all: Poland and Serbia allow for a limited discretion, but apparently, in practice, the courts do not very often depart from equal sharing, see Pintens (above n. 18) 26.
(d) assets personal in nature, acquired during the regime;
(e) assets exclusively acquired for a spouse’s profession.

Although it appears that the Comments on this Principle do not take a position on whether assets received as compensation for pain and suffering are personal and so leaves this to the national laws to define,147 surely the ‘better law’ would have been to include them in the personal property, as is the case under Principle 4:19.148 This would also have provided for greater consistency between the two optional regimes offered by the Principles.

Given that there is a community of property during the marriage, there must also be appropriate rules on debts149 reflecting this position (Principles 4:40-4:43), which are necessarily more complicated than those for the other regime offered by CEFL (4:21 and 4:22). Under those Principles, the debts are allocated as either community debts (Principle 4:40, including in particular debts incurred for the maintenance of the children or to meet appropriate family needs, but also debts related to a spouse’s professional activity) or personal debts (Principle 4:41). The recovery of community debts in Principle 4:42 is straightforward (from the community property and the personal property of the spouse who incurred the debt), but the recovery of personal debts in Principle 4:43 is more complex. Often perceived as a weakness of community of property regimes, there is the potential danger that the personal debts of one spouse might be borne by the other, at least in part, if they are recoverable from the community property. Therefore the CEFL opted for a ‘better law’ approach150 by limiting recovery to certain community assets in Principle 4:43:

(1) Debts which are personal to one spouse can be recovered from
   (a) the debtor spouse’s personal property;
   (b) the debtor spouse’s income and gains;
   (c) the community assets to the extent of their merger with the debtor spouse’s personal property.

(2) Personal debts related to tort or crime can also be recovered from half of the net value of the community property where the debtor spouse’s personal property, income and gains are insufficient for recovery.

Although no actual hierarchy is imposed, this Principle first favours recovery from the property of the debtor’s spouse,151, but also that spouse’s income and gains which would otherwise become

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149 See also the rules on administration of the property contained in Principles 4:44-4:48 which are not discussed here, but see Ferrand (n. 123) p. 51-55.
community property. Recovery from community property is only possible where the personal assets have been merged with those of the other spouse (e.g. in a bank account), and only to the extent they have been merged. The only exception is in the case of personal debts related to a tort or crime: here it was decided that the victim should not bear the consequences of insufficient funds of the debtor’s (i.e. tortfeasor’s/criminal’s) personal property, income and gains.\textsuperscript{152}

Apart from the element of discretion in Principle 4:57(2) mentioned above, the Principles offer no surprises regarding the division of assets on divorce: the basic principle is one of equal sharing of the community property (Principle 4:57(1)), with the possibility to allow the competent authority to allocate specific assets – namely the family home and household goods and professional assets (Principle 4:56) – to one of the spouses in the interest of the family (without deviating from allocating equal shares).

2.6. Comparison – A quest for fairness?

2.6.1 Comparing the incomparable?

Sections 2.2-2.5 above have shown some key distinguishing features of the financial consequences of divorce which might be perceived as fundamental and unbridgeable differences:

- the fact that in some jurisdictions a form of community of property is created upon marriage whereas, in other jurisdictions, marriage as such does not change the property relations of the spouses;
- the fact that in some jurisdictions the financial consequences are fully discretionary, whereas in others there is no, or only limited, discretion with regard to the division of property; and
- the fact that the common law jurisdictions do not even have a matrimonial property regime as such but take a holistic view of all the financial consequences of divorce, whereas the civil law jurisdictions tend to separate those consequences into different, independent remedies.

These differences, at least at first glance, appear to be so fundamental that a meaningful comparison seems impossible. This certainly is true if one attempts to compare the details of the financial consequences of divorce. However, if one tries to see a broader picture and identify the

\textsuperscript{152} Ferrand (n.123) p.50.
underlying policies, the differences perhaps are not as great and insurmountable as they first appear.153

It is often argued in/by common law lawyers that their jurisdictions take a holistic and discretionary approach to the financial consequences of divorce because this is the best (or even the only) way to achieve a fair outcome for all situations.154 While there might be some truth in this argument, it also implies that all regimes which actually operate with rigid or at least firmer rules therefore must come to ‘unfair’ outcomes. However, it is safe to assume that all jurisdictions actually aim to achieve fair outcomes, as it is difficult to imagine a jurisdiction which is content with a system that consistently generates unfairness or inequity. So if one assumes that all jurisdictions achieve (or at least aim to achieve) fair outcomes, then this is what all jurisdictions have in common. Taking this as a starting point, one then has two basic issues to compare: the methods for achieving a fair outcome and what is perceived as ‘fair’ in the respective jurisdictions.

2.6.2 Different paths to fairness

2.6.2.1 Different views on equality and fairness

There appears to be a divide in continental Europe (and indeed even amongst the members of the Commission on European Family Law) on whether a matrimonial property regime based on a community of property or on a separation of property is preferable to create ‘fair’ outcomes and also to create, or support, a partnership of equals. As already mentioned above, this is an ideological debate based on certain conceptions of marriage.155 Community property systems create a pool of joint property from the very beginning and throughout the marriage; both spouses immediately acquire property rights. Thus it has been said that this ensures equality, particularly for more ‘traditional’ marriages where only one of the spouses is generating an income or enjoys a significantly higher income.156 On the other hand, a system based on a separation of property merely delays access to (usually) the very same assets until the divorce by stipulating participation rights.

154 Although it is debatable whether this is actually achieved in these jurisdictions, given the unfortunate combination of legal uncertainty (as a necessary result of the basic discretion of the courts) and very high legal costs; cf. Miles/Scherpe (n. 153) 142.
155 On this point see Scherpe above n. 8) 474 f.
156 Anne Röthel, ‘Die Zugewinngemeinschaft als europäisches Modell?’ in Volker Lipp, Eva Schumann and Barbara Veit (eds), Die Zugewinngemeinschaft als europäisches Modell? (Göttingen, Göttinger Juristische Reihe, 2009) 66; Pintens (above n. 18) 42; Pintens (above n. 20) 279 ff.
However, during the marriage no mandatory sharing takes place, thus promoting the independence of the spouses\(^{157}\) and, in that sense, promoting equality – albeit, perhaps, a different kind of equality.

Thus which system is ‘fairer’ depends on one’s views on marriage, and indeed on whether equality (and which kind of equality) is an element of ‘fairness’, but also on the lived reality of the marriage in question. As I have written elsewhere:\(^{158}\)

> If equality primarily means that no distinction should be made between breadwinner and homemaker and that this should manifest itself during marriage through property ownership, then the community of property systems would be the better choice. If equality is seen as full autonomy of the spouses, and the partnership is seen as one of independents, the separation of property system seems appropriate where the objective of non-discrimination between breadwinner and homemaker is realised at divorce.

It appears, therefore, that the policy message sent by the two systems is a very different one: the separation of property promotes a model of financially independent spouses with a safety net in case of divorce; the community of property system, it could be argued, promotes a model that better enables the spouses to choose to forgo financial independence to focus on the family, should they so wish.

However, as fundamental as these ideological differences seem to be (indeed, they have led the Commission on European Family Law to present two optional regimes in their Principles), the real practical differences might actually be minor. In an ongoing and well-functioning relationship, it presumably does not matter, at least most of the time, who owns what as the couple share their assets. Therefore the ideology-based views on which model better promotes independence etc. might actually not pass the reality test. For example, it would be difficult to argue that French women are, on the whole, less independent and ‘less equal’ than their German counterparts. The higher labour market participation rates in France actually seem to suggest the opposite. In any event, where the matrimonial property regime matters most is when the relationship ends. Here, independent of which matrimonial property regime governs the property relations of the spouses, if the parties are at loggerheads it presumably requires the intervention of the court to secure the property rights/compensation claims of the spouses in both systems. So while admittedly claims *in rem* as the result of a community of property might potentially be procedurally easier to pursue, the

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\(^{157}\) Pintens (above n. 18) 43; Pintens (above n. 20) 279 ff.

\(^{158}\) Scherpe (above n. 8) 475.
differences in practice might not be as fundamental as the (perceived) ideology behind them suggests.

### 2.6.2.2 Discretion as a means to an end

Each family is different. Each divorce is different. Any system with fully fixed rules regarding the financial consequences of divorce inevitably would create unfair outcomes. That is the reason why the common law jurisdictions have opted for a fully discretionary system, at the expense of legal certainty, so that every possible family situation can be resolved fairly. But that is also the reason why all continental jurisdictions have incorporated elements of discretion into their system for the financial consequences of divorce. While only some of jurisdictions (e.g. the Nordic countries and Austria) allow for a discretionary element with regard to sharing according to the matrimonial property regime, all jurisdictions allow for discretion with regard to most other financial consequences of divorce, most importantly maintenance payments and *prestation compensatoire/pension compensatoria*. Hence the continental European jurisdictions decided to prioritise certainty with regard to property ownership but at the same time have ensured that potential hardships/unfair outcomes of the property division could be compensated for (or at least mitigated by) other discretionary remedies. Nevertheless, the underlying assumption of the matrimonial property regimes is that, for the vast majority of spouses, they create fair outcomes. It also worth noting at this point that couples for whom the ‘default’ matrimonial property regime might be inappropriate generally have the option of choosing a different property regime by marital agreement (on which see 3. below). It is further worth noting that the Principles drafted by the Commission on European Family Law expressly include the possibility to adjust the outcome of the division of property in cases of ‘exceptional hardship’ (Principles 4:15 and 4:57). While this cannot be regarded as the ‘common core’ of the European jurisdictions, it was felt to be necessary to have a ‘safety valve’ for exceptional cases.

### 2.6.2.3 Holistic view or separate remedies

The continental European jurisdictions all separate the financial consequences into different remedies, of which the division of the matrimonial property is often most central. However, sharing of pension rights, spousal maintenance, compensatory capital adjustments (such as the French *prestation compensatoire* or the Spanish *pension compensatoria*) or allocation of usage the family home can be of equal importance. While treated and decided upon separately, together these different ‘pillars’ are meant to provide for a fair outcome.  

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159 See references in n. 7 above.
By contrast, the common law jurisdictions do not separate out these ‘pillars’ but take a ‘holistic view’ and deliver one ‘tailor-made package’ of financial consequences of divorce, which may (or may not) contain the different remedies available under the ‘pillar’ approach. The courts are given an extensive ‘tool box’ of remedies by statute but they are left to exercise their own discretion as to which of the tools to use.

The difference, therefore, is arguably only that the civil law jurisdictions mandate the courts to at least consider all of the remedies, and in some areas (such as the division of property) orders have to be made, whereas in the European common law jurisdictions, the courts are at liberty not to do so and thus have greater flexibility. Nevertheless, the ultimate aim of both approaches remains a fair outcome, but any comparison of course needs to look at all the remedies together. It is also important to note that, as pointed out in the previous section, discretionary elements are found in all jurisdictions, although admittedly to varying degrees. And it is these discretionary elements that ensure that each system has the means to ensure fair outcomes.

2.6.3 Similar perceptions of fairness

‘Fairness’ of course is an elusive and ultimately subjective concept, and not only very likely to be different from jurisdiction to jurisdiction (and indeed from person to person) but also subject to change over time when the social realities of marriage change. However, while societal changes within the European jurisdictions might not happen concurrently, there are certain general trends that can be observed, many of which are commented on in the different chapters of this book and that need not be iterated here, such as the general equality of spouses, the rise of the number of children born outside of marriage and the number of cohabiting couples etc. Recognising the existence of these common trends, it is not unlikely that they will also find an expression in the law governing the financial consequences of divorce and particularly what is perceived to be ‘fair’ in the relevant jurisdiction.

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160 For a comparative discussion see Scherpe (above n. 8) 475 ff.
161 Miles/Scherpe (n. 153) 141.
162 As of course, for example, maintenance payments or prestation compensatoire/pension compensatoria will only be ordered where appropriate.
163 Miles/Scherpe (n. 153) 142.
In England and Wales, the House of Lords in *Miller v Miller; McFarlane v McFarlane*\(^{164}\) expressly sought to bring greater clarity to the very abstract concept of ‘fairness’ and identified three ‘strands’ of fairness in the context of the financial consequences of divorce, namely sharing, needs and compensation.\(^{165}\) These indeed appear to be the policies underpinning the financial consequences of divorce in all jurisdictions, albeit admittedly to varying degrees and with varying emphasis, and therefore they are now looked at in turn.

### 2.6.3.1 Sharing

Marriage – at least in law – in Europe is perceived to be a union of equals, where the couple share their lives and take responsibility for each other. Despite rising divorce rates, the underlying assumption remains that marriage is a union for life. However, all jurisdictions have rules on the financial (and other) consequences of divorce, as described above, to deal with the fact that the shared life might come to an end – and that the lives need to be divided and the assets shared.

‘Sharing’ is a hollow concept unless it is made clear what must be shared. In this regard, a number of common features can be observed, namely that it appears to be the general view in Europe (with the notable exception of the Netherlands) that it is only the ‘fruits of joint labour’ that should be shared. Therefore, in almost all jurisdictions and in the CEFL Principles, assets owned before the marriage or inherited or received as a gift during the marriage, are either excluded automatically from the sharing (although in some jurisdictions the family home is given special consideration, for example in England and Wales)\(^{166}\) or at least subject to potential discretionary adjustment to reflect the origin of the assets. In other words, all European jurisdictions seem to have some concept of ‘matrimonial property’ that is to be shared, even though what is considered as such property differs from jurisdiction to jurisdiction, and, in some jurisdictions, assets can ‘become’ matrimonial through usage over time.

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\(^{164}\) *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24.

\(^{165}\) Arguably doing so after having noted New Zealand legislation and influenced by Joanna Miles, *Principle of pragmatism in ancillary relief: the virtues of flirting with academic theories and other jurisdictions*, 19 (2005) International Journal of Law, Policy and the Family 242-256, although neither New Zealand legislation nor Miles’ article were expressly referred to in the judgment. But Miles’ article was cited by Potter P (in judgement given for the court which also comprised Thorpe LJ and Wilson LJ) in the influential case of *Charman v. Charman* [2007] EWCA Civ 503 at [118] where Potter P in a (most unusual) postscript entitled ‘Changing the Law’ also draws attention to the fact that Counsel for Mr Charman, Singleton QC, had incorporated the article in his submission for Mrs McFarlane in the House of Lords. Potter P for the court also states here: ‘The article is particularly interesting in that it demonstrates that the principles discussed in the article (needs, entitlement and compensation), were subsequently the principles identified by the House of Lords in deciding the conjoined appeals of *Miller* and *McFarlane.*’ Potter P then also expressly refers to the discussion of New Zealand legislation in the article in [119].

\(^{166}\) Miles/Scherpe (above n. 90).
As regards the actual sharing, apart from Greece (and some of the Spanish regional laws) the principle of equal sharing of the matrimonial assets is embedded in all European jurisdictions. Marriage is perceived as a partnership of equals, with both spouses assumed to be contributing equally to the welfare of the family, resulting in equal shares of the ‘fruits of joint labour’ should the relationship come to an end. So Greece, with its rebuttable presumption that a spouse has contributed 1/3 to the assets of the other spouse and is thus in principle only entitled to that share, stands virtually alone among the nations of Europe in not embracing the principle of equal sharing.

2.6.3.2 Need
Another policy that the European laws have in common is that the needs of the spouses play an important role. Unsurprisingly, the views on what constitutes ‘needs’ and how they should be covered differ, but there is a consensus that needs ought to be covered. Not in all jurisdictions is this achieved through the law governing the financial consequences of divorce. In the Nordic Countries, for instance, and Sweden in particular, the understanding is that an ex-spouse is not responsible for the needs of his or her former spouse, but that providing for its citizens is the duty of the state. Hence maintenance, which in most jurisdictions plays a pivotal role in covering the needs of the spouses at least for a certain period of time (and thus ‘compensating’ for the hardships of the inflexible division of property) is rarely awarded in Sweden and the other Nordic Countries. While this perhaps is at the extreme end of the spectrum, a general trend can be observed that the former spouse no longer is ‘an insurer for all losses’ and marriage no longer a ‘meal-ticket for life’, as more and more European jurisdictions move towards time limiting spousal maintenance claims. This reflects and promotes the view that marriage is, in principle, a union of two independent persons and that such independence is what the individuals concerned should strive for when the union comes to an end. Nevertheless, there is, of course, recognition of the spouses’ inevitable – and indeed desirable – interdependencies during marriage, which the next section deals with.


169 Miles/Scherpe (n. 153) 146. See also the seminal article on this matter by I. Ellman, The Theory of Alimony, (1989) 77 California Law Review 1-82, who also is the Chief Reporter for the American Law Institute’s Principles of the Law of Family Dissolution (American Law Institute, 2002).

170 E.g. Germany and the Netherlands, on which see the national report on Germany by Martiny in this volume and Dutta (above n. 7) 164 ff., 179 ff. and Boele-Woelki/Braat (above n. 11) 243.
2.6.3.3 Compensation

The final ‘strand’ of fairness is that of ‘compensation’, the underlying policy being that if one spouse makes sacrifices for the marriage/family, and thus incurs what might be called ‘relationship-generated losses’, this should be compensated for to a certain extent by the other spouse when the relationship comes to an end. Throughout Europe, such ‘investments’ in the family are considered to be beneficial for society, and without legal (and indeed financial) recognition there would be a disincentive to make such sacrifices for the family. However, not only determining what, if anything, should be compensated for, but also how this compensation should be quantified remains a difficult issue which usually is side-stepped by subsuming compensation considerations into sharing or needs. In most jurisdictions the division of property to a certain extent already is meant to incorporate elements of compensation in the property sharing exercise, particularly where a matrimonial property regime prescribes equal sharing (which of course is almost all European jurisdictions). In many jurisdictions there are additional compensatory mechanisms, such as the French prestation compensatoire or Spanish pension compensatoria, and maintenance or other periodical payments also contain an element of compensation.\(^{171}\) Even in England and Wales, compensation is usually dealt with as part of ‘needs, generously interpreted’ or subsumed in the sharing.\(^{172}\) So even if ‘compensation’ does not make an overt appearance in the express reasoning in many cases or statutes, it nevertheless is a strong rationale underpinning the financial consequences of divorce in Europe, including the matrimonial property regimes where they exist.

3. Marital Agreements

3.1. General remarks

3.1.1. Terminology

After having looked at the ‘default regimes’, this chapter now turns to ‘marital agreements’, meaning an agreement or contract between the spouses by which they seek to regulate their property and other financial relationships,\(^{173}\) often by selecting a different matrimonial property

\(^{171}\) See generally Miles/Scherpe (n. 153) 147-149.

\(^{172}\) See e.g. Charman v. Charman [2007] EWCA Civ 503 at [76] and VB v. JP [2008] EWHC 112 (Fam). But see also Lauder v. Lauder [2007] EWHC 1227 (Fam) where consideration of compensation led to a higher claim.

\(^{173}\) On such agreements see esp. Dethloff (above n. 107) and Scherpe (above n. 8). For an interesting collection of nine national reports on international marital agreements written by practitioners see D Salter, C Butruille-Cardew, N Francis and Stephen Grant, International Pre-Nuptial and Post-Nuptial Agreements (Bristol, Jordan Publishing, 2011).
regime. Depending on the substance of the agreement, such agreements are often also referred to as ‘matrimonial property agreements’ (if just dealing with property) or ‘maintenance agreements’ (which nominally only deal with maintenance, although that may well also include some form of property allocation). Terminology-based distinctions can also be grounded on the point in time when the agreement was entered into, namely pre-nuptial or post-nuptial agreements. Finally, some jurisdictions give special consideration to agreements concluded at a point in time when the couple have already decided that they want to divorce and enter into an agreements regarding the financial consequences of divorce (referred to, perhaps somewhat confusingly, as ‘separation agreements’ in England, or somewhat more precisely as Scheidungsfolgenvereinbarungen [agreements on the financial consequences of divorce] in Germany). This type of agreement is deemed to merit different treatment as the parties at that point are dealing with each other on the basis of known facts, whereas all other marital agreements are concluded some time (and sometimes even decades) before it they are meant to apply (and, therefore, by necessity, involve an element of conjecture). So the factual assumptions of the parties when entering into the agreement might be wrong or the expected facts have failed to materialise for most marital agreements, but for ‘separation agreements’ that is not the case as the facts are (or at least could be) known. Therefore these agreements generally are given greater weight/less scrutiny, \(^{174}\) but what is said below on the legal evaluation nevertheless applies.

3.1.2. Fundamental differences in the function of marital agreements
One of the most important things to take into account when comparing marital agreements is that they apply against the background of the ‘default rules’. So if the default rules stipulate some form of community of property, the effect of the agreement is immediate. The same of course is true if the default regime is one of a separation of property and the couple opts for a form of community of property (although this is very rare). This means that the function of the agreements is that it they are meant not only to apply in cases of divorce but actually during the marriage as well. So such agreements are not, by any means, merely ‘divorce agreements’ but true ‘marital agreements’. There may be many reasons for entering into such agreements, but one might well be to protect the other spouse from the ‘negative effects’ of a community of property, particularly the potential liability for the one spouse’s debts. So the purpose (or at least one of the purposes) and function of the agreement in such cases is not to disadvantage or ‘disenfranchise’ the other spouse but rather to protect him or her. Another reason, and this applies equally to jurisdictions where a separation of

property is the default position, might be that the personal and financial circumstances of the couple are such that the default regime is inappropriate for them, particularly in case of death of one of them (e.g. because they have children from a previous relationship, or tax issues).

That said, where there simply is no default regime, like in the common law jurisdictions of Europe, and all the financial consequences are at the discretion of the court, the very nature of the agreement is utterly different. As Lord Wilson has put it,

‘a marital agreement which—as in a civil law country—replaces one defined outcome with another defined outcome is very different from one which—as in a common law country—replaces an undefined outcome, dependent on the future exercise of a court’s discretion, with a defined outcome.’

The discretionary nature of the financial remedies in case of divorce also explains why marital agreements are not, and cannot be, binding on courts in the common law jurisdictions. Since Parliament has decided to award the courts the discretion for these remedies, a private agreement between two parties cannot oust the jurisdiction of the courts. Therefore the ‘status’ and doctrinal nature of such agreements are different, although the outcomes in practice are somewhat similar when looking at the guiding principles. In any event, even in common law jurisdictions, the agreements might have been concluded for estate and tax planning reasons, or having regard to the position of children from a previous relationship. Therefore, irrespective of the jurisdiction, it is essential not to pre-judge an agreement because of its content but actually to explore, as far as this is possible, the motivation for conclusion.

The fundamental question underlying all these agreements, however, in each jurisdiction is how much freedom the parties should have to deviate from the ‘default rules’. Needless to say, to a large extent, this will depend on the underlying default rules, but also on a society’s view of marriage and what the inalienable, irreducible core of the marriage commitment is deemed to be.

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176 In the absence of express statutory provisions to that effect, such as in Australia (on which see Owen Jessop, ‘Marital Agreements and Private Autonomy in Australia’, in: Jens M. Scherpe (ed.), Martial Agreements and Private Autonomy in Comparative Perspective (Hart Publishing 2012), pp. 17-50) and NZ (on which see Briggs (above n. 174). See also the Law Commission report (above n. 76).

177 See below and Scherpe (above n. 8).
3.2. Legal evaluation of marital agreements at the time of conclusion

3.2.1. Marital Agreements are ‘special’
A marital agreement dealing with the financial relations of the spouses is, first and foremost, to create a legal situation, legal rights and duties that are different from those that would otherwise apply, i.e. the default situation. Given that in family law, and in particular the area of law concerned here, the law was created with the specific purpose to deal with the special situation of marriage and to create a legal framework that deviated from what the general law would otherwise stipulate, it might at first seem somewhat odd that a couple are allowed to ‘opt out’ of this protective system in the first place. Together with the perceived violation of marriage as a principally dissoluble union, this reasoning, for a long time in many jurisdictions, has led to such agreements being considered contrary to public policy.\textsuperscript{178} While in a completely discretionary system this kind of argument might make sense (to a certain extent), it is out of place where a strict default matrimonial property regime applies. Simply put: the regime which applies by default cannot be suited for every marital relationship. Therefore the possibility and necessity for some couples to devise a matrimonial regime that better fits their needs was recognised relatively early on and relevant provisions have subsequently been included in various family law codifications.

Private agreements or contracts between the (future) spouses have been permissible in most jurisdictions for quite some time, and unsurprisingly, as a starting point, the general rules of contract law apply to these agreements. However, this in most jurisdictions is just a starting point. There is an awareness that a) as just described, the couple contract out of a protective system (and generally to the detriment of one party who would otherwise be protected), and b) the social situation is not necessarily one that is comparable to ‘normal’ contracts where the underlying assumption is that

both parties have equal bargaining power and will negotiate with their own advantage in mind. In this regard, marital agreements are hardly unique. There are many situations where the laws of various jurisdictions have set up specific rules either because of a general structural inequality of the parties (for example in labour law, insurance law and consumer law) or because of the nature and importance of the transaction (for example the purchase of land or wills).

In their Principles of the Law of Family Dissolution, the American Law Institute said the following about the need for special rules for marital agreements:

While there are good reasons to respect contracts relating to the consequences of family dissolution, the family context requires some departure from the rules that govern the commercial arena. First, the relationship between contracting parties who are married, or about to marry, is different than the usual commercial relationship in ways that matter to the law’s treatment of their agreements. Persons planning to marry usually assume that they share with their intended spouse a mutual and deep concern for one another’s welfare. Business people negotiating a commercial agreement do not usually have that expectation of one another ... These distinctive expectations that persons planning to marry usually have about one another can disarm their capacity for self-protective judgment, or their inclination to exercise it, as compared to parties negotiating commercial agreements. This difference justifies legal rules designed to strengthen the parties’ ability and inclination to consider how a proposed agreement affects their own interest.179

The underlying assumption is that while there might be nominal autonomy by the standards of the general contract law, there might not be actual autonomy because of the special social situation the parties find themselves in. Somewhat paradoxically, most jurisdictions therefore have rules in place that restrict the autonomy of the parties procedurally in order to protect the actual autonomy of the parties. The most important of these rules are requirements concerning the form of the agreements and the requirement of legal advice (3.2.2. below), the disclosure of assets (3.2.3. below) and certain time requirements (3.2.4. below).

3.2.2. Formal requirements and legal advice
As for formal requirements, in civil law jurisdictions the most common requirement is that the agreement needs to be contained in a notarial deed. This has the purpose of bringing to the

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attention to the parties the importance of the agreement that they are about to enter and making the content of the agreement clear and easily proved. At the same time, the notary in the civil law jurisdictions is under a legal duty to provide neutral independent advice to both parties, and particularly the (future) spouse who is likely to be disadvantaged by the agreement compared to the default legal situation. This is generally regarded, rightly or wrongly, with some scepticism by lawyers from common law jurisdictions who instead require independent legal advice by different lawyers for the spouses. This is not the place to discuss the differences and advantages of the respective systems, and it suffices that there appears to be general agreement that some form of legal advice is desirable for marital agreements, unlike for most other agreements or contracts. This highlights the fact that the law gives marital agreements special consideration.

There remains, however, a danger that the effectiveness of legal advice is overrated. The parties generally suffer from what has been referred to as ‘optimism bias’ regarding their marriage, namely that they assume that their marriage will be a success and, therefore, that the agreement they are about to conclude will be of little or no practical relevance. While legal advice might help the parties (and specifically the party who is agreeing to a reduction to his or her rights on divorce) to better understand what they are doing, legal advice certainly is no guarantee that ‘the message will sink in’. As I have said elsewhere, the best legal advice can never be more than a safeguard, but certainly never the safeguard.

3.2.3. Disclosure

As regards disclosure, common law lawyers often find it puzzling that there appears to be no duties to disclose assets when entering into marital agreements in many European jurisdictions. However, in this respect, one must keep in mind the default matrimonial property regimes. Most of these regimes expressly exclude pre-marital property from sharing, so there is nothing to be gained (and only costs generated) by requiring the parties to disclose such assets. That said, it generally is in the interest of the (future) spouse concerned to disclose such assets and if possible have them listed in

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181 See e.g. American Law Institute (above n 179) comment b) on § 7.05, 1098; Dethloff (above n. 107) 87.

182 Although it might be of great relevance even in happy marriages for the reasons described above under 2., as the agreement will not only apply in case of divorce but also during marriage in many jurisdictions.

183 Scherpe (above n. 8) 495.
the agreement as this can then later serve as proof that these assets indeed were pre-marital and that this was known at the time of the conclusion of the agreement. Otherwise, the burden of proof that these assets fall into the pre-marriage category attaches to the spouse benefitting from such proof, and providing that evidence might be significantly more difficult many years later when the marital agreements eventually relied upon and/or challenged.

Several jurisdictions, notably those where the default regime is some form of community of property, require disclosure for post-nuptial agreements. This of course is due to the fact that when the spouses enter into such an agreement, there presumably has already been a phase in which some community property has been (or at least could have been) created. Post-nuptial agreements therefore essentially lead to a potential ‘signing away’ of existing rights and hence disclosure is a logical requirement in these situations. As for the jurisdictions without matrimonial property regimes, disclosure is a legal necessity, but (at least for England and Wales) only if the disclosure (or lack thereof) would be material to the agreement.\(^{184}\) In principle all assets of the parties are subject to the discretionary remedies of the courts. It therefore makes sense that a spouse should be informed about existing assets before entering into an agreement that (at least potentially) removes them from the pool of assets that is to be shared in case of divorce. In summary, it can be said that disclosure in all jurisdictions is required where it potentially might make a difference to the decision of at least one of the (future) spouses to enter the agreement.

3.2.4 Time requirement

Although much more common in common law jurisdictions, and almost absent in the civil law jurisdictions, Catalan law, for example, does also stipulate a rule that a pre-nuptial agreement must be entered into at least one month before the wedding.\(^{185}\) While this is meant as another safeguard to ensure that a spouse is not suddenly confronted with and urged to sign an agreement shortly before the wedding, the effectiveness of such time requirements is very doubtful. The Law Commission of England and Wales when considering the issue quite rightly pointed out two main reasons against such time requirements:

- The first is a practical problem: with ceremonies commonly arranged—and deposits paid, for example, on reception venues—many months in advance, it would be hard to find an acceptable legal time limit that really addressed the issue of pressure. The second is a logical problem: any deadline for the making of prenuptial agreements simply diverts the pressure

\(^{184}\) *Radmacher v Granatino* [2010] UKSC 42, [69]. See also *Miles* (above n. 73) and the references in n. 178 above.

\(^{185}\) Ferrer-Riba (above n. 20) 363.
3.3. Legal evaluation of marital agreements at the time they are invoked

3.3.1. The substantive ‘fairness challenge’ to marital agreements

As pointed out at the beginning of the previous section (above 3.2.), the purpose of a marital agreement is to create an outcome that differs from the outcome that otherwise would be achieved by the application of the default legal rules. While the previous section looked at certain procedural safeguards, this section deals with the substance of the agreement: when do the laws of the European jurisdictions allow the outcome of such an (otherwise valid) agreement to stand? The answer to this question is a reflection of the view on marriage in the respective societies. The rules discussed in this section draw a line – a line that cannot be crossed, a line which states clearly that there are some areas of marital law that are not at the disposition of the parties and that will be applied irrespective of their express agreements. In its most extreme form– either all the default financial consequences are mandatory (as apparently in Slovenia), or none of them must apply (as apparently in Scotland). However, most jurisdictions do not hold these extreme positions but rather place themselves somewhere in the middle – where exactly again depends on what the view on marriage is, what is perceived as the core of marriage out of which the parties cannot contract.

The comparison reveals certain common features in the European jurisdictions. English law requires ‘fairness’ to prevail, Irish law a minimum of ‘proper provision’, in Austria agreements can be set aside if they are ‘inequitable’, in Sweden if they are ‘unreasonable’, in Spain if they are ‘seriously detrimental’ to the other spouse. The Netherlands and Germany utilise the basic concept of an agreement being against ‘good faith’ if it oversteps certain boundaries. All of these

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186 Law Commission report (above n. 76) 109. See also the criticism of B Hooker, ‘Prenuptial Contracts and Safeguards’ [2001] Family Law 56 (57), who calls a deadline a ‘mistake’.
187 See the chapter by Barbara Novak in this volume, p. 123.
189 Miles (above n. 73) and Radmacher v Granatino [2010] UKSC 42, esp. [75].
190 Crowley (above n. 95).
191 Ferrari (above n. 49) 64 f.
192 Jänterä-Jareborg (above n. 31), esp. 391 ff.; Scherpe (above n. 31), esp. 228 ff.
193 Ferrer-Riba (above n. 20), esp. 363 f.
194 Boele-Woelki/Braat (above n. 11), 251 ff.
195 Dutta (above n. 7) 174 ff.
terms can generally be summarised as expressing that, for each jurisdiction, an agreement between the spouses will be set aside if it is ‘unfair’ or ‘unjust’. Still, all of this remains rather vague. Therefore it is more rewarding to look at the actual circumstances in which the courts have deemed it necessary to set aside marital agreements, and again certain common themes emerge.

3.3.2. Fairness in marital agreements

It is unsurprising that, in considering the validity of marriage agreements, a number of European jurisdictions look at whether there has been a ‘change of circumstances’. By their very nature, marital agreements are (also) regulating a (more or less) uncertain future event and may well have been concluded long before the marital breakup occurs. The factual basis of which this agreement was reached might therefore have changed completely, and assumptions about how the life of the couple develop might have been proved utterly wrong. While even in general contract law, this change can, in certain scenarios, lead to a contract being adapted or even declared void by the courts, there seems to be an even greater willingness to interfere if the agreement in question relates to marriage.

The paradigm case for a change of circumstance is the change of role in the marital relationship after the birth of a child, and many jurisdictions indeed make special reference in their legislation or case law to children and/or child care. If one of the spouses, still more often than not the woman in opposite-sex relationships, becomes the primary carer, this by necessity means that this spouse incurs certain detriments with regard to their income and ability to build up assets and a pension, and also to their career and employability in general. This is actually one of the main reasons why the default systems were set up in the way they were (as explained above, in modern times generally as a partnership of equals without regard to the role of the spouses in marriage), and hence one of the main areas where marital agreements might create outcomes which fundamentally oppose what policies in this area have historically sought to achieve.

Two jurisdictions provide a good example for this. The first is Germany with the fairly detailed ‘core theory doctrine’ (Kernbereichslehre) developed by the German Federal Court of Justice.\textsuperscript{196} Essentially this doctrine puts all potential financial remedies on a scale and determines their ‘closeness to the core of the protective scope of divorce law’. The closer to that core the remedy that the spouses agreed to contract out of or modify is, the less likely the courts are to allow that deviation to stand.

According to the Federal Court of Justice, the division of matrimonial property is furthest removed from that core (and given that it is expressly regulated in the Civil Code this is not a surprise), but maintenance needs because of ongoing child care, or old age and infirmity are deemed to be closest to the core and thus, in practice, are almost impossible to contract away.

The second example is the approach developed by the UK Supreme Court for English law in the case of Radmacher v Granatino. Building upon the three ‘strands’ of fairness that guide the courts’ discretion when considering ancillary relief at the point of divorce (developed in the cases of White v White and Miller v Miller, McFarlane v McFarlane), namely ‘needs’, ‘compensation’, and ‘equal sharing’ the Court held:

Of the three strands identified in White v White and Miller v Miller, it is the first two, needs and compensation, which can most readily render it unfair to hold the parties to an ante-nuptial agreement. The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement. Equally if the devotion of one partner to looking after the family and the home has left the other free to accumulate wealth, it is likely to be unfair to hold the parties to an agreement that entitles the latter to retain all that he or she has earned.

Where, however, these considerations do not apply and each party is in a position to meet his or her needs, fairness may well not require a departure from their agreement as to the regulation of their financial affairs in the circumstances that have come to pass. Thus it is in relation to the third strand, sharing, that the court will be most likely to make an order in the terms of the nuptial agreement in place of the order that it would otherwise have made.

So essentially, providing for existing needs and compensation cannot generally not be contracted out of. This is very much in line with not only the German approach just described, where spousal maintenance is meant to cover needs and compensation, but also with the approach in most European jurisdictions. Where a matrimonial property regime is in place, sharing assets can be contracted out of, but the other remedies which are meant to cover needs and compensation (although arguably often unfortunately are unsuited or insufficient to do so) cannot be contracted out of. In many jurisdictions agreements about post-marital maintenance cannot be concluded in advance, and contracting out of the prestation compensatoire in France or pension compensatoria in

197 [2010] UKSC 42. See esp. paras. 75 ff. and also the references in n. 178 above.
199 [2006] UKHL 24. On this see 2.3. above.
200 Radmacher v Granatino [2010] UKSC 42, at [81]–[82].
202 See references in the previous n. and Scherpe (above n. 8) 517 f.
Spain is not permissible either. Ensuring that the needs of the spouses are met in case of divorce and that certain disadvantages incurred are compensated appears to be the line that most of the European jurisdictions (perhaps with Scotland being the most notable exception) draw. That therefore represents the common core of the law in Europe in this area. However, it is important to remember that while these principles might reflect the common core, the definitions and perceptions of what ‘needs’ are and what ought to be compensated vary greatly.203

### 3.4. Final Comparison – Protection of Autonomy and Protection from Autonomy

The commonalities and differences in approaches have been set out briefly above; space precludes a more detailed comparison.204 What remains to be said is that the structural similarities actually extend beyond what has been written. It appears that in all European jurisdictions where marital agreements are permissible in principle, the technical approach to reviewing them is surprisingly similar and takes place in two stages.

In the first stage, the focal point is the time of the conclusion of the agreement, and in all jurisdictions certain specific formal and/or procedural requirements need to be met in order for the agreement to be able to have any legal relevance. All of these do not focus on the substance of the agreement as such, their main function is to ensure that the spouses are in a position to make an autonomous decision. This stage is about procedural rather than substantive fairness, about ensuring actual autonomy rather than realising the policy aims of family law in general and marriage in particular. Hence this stage could be called the ‘protection of autonomy’ stage.

The second stage only comes into play once the agreement has mastered the first hurdle and has satisfied the first stage – in other words, if the law is satisfied that the agreement actually was based on an autonomous decision of the spouses. The whole point of this stage is that the scrutiny now moves to the substance of the agreement, and therefore the court is essentially establishing whether, for policy reasons (as they are in the respective jurisdiction), it will set aside the agreement that the spouses had reached simply because of the outcome the agreement would create. It is, therefore, apt to call this stage the ‘protection from autonomy’ stage: whatever the agreement reached, for – ultimately paternalistic – general policy reasons, the courts will disregard the agreement in certain circumstances. This, in turn, reveals, for each jurisdiction, the inalienable core of marriage law.

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203 Cf. Law Comission report (above n. 76).
204 For a more comprehensive comparison see Scherpe (above n. 8).
4. Summary – Is there a European regime for the financial consequences of divorce?

The answer to the question in the heading of this section quite clearly is a ‘no’ – there is no European regime for the financial consequences of divorce, although the CEFL Principles and the Franco-German Agreement on an optional matrimonial property regime might be seen as first tentative steps in that direction. But what can be discerned from the comparison of the various matrimonial property regimes and functional equivalents is that there are certain common European elements.

As explained above, while the starting points and techniques used to achieve a fair financial outcome for the spouses differ fundamentally, and indeed the perceptions of what is fair are also fundamentally different, the European jurisdictions nevertheless do share some views on what makes an outcome fair. This shared view often is the result of similar views on marriage. Almost all European jurisdictions regard marriage as a partnership of equals, and this is reflected in some form of equal sharing of assets on divorce (the exceptions being Greece and some Spanish regional laws). There is therefore a broad European consensus that there is no room for any discrimination between the spouses based on the role they had during marriage, and that the main breadwinner (or the more financially successful spouse) should not be privileged simply because he or she managed to generate and retain more assets. Marriage is seen as a joint venture, and consequently at the end of a marriage the assets of this venture are to be shared equally (absent exceptional circumstances).

While there do, of course, remain significant differences in exactly which assets are to be shared, the underlying principles appear to be that only ‘fruits of joint labour’ are to be shared, i.e. assets that have been generated by the spouses during the marriage (but not in all jurisdictions necessarily by the marriage, see for example the treatment of value increases of real estate in Germany). Therefore assets acquired by one of the spouses before the marriage (and obviously after the marriage) as well as gifts and inheritances received during the marriage are generally excluded from the sharing exercise. Such assets are deemed to be extraneous to the marriage, and therefore not to be divided under the sharing principle should the marriage end.

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A further, though less pronounced, consensus in most European jurisdictions seems to be that ‘sacrifices’ made for the family (the common but rather unfortunate terminology for ‘undertaking family work’) and resulting economic disadvantages ought to be addressed in some way. The underlying policy is that the choice to undertake family work should be incentivised and promoted to a certain extent, and that such work ought to be recognised as an important element in the financial consequences of divorce. However, there is equally a clearly discernible trend away from the ‘meal ticket for life’-marriage, which originated from the idea that the marital commitment was permanent and that this commitment persisted even if the marriage ended in divorce. Instead, the European jurisdictions have increasingly and explicitly turned away from this idea of marriage (and divorce) and have often limited the duration and quantum of post-marital obligations, particularly spousal maintenance. This is in line with the general acceptance of marriage as a partnership of equals and also promotes, to varying degrees, the view of the spouses as individuals rather than merely members of the marital unit – and, in principle, their autonomy. While there is an obvious tension between the policies described, this reflects the diversity if marriages in modern societies and the law’s desire to accommodate all marriages.

The same can be seen in the way the jurisdictions allow – and do not allow – spouses to make their own arrangements regarding their financial relations. Most European jurisdictions allow the parties considerable freedom to enter into marital agreements and thus to opt out of the protective scheme that the default rules provide. There are, however, limits to this autonomy. The first limitation is that the European jurisdictions recognise that marital agreements concern a special social situation that merits special procedural and other safeguards in order to protect the spouses’ actual autonomy. Social and other pressures, unrealistic expectations and other factors set this apart from ‘normal’ contractual negotiations and this is reflected in rules that aim for a protection from autonomy. But even where the marital agreement meets these requirements, a second layer of protection secure a protection from autonomy. This is the result of the view that there are certain elements of the default rules that for public policy reasons the spouses cannot contract out of. Whatever the spouses may have agreed, there are certain rights and duties that are mandatory and not at the disposition of the parties: these reflect the ‘core’ of marital obligations. In most European jurisdictions, this means the obligation to meet relationship-generated needs and compensation for relationship-generated disadvantages, particularly if those are the result of past or ongoing child care responsibilities.
So while there indeed is no common Europe regime for the financial consequences of divorce, there are certainly common themes and principles, and these are – admittedly on a rather abstract level – constitute elements of a common European family law.

Recommendations for further reading


S Hofer, D Schwab and D Henrich (eds), From Status to Contract?—Die Bedeutung des Vertrages im europäischen Familienrecht (Bielefeld, Gieseking, 2005).


K Boele-Woelki, B Braat and I Curry-Sumner (eds), European Family law in Action. Volume IV – Property Relations Between Spouses (Intersentia 2009)
