

# ASPECTS OF THE MATRIMONIAL PROPERTY CONTRACT IN SOME EUROPEAN COUNTRIES

## ASPEKTY MANŽELSKEJ MAJETKOVEJ ZMLUVY V NIEKTORÝCH EURÓPSKYCH KRAJINÁCH

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### ABSTRAKT

Štúdia sa zaoberá inštitútom manželskej majetkovej zmluvy. Skúma jeho funkciu, teda ako dokáže vytvoriť rovnováhu medzi solidaritou manželov a finančnou nezávislosťou. Dôležitou otázkou je aj presadzovanie zmluvnej slobody strán. Článok sa zaoberá základnými prvkami maďarskej úpravy, ako aj snahami o zjednotenie v európskom rámci: aké argumenty a protiargumenty existujú pre a proti nevyhnutnosti a možnosti harmonizácie. Materiál uzatvára medzinárodný výhľad. Štúdia zdôrazňuje najväčšiu výhodu maďarskej úpravy, rozdiely pozorované v oblasti voľnosti obsahu zmluvy v dôsledku medzinárodného pohľadu a odpovedá na otázku, či je to dostatočné na zabezpečenie uzavretia a plnenia manželskej majetkovej zmluvy, resp. a načrtnúť ako model fakultatívne majetkovo-právne systémy?

### ABSTRACT

The study deals with the institution of the matrimonial property contract. It examines its function, i.e. how it can create a balance between the solidarity of spouses and financial independence. The enforcement of the parties' freedom of contract is also a prominent issue. The article covers the fundamental elements of the Hungarian regulation, as well as the unification efforts taking place within the European framework: what arguments and counterarguments are there for and against the necessity and possibility of harmonization. The paper concludes with an international outlook. The study emphasizes the greatest advantage of the Hungarian regulation, the differences observed in the field of freedom of contractual content as a result of the international perspective, and answers the question, is it sufficient to ensure the conclusion and execution of the matrimonial property contract, and to outline the optional property law systems as a model?

### I. INTRODUCTION

The purpose of this study is to review the main rules regarding the matrimonial property contract both in Hungarian law (bearing in mind that the author is primarily engaged in research on Hungarian law) and in the law of some European countries and to compare these provisions.

The main questions of the research are what justifies harmonization and why this area is suitable; what are the property law systems in each European country; is it possible to enter into a matrimonial property contract; how the freedom of contract can be interpreted in this context; what is the form and record of the contract?

In view of the fact that the literature<sup>2</sup> makes a distinction between the narrower and the broader sense of the matrimonial property contract, it is necessary to state that this article deals

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only with the narrow sense of the matrimonial property contract, not with other contracts between the spouses. It is also not intended to examine the regulations for people living in a registered partnership.

It can be established in terms of the function of the matrimonial property contract: if the legal system of property law lays down the separation of property by prioritizing the autonomy of the individual, then this agreement can strengthen the solidarity of the parties; and if the legal solution follows the community of property system, the matrimonial property contract can increase the autonomy and financial independence of the parties.<sup>3</sup> This type of agreement can be suitable for creating a balance between individual sovereignty and marital community and reciprocity.

Regarding the systematic placement, despite the word contract in the name of the examined legal institution, it is difficult to fit it into the scope of contracts in the classical sense: despite the fact that the parties are typically defined here for legal relationships with a relative structure, their contract is concluded partly so that its scope extends to third parties as well. However, this is already a characteristic of legal relationships with an absolute structure.<sup>4</sup> The peculiarity of family law agreements is that they fall primarily under the scope of family law and, secondarily, the law of obligations, so they are very complex relationships due to the „interference in legal areas”.<sup>5</sup>

In connection with the topic, an important question is the enforcement of the will autonomy of the parties. In the member states of the European Union, there is a uniform opinion regarding the fact that it is necessary to ensure that the spouses can freely decide on the property rights effects of marriage, on whether they wish to depart from the legal property rights system in whole or in part. In general, it can be stated that the more liberal a state's legal regulations are regarding marriage contracts, the more problems it may cause in determining the permissible content of such a contract. This is a natural result of the legislator defining the concept of marriage contracts broadly to strengthen the freedom of the spouses.<sup>6</sup> However, there are already differences regarding the degree of freedom allowed to the parties: while, for example, in Denmark, Greece, and Italy you can only choose from the property law systems regulated by law, in Austria and France you can freely mix the elements of the individual systems.<sup>7</sup> Significant differences can also be observed about the legal property law system, in line with the economic and social system, the ideal of marriage, and the regulatory antecedents.<sup>8</sup> The general rule in European countries is that matrimonial reciprocal contracts are valid and the best solution for protecting spousal freedom. The form of a marriage contract varies across Europe: in some countries, marriage contracts require a notarial form. On the one hand, for example in Hungary, the form of a notarial or a private document countersigned by a lawyer is also appropriate; on the other hand in England and Ireland, private contracts apply.<sup>9</sup> By examining

<sup>3</sup> MOLNÁR, S. : The systems of matrimonial property relations especially from the point of view of the autonomy of the parties (A házassági vagyoni jogi viszonyok rendszerei különösen a felek autonómiája szempontjából). In: *Iustum Aequum Salutare*, 2017/1. 230.

<sup>4</sup> MOLNÁR: op cit 234.

<sup>5</sup> KRISTON, E. : An interdisciplinary study of modern types of family relationships and relationships created as a result of economic and innovation potentials (A gazdasági és innovációs potenciálok hatására létrejövő családi kapcsolatok, viszonyok modern típusainak interdiszciplináris vizsgálata). In: *Multidiszciplináris tudományok*, 2021/2. 289.

<sup>6</sup> SISÁK, E. : Smart Marriage Contracts: The future of blockchain in matrimonial property law? In: *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, 2021/3. 662.

<sup>7</sup> WOPERA, Z. – TÓTH, B. : EU settlement of the property relations of international couples - Another strengthened cooperation for the regulation of family law disputes (A nemzetközi párok vagyoni viszonyainak uniós rendezése – Újabb megerősített együttműködés a családjogi jogviták szabályozására). In: Katalin Raffai (ed.): *Cross-border family matters. International personal and family law issues in the 21st century. (Határokon átnyúló családi ügyek. Nemzetközi személyes- és családjogi kérdések a XXI. században)*. Budapest, Pázmány Press, 2018. 201.

<sup>8</sup> MOLNÁR: op cit 226.

<sup>9</sup> MONEDERO, P.J.A. : Family Laws in the European Union. In: *Socialinè teorija, empirija, politika ir praktika*, 2019. 92.

the elements of freedom of contract, which means that the will of the parties is not bound in the legal sense, it can be concluded that freedom of contract is guaranteed within the European framework; the freedom to choose a partner is limited since due to the nature of the contract, it can be concluded by spouses or newlyweds; while the greatest differences between European countries can be observed in the restriction of the freedom of content.

## II. THE MAIN ELEMENTS OF HUNGARIAN REGULATION

In Hungarian law, the primary rules for matrimonial property contracts in the narrow sense are laid down in the Civil Code, included in the Book of Family Law (Section 4:63.). The provisions of the Book Six, Law of Obligations apply only as a background rule.

As an optional regime, the Hungarian system includes the most essential provisions and main lines of the property regime of the community of accrued gains and the regime of separation of property. The Hungarian system allows a lot of freedom for both future spouses and spouses: The parties can apply any property law system, and they can even define the relevant property law form differently for some assets. The Civil Code and its related provisions are, as a rule, dispositive and establish the primacy of the contractual arrangement, with which the legislator presumably wishes to support legal awareness, autonomy and self-determination.<sup>10</sup> The legal property law system therefore only appears as a secondary settlement method.

The contract can be concluded by both future spouses and spouses, but there is no place for representation (Civil Code, Sections 4:63-4:64.). The dispositive regulation enables the creation of a special property law system applicable only between contracting spouses.<sup>11</sup> The freedom of content is therefore broadly enforced. In practice, the following stipulations are typical: deviation from the legal rules for real estate, movable property of significant value, special assets, e.g. shares in a business partnership; complete separation of assets; it is also typical to specify a requirement other than joint responsibility, if, for example, one of the spouses engages in an activity that is risky from a business or financial point of view.<sup>12</sup>

Among the reasons for invalidity that limit the freedom of content, the prohibited, obviously contrary to good morals, usurious contract, as well as obvious disproportionality may be of particular importance in the discussed circle. The latter case can also be excluded in the matrimonial property contract, which solution can apply especially in the division of joint property.<sup>13</sup> In practice, the contract can be contested by referring to an error in the contractual intention if it is contrary to conjugal solidarity and seriously violates the interests of family protection.<sup>14</sup> The content limitations in Book Six are supplemented by the following in Book Four: Protection of third parties a matrimonial property contract shall not contain any provision of retroactive effect (Section 4:67.); even in the case of living under the separation of property regime, neither spouse can be fully or predominantly exempt from costs and expenses (Section 4:73.)<sup>15</sup> This is in line with the basic principle regarding the protection of marriage and the family,<sup>16</sup> part of which is to ensure the harmony of family and individual interests.

<sup>10</sup> SZEIBERT, O. : The marriage (A házasság). In: Lajos Vékás – Péter Gárdos (eds.): Commentary on the Civil Code, Volume 1 (Kommentár a Polgári Törvénykönyvhöz, 1. kötet). Budapest, Wolters Kluwer, 2014. 676.

<sup>11</sup> TÓTH, Z. : New elements, new perspectives: new rules of the matrimonial property rights contract (Új elemek, új távlatok: a házassági vagyoni jogi szerződés új szabályai). In: Közjegyzők Közlönye, 2014/2. 24.

<sup>12</sup> KÖVESNÉ KÓSA, Z. : Contracts between spouses (A házastársak egymás közötti szerződése). In: Közjegyzők Közlönye, 2018/1. 22-23.

<sup>13</sup> KÖVESNÉ KÓSA: op cit 20.

<sup>14</sup> HERGER, Cs. – KATONÁNYÉ PEHR, E. : Hungarian family law (Magyar családjog). Budapest, Novissima, 2021. 120.

<sup>15</sup> KÖVESNÉ KÓSA: op cit 20.

<sup>16</sup> JOBBÁGYI, G. : Family law effects of marriage and cohabitation (A házasság, az élettársi kapcsolat családügyi hatásai). In: András Osztovits (ed.): Act V of 2013 on the Civil Code and the Great Commentary on the related legislation, II. volume (A polgári törvénykönyvről szóló 2013. évi V. törvény és a kapcsolódó jogszabályok nagykommentárja, II. kötet). Budapest, Opten, 2014. 96.

Compliance with the formal requirements (public document or private document countersigned by a lawyer) is a condition for the validity of the contract, while registration in the national register maintained by the Hungarian Chamber of Notaries is necessary for validity vis-à-vis third parties. However, declaring that the negotiated contracts are ineffective as a general rule<sup>17</sup> limits the contractual freedom and private autonomy of the spouses to an unjustified extent.

The contract can be amended or terminated by the spouses, in the latter case the law will govern. Either spouse can request a modification by the court according to the rule on amendment of the contract by the court in the Book of Obligations (Section 6:192). However, the court can only make changes within the framework of the given contract, it cannot apply a different property law system.<sup>18</sup> Future spouses and spouses can also choose the applicable law for their property relations.

Although statistical data are not available specifically for the analyzed group, certainly, neither pre-marital nor marital property rights contracts occur often. Despite this, spouses and especially future spouses sometimes record in a deed which property belonged to which spouse's separate property before the marriage, thus making it easier to prove the ownership of certain property. The rarity of matrimonial property rights contracts may be because the previously valid Hungarian Family Law Act contained only one provision regarding this and did not regulate other alternative property rights.<sup>19</sup> In comparison, the 2013 Civil Code its more detailed regulation probably contributes to its more frequent application.

The Hungarian Chamber of Civil Law Notaries was able to provide information regarding the following: Non-litigation procedure for the registration of marriage and cohabitation property rights contracts in the electronic register and the registration of the fact of modification, cancellation, termination or termination of the registered property rights contract. The data indicate the number of procedures conducted by notaries at the national level. Although the number of cases covers a wider range than the subject of the research, it is clear that there has been a continuous increase since 2014, by 2018 the number of cases had increased by more than 2.5 times compared to the initial period, at which time it reached its peak and then slowly decreased started.<sup>20</sup>

### III. UNIFICATION EFFORTS IN EUROPE

Because international marriages, which require unanimity for the sake of legal certainty and predictability, are becoming more and more common, the need to unify family law and matrimonial property law issues within the European framework has arisen. The most serious obstacle in this process is the complexity and diversity of property law systems.<sup>21</sup> That is why unification is progressing slowly in the area of family law, as it is an area that is closely related to the social perception of the given state, the area of matrimonial property law is also closely related to property and family law relations, and the traditions of the country.<sup>22</sup> A fundamental problem is deciding what the process should cover: only procedural issues or also substantive

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<sup>17</sup> See more details on the subject Tímea Barzó: Creditor protection rules in matrimonial property law (Hitelezővédelmi szabályok a házassági vagyonjogban). In: Forum: Acta Juridica et Politica, 2015/2. 41-53.

<sup>18</sup> JOBBÁGYI: op cit 92.

<sup>19</sup> WEISS, E. – SZEIBERT-ERDŐS, O. : National Report: Hungary, 2008. 24.

<sup>20</sup> Based on data from the Hungarian Chamber of Civil Law Notaries.

<sup>21</sup> WOPERA – TÓTH: op cit 196-198.

<sup>22</sup> KÓRÓS, A. : Fundamental issues of the modernization of matrimonial property law (A házassági vagyonjog korszerűsítésének elvi kérdései). In: Polgári Jogi Kodifikáció, 2001/2. 3-18.

legal provisions. The latter represents a much greater restriction on the sovereignty of the member states.<sup>23</sup>

Arguments in favour of the approximation of the law of marriage contracts are that it makes it easier for both couples (who can adjust property regulations to their own needs) and for law enforcement officers, it can be considered a flexible legal instrument, and it can also reduce legal uncertainty with the possibility of choosing the law.<sup>24</sup> The first document of the ongoing legal harmonization process<sup>25</sup> was created in 2006, the Green Book of the European Commission.<sup>26</sup> The document aimed to standardize the material legal requirements of matrimonial property law, for example, using the same criteria formulated against the registration system.<sup>27</sup> The legal certainty of the parties concerned, and especially of the creditors, is served by improving the publicity of matrimonial property law systems.<sup>28</sup>

Without a detailed description of the related activity, I would like to refer to the following legal source in connection with the topic. In June 2016, the Council Regulation on matrimonial property law was published in the Official Journal.<sup>29</sup> The regulation widely enforces the private autonomy of the parties, for example, it ensures the choice of the parties in connection with the applicable law.<sup>30</sup> The Council Regulation was created to contribute to the easier management of the property of the spouses and make it simpler to divide the property in the event of a divorce or the death of one of the spouses.<sup>31</sup> The regulation was adopted by 18 member states within a strengthened cooperation procedure framework. The method of acceptance is based on the fact that the unanimity required in cross-border family law cases was not available.<sup>32</sup> Hungary and Slovakia are not among the accepting countries, because the Hungarian legislator did not agree with the conceptual approaches and its interpretation obstacles raised doubts.<sup>33</sup> The legal document uses the term matrimonial property agreement, which is an agreement between spouses or future spouses by which they organise their matrimonial property regime.<sup>34</sup> To facilitate the acceptance of matrimonial property rights acquired as a result of the matrimonial property agreement in the Member States, the decree emphasizes the need to establish rules regarding formal validity. At least the agreement should be expressed in writing, dated and signed by both parties. However, the agreement should also fulfil additional formal validity requirements set out in the law applicable to the matrimonial property regime as determined by this Regulation and in the law of the Member State in which the spouses have their habitual residence. This Regulation should also determine which law is to govern the material validity

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<sup>23</sup> KRISTON, E. : Certain contractual relationships of „family property law” and the contractual freedom prevailing in them (PhD thesis) (A „családi vagyonyjog” egyes szerződéses viszonyai és a bennük érvényesülő szerződési szabadság (PhD értekezés)) Deák Ferenc Állam- és Jogtudományi Doktori Iskola, Miskolc, 2020. 101.

<sup>24</sup> LÁNYINÉ DR. TOLDI, J. : Matrimonial property law contract in the European Union (Házassági vagyonyjogi szerződés az Európai Unióban). In: Családi jog, 2007/1. 22.

<sup>25</sup> See details about the process Lányiné dr. Toldi: op cit 21-25.; Wopera – Tóth: op cit 189-196.; Kriston (2020): op cit 97-105.

<sup>26</sup> Commission of the European Communities: Green Paper on Conflict of Laws in Matters Concerning Matrimonial Property Regimes, Including the Question of Jurisdiction and Mutual Recognition {SEC(2006) 952} COM/2006/0400 final.

<sup>27</sup> LÁNYINÉ DR. TOLDI: op cit 21.

<sup>28</sup> Green Paper 9.

<sup>29</sup> Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.

<sup>30</sup> KRISTON (2020): op cit 103.

<sup>31</sup> Matters related to matrimonial property systems, National information related to Regulation (EU) 2016/1103 (Házassági vagyonyjogi rendszerekkel kapcsolatos ügyek, Az (EU) 2016/1103 rendelettel kapcsolatos nemzeti tájékoztatás).

<sup>32</sup> TÓTH, B. : Current issues of EU rules on matrimonial matters (A házassági ügyek uniós szabályainak aktuális kérdései). In: Publicationes Universitatis Miskolciensis, 2019/1. 485.

<sup>33</sup> KRISTON, E. : Problematic points of the harmonization of matrimonial property law: Council Regulation (EU) 2016/1103 on the settlement of matrimonial property law issues (A házassági vagyonyjog harmonizációjának problematikus pontjai: A Tanács (EU) 2016/1103 rendelete, a házassági vagyonyjogi kérdések rendezéséről). In: Publicationes Universitatis Miskolciensis, 2019/1. 446.

<sup>34</sup> Council Regulation (EU) 2016/1103 Article 3, 1. (b).

of such an agreement.<sup>35</sup> In connection with the matrimonial property law decree, the problem that appears in practice is how it relates to other EU decrees. The Court of Justice of the European Union stated that the purpose of the matrimonial property law regulation is primarily to facilitate the day-to-day management of property and the termination of the property law system.<sup>36</sup> The close intertwining of matrimonial property and succession issues is indicated by the fact that it is not always easy to determine the rules applicable to such matters.<sup>37</sup>

For the sake of free movement, in the area of matrimonial property rights contracts, the means of substantive legal harmonization can be to ensure the conclusion and execution of the contract and to outline the optional property rights systems with precise content.

The Commission of European Family Law (CEFL), founded in 2001, which created the Principles of European Family Law, has a decisive role in the coordination of the relevant material law. The purpose of the Principles is to serve as guidelines for legislators, thereby promoting substantive legal harmonization. The following requirements are formulated against the matrimonial property law rules: equality of the spouses, guaranteeing a share on a fair basis, protecting the weaker party, enforcing legal certainty, flexibility and solidarity.<sup>38</sup> With the issue of the matrimonial property contract, „Principles of European Family Law Regarding Property Relations Between Spouses” Chapter II. deals with.<sup>39</sup> The relevant regulations establish the concept and form requirements of the marital property agreement, emphasize the disclosure obligation of the spouses and the obligations of a notary or other legal professional with comparable functions, effects as against third parties and the so-called Hardship Clause. Chapter III. recommends two of the matrimonial property law systems: participation in acquisitions and community of acquisitions.<sup>40</sup> The latter is regulated in much more detail.

Based on the responses to the questionnaire prepared by the Commission, the following matrimonial property law systems can be distinguished: participation in acquisitions, a community of acquisitions, delayed community of property, regime of separation of property and regime of separation of property with court settlement. The fundamental question is whether, as a general rule, both parties share or increase their separate assets, and whether the parties have joint property or not.<sup>41</sup> In the next chapter, the study examines the main issues related to matrimonial property law contracts through one country’s example of the mentioned property law systems based on the reports prepared in 2008 and their 2021 update.

#### IV. INTERNATIONAL OUTLOOK

Examining and comparing the rules of individual Member States regarding the matrimonial property law contract can contribute to the definition of the content elements of the contract. The study presents a country from each of the systems that CEFL has developed based on questionnaire replies.

Poland follows the community of property system. Spouses and future spouses can enter into a matrimonial property law contract, modify it later or even cancel it. The contracting parties can only choose from the systems defined by law (separation of property or community

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<sup>35</sup> Council Regulation (EU) 2016/1103 (48).

<sup>36</sup> Curia Case C-558/16. 41.

<sup>37</sup> DIKOVSKA, I. : Can a choice-of-court agreement included in a marriage contract meet the requirements of both EU Succession and Matrimonial Property Regulations? Croatian Yearbook of European Law and Policy, 2019. 299.

<sup>38</sup> SZEIBERT, O. : The bridging of differences between matrimonial property law systems, in particular with regard to the community of property and property regime of community of accrued gains (A házassági vagyoni jogi rendszerek közötti eltérések áthidalhatósága, különös tekintettel a házastársi vagyonközösségre és a közszerzeményi rendszerre). In: Családi Jog, 2016/1. 7-8.

<sup>39</sup> SZEIBERT, O., (translated by): Principles on property relations of spouses (A házastársak közötti vagyoni viszonyokra vonatkozó Elvek).

<sup>40</sup> See in detail SZEIBERT, O. : Marriage in Europe in the light of efforts to unify the law (A házasság Európában a jogegységesítő törekvések tükrében). Budapest, ELTE Eötvös, 2014. 195-218. (Szeibert 2014a).

<sup>41</sup> SZEIBERT (2016): op cit 3.

of accrued gains/participation in acquisitions), and their rules cannot be modified, so the parties cannot move freely.<sup>42</sup> Practice shows that since the turn of the millennium, the commercial activity of spouses and their participation in business life has increased, which justifies the deviation from the legal property law system in terms of asset management and responsibility.<sup>43</sup> The contract must be concluded in the form of a notarial act, in connection with which the notary is obliged, according to the general rules, to ensure that the parties fully understand the content of their agreement and its significance, that it corresponds to their free will. No record is kept of these agreements, they are effective against third parties if they knew about the conclusion and its content.<sup>44</sup>

In the Nordic countries (Sweden, Norway, Denmark, Finland), on the basis of delayed community of property, property acquired before or during the cohabitation is separate property, but in the case of divorce, the property is divided by taking into account all property. It must be emphasized that although the range of separate property objects that did not have to be taken into account in the division of property became larger and larger in the 20th century.<sup>45</sup> In the 21st century, the property of the spouses is already widely considered to be joint property, from which, as a general rule, they receive half in the event of a divorce.<sup>46</sup> In these countries, too, the solution is that the spouses can choose from among the regulated systems (so the asset separation regime can also be used here).<sup>47</sup>

In Germany, the statutory property rights regime is a public procurement system based on the principle of surplus value, in which settlement is made based on a comparison of the starting and closing assets.<sup>48</sup> The parties acquire their assets independently and upon termination of the marriage they share in each other's assets. When the marriage ends, no community of property arises, but only a demand for compensation.<sup>49</sup> The property of the spouses is separated in proportion to the acquisition, joint property is created only on those assets that were jointly acquired in return.<sup>50</sup> Matrimonial property rights contracts can be concluded by both future spouses and spouses, they are binding. Within the framework of the marriage contract to be concluded before a notary public, the system of property separation or property consolidation can be chosen. Within the framework of the BGB, the legal rules can be partially amended, however, it is forbidden to mix the individual systems. This type of restriction of contractual freedom is justified by the security of business life and the guarantee of formality. The marriage contract must be registered in a separate register to ensure that third parties know the financial

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<sup>42</sup> SZEIBERT (2014a): op cit 194.

<sup>43</sup> SZEIBERT, O.: Property regime of community of accrued gains in Germany and Poland; the family business in Italy and Spain (A közszerzeményi rendszer Németországban és Lengyelországban; a családi vállalkozás Olaszországban és Spanyolországban). In: Családi Jog, 2010/3. 43.

<sup>44</sup> AUTEUR, N. : National Report: Poland, 2008. 18-19.

<sup>45</sup> BOELE-WOELKI, K. – BRAAT, B. – CURRY-SUMNER, I. (eds.): European Family Law in Action. Volume IV. Property Relations between Spouses cites: Orsolya Szeibert: Matrimonial property law trends in Europe and the new Civil Code. in his family law book (Házassági vagyoni jogi tendenciák Európában és az új Ptk. családjogi könyvében). In: Zoltán Csehi – Katalin Raffai (eds.): State and private law – Efforts and results at the intersection of European Union law, private international law, civil law and civil procedural law (Állam és magánjog – Törekvések és eredmények az Európai Unió joga, a nemzetközi magánjog, polgári jog és polgári eljárásjog keresztmetszetében). Budapest, Pázmány Press, 2014. Szeibert (2014b) 239.

<sup>46</sup> SZEIBERT, O. (2014a): op cit 187.

<sup>47</sup> SZEIBERT, O. (2014a): op cit 193-194.

<sup>48</sup> KÓRÓS: op cit See also Csabáné Herger: Property equalization in German matrimonial property law (A szerzeményi kiegyenlítés a német házassági vagyoni jogban). In: Családi Jog, 2015/4. 33-44.

<sup>49</sup> SZEIBERT, O. (2014a): op cit 187.

<sup>50</sup> WOPERA, Z. : Handbook of European family law - regulation of matters related to marriage, parental responsibility and maintenance in EU law and the Hague Conventions (Az európai családjog kézikönyve – házassággal, szülői felelősséggel és tartással kapcsolatos ügyek szabályozása az európai uniós jogban és hágai egyezményekben). Budapest, HVG-ORAC, 2012. 220.

situation of the parties.<sup>51</sup> If the spouses have chosen the community of property system, the notarized marriage contract must also be submitted to the real estate registry and a request must be made to correct this registry.<sup>52</sup> Contract clauses typically modify the compensation rules related to accumulated profits, for example, stock ownership is not taken into account in either the initial or final assets; facts other than the cases included in the BGB are recorded for the premature settlement of the accumulated profit.<sup>53</sup> Since 2009, even at the legal level, compensation for accumulated profits has been dealt with in more detail to avoid abuses.<sup>54</sup> Spouses can also choose a special form of community property in their contract, the community of property system. In such cases, they must stipulate in their agreement that all assets acquired before the marriage are considered reserved assets.<sup>55</sup> About content limitations, it should be emphasized that the contract can only have a valid clause, i.e. if, for example, the agreement unilaterally puts one of the spouses in a disadvantageous position, if other conditions exist, the contract conflicts with good morals and is therefore void. The relevant statutory provisions, which are otherwise excluded in the contract, must be applied in such cases. Jurisprudence in this respect is situational, it can be decided on a case-by-case basis whether the contract conflicts with good morals and is therefore invalid.<sup>56</sup> Although statistical data are not available, expert estimates from 2008 suggest that less than 10% of married couples enter into such an agreement.<sup>57</sup>

In a decision of the German Constitutional Court in 2001, it was stated that if the contracting parties are not equal, i.e. the dominant position of one of the parties is reflected in the contract, then the court does not protect it, but intervenes on behalf of the weaker party.<sup>58</sup> Based on this, the Federal Supreme Court also changed its previous practice about marriage contracts: if the basic rights of one of the parties are violated due to renunciation, it does not consider it acceptable if the circumstances of the parties do not justify it and it is disadvantageous for one of the parties.<sup>59</sup> In this case, the principle of *pacta sunt servanda* can be overridden.

In Austria, the asset separation system is the legal form of property law, but at the same time, moderate equalization is implemented by law.<sup>60</sup> The court considers and divides the following: property acquired separately by the parties during the marriage and property used during the marriage. That is, the range of property that can be divided is defined by law, but the distribution ratio is at the discretion of the court.<sup>61</sup> Preliminary agreements regarding marital property rights cannot be reviewed or amended by the court, they are binding.<sup>62</sup> Spouses are also free to enter into a binding contract with each other, in which they can choose different forms of community property, modify existing types or create new ones, in the form of a public

<sup>51</sup> RYZNAR, M. – STĚPIEŇ-SPOREK, A. : To Have and to Hold, for Richer or Richer: Premarital Agreements in the Comparative Context. In: *Chapman Law Review*, 2009/1. 49-50.

<sup>52</sup> European Judicial Network (Európai Igazságügyi Hálózat): *Matrimonial Property Regimes – Germany (Házassági vagyoni rendszerek – Németország)*.

<sup>53</sup> MARTINY, D. – DETHLOFF, N. : National Report: Germany, 2008. 45-46.

<sup>54</sup> DETHLOFF, N. – MARTINY, D. – MAURER, M. : Update – Germany, 2021. 6.

<sup>55</sup> European Judicial Network (Európai Igazságügyi Hálózat): *Matrimonial Property Regimes – Germany (Házassági vagyoni rendszerek – Németország)*.

<sup>56</sup> European Judicial Network (Európai Igazságügyi Hálózat): *Matrimonial Property Regimes – Germany (Házassági vagyoni rendszerek – Németország)*.

<sup>57</sup> MARTINY, D. – DETHLOFF, N.: op cit 40-42.

<sup>58</sup> SANDERS, A. : Marriage, Same-sex partnership and the German Constitution. In: *German Law Journal*, 2012/8. 923.

<sup>59</sup> SZEIBERT-ERDŐS, O. : The direction of family law changes in England and Germany - same-sex partnerships, legal status of transgender persons, naming and matrimonial property rights agreement (A családügyi változások iránya Angliában és Németországban – azonos neműek partnerkapcsolata, transznemű személyek jogállása, névviselése és házassági vagyoni szerződés). In: *Családi Jog*, 2008/1. 41-42.

<sup>60</sup> SZEIBERT, O. (2014b): op cit 240.

<sup>61</sup> MOLNÁR: op cit 227.

<sup>62</sup> ROTH, M. : Update – Austria, 2021. 10.



document. Among the stipulations used in practice, it should be highlighted that the limitation of liability is typical.<sup>63</sup> Regarding the limitations of the agreement in the matrimonial property law system, it should be emphasized that a marriage contract may not include, for example, a complete mutual waiver of maintenance in an existing marriage.<sup>64</sup> In connection with the scope of the matrimonial property rights contract covering third parties, a solution was developed in Austria that linked the registers: the examined contract also appears in the company register.<sup>65</sup>

In the common law legal system, including in England, there is no independent matrimonial property law system, marriage does not affect the property relations of the spouses in a legal sense, they only have separate property. At the same time, discretionary compensation appeared in jurisprudence in 1970 in the name of fairness.<sup>66</sup> In legal disputes related to the dissolution of marriage, in addition to reasonableness, social and fairness aspects have also come to the fore when determining what amount the party in a better financial situation should pay after the dissolution of the marriage in order to maintain the standard of living of the ex-spouse.<sup>67</sup> The court, taking into account the totality of the parties' financial relations, decides on the basis of almost completely free consideration, and the settlement can be realized either in a lump sum or in the form of alimony.<sup>68</sup>

In the report on England prepared for the Commission on European Family Law, the following was highlighted: Future spouses couples can also enter into a property-related agreement, and although it is not binding, it still has an effect. The *K v K* case is decisive in this respect. If the parties have used independent legal advice, their assets have been fully disclosed, there is no significant inequality in terms of their bargaining position, the agreement was concluded some time (e.g. 21 days) before the marriage, they were mindful of the children, and the agreement still suits their situation, then it will be taken into account in the court's decision. Despite the lack of binding force, there is a growing willingness to abide by agreements, especially if the marriage was short.<sup>69</sup> Spouses can also conclude a contract regulating their property relationship, provided that it does not limit the right to go to court, but this is not necessarily binding either. Prenuptial and/or postnuptial agreements must be in written form or may be approved by the court after full disclosure of all assets and can then be enforced as a court order.<sup>70</sup> As for the registration system, there is no such system in England. Although the conclusion of the agreement does not require full disclosure of the assets and debts of the spouses, based on case law it can be established that if this is not done, it is unlikely that they will pay attention to the agreement.<sup>71</sup> Although statistics are not available on how often negotiated agreements are entered into, it can be seen that, despite the lack of enforceability, more and more people are entering into such contracts, especially those who are not getting married for the first time. Competent authorities have full discretion in deciding whether to enforce the agreement or take it into account or disregard it.<sup>72</sup> Although the court enforceability of pre-and post-nuptial agreements is not general, decisive decisions on this issue have been made in case law.<sup>73</sup> In *Macleod v. Macleod*, a dissolution agreement limiting the

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<sup>63</sup> ROTH, M.: National Report: Austria, 2008. 56-57.

<sup>64</sup> European Judicial Network (Európai Igazságügyi Hálózat): Matrimonial Property Regimes – Austria (Házassági vagyoni jogi rendszerek – Ausztria).

<sup>65</sup> SALERNO CARDILLO, F. : Proposal for the „European” Marriage Contract (Javaslat az „Európai” Házassági szerződésre). In: *Közjegyzők Közlönye*, 2006/1. 5.

<sup>66</sup> SZEIBERT (2014b): op cit 237-238.

<sup>67</sup> KRISTON (2019): op cit 440.

<sup>68</sup> SZEIBERT, O. : Matrimonial property law in European countries – Part 1 (Házassági vagyoni jog az európai országokban – 1. Rész). In: *Családi Jog*, 2009/3. 36.

<sup>69</sup> BARLOW, A. : National Report: England and Wales, 2008. 16.

<sup>70</sup> BARLOW, A: op cit 16.

<sup>71</sup> BARLOW, A: op cit 16.

<sup>72</sup> BARLOW, A: op cit 17.

<sup>73</sup> LOWE QC (HON), N. – BARLOW, A. : Update – England and Wales, 2021. 6.

financial terms of divorce was upheld. According to the relevant Matrimonial Causes Act, spouses can enter into property rights agreements at any time, thus agreements created at the end of the marriage and thereby circumventing the discretionary powers of the court are widespread.<sup>74</sup> In 2010, the Supreme Court made a landmark decision in *Radmacher v. Granatino*: the court must enforce a prenuptial agreement freely entered into by the parties, unless it would not be fair to bind the parties to it under the circumstances.<sup>75</sup> The practice therefore seems to be moving in the direction of the court taking into account the existing agreement between the parties when deciding, if it meets the strict set of conditions.<sup>76</sup>

This chapter is based on responses to a questionnaire prepared by CEFL. Although answers are not available for Slovakia, the place of publication justifies the study to include this country. Slovak law does not provide broad frameworks for spouses, it contains a limited and exhaustive list of possible means for regulating property relations outside the law. The Slovak Civil Code also applies the *numerus clausus* principle in the law of marriage contracts, i.e. spouses can only enter into agreements that are regulated by law. They can choose from three options: the range of jointly owned assets is narrowed or expanded compared to the legal system; the legal rules of joint asset management are amended; subject the formation of common ownership to the dissolution of marriage.<sup>77</sup> In Slovakia, under the Slovak Civil Code, the default matrimonial property regime is the „undivided joint property of the spouses”, which is established upon the conclusion of the marriage. However, spouses may contractually extend or limit the scope of this system and the administration of property. However, regarding the content of the marriage contract, the contractual freedom of the parties does not apply unlimitedly, it is limited by law. The spouses are entitled only to: extend or limit the scope of undivided joint property as defined by law; change the rules of asset management; and postpone the establishment of undivided joint property until the marriage is dissolved.<sup>78</sup> Matrimonial agreements are limited to the choice of matrimonial property regime.<sup>79</sup> The spouses may, for example, agree that joint property includes property that would otherwise belong to the separate property of the spouses; or exclude parts of the joint property from joint ownership. Similarly, spouses may agree to treat joint property differently from the law, for example by stipulating that joint property or certain assets should be managed by both spouses or only by one of them. If the spouse disposes of property excluded from joint administration, the other spouse cannot plead the invalidity of the alienation. The spouses may also agree on a deferred community of property in the contract, which does not modify the extent of joint property, but the date of its creation. Thus, during marriage, each spouse acquires exclusive ownership of a property, and only now when the marriage is terminated does the community property complex arise, which is then settled.<sup>80</sup>

Of the individual solutions, I consider the one that gives the contracting parties a great deal of freedom as regards the content of the agreement, to be the most appropriate.

## V. CONCLUSION

After examining the relevant Hungarian regulations, it can be concluded that Hungary fits into the legal culture of the surrounding countries.<sup>81</sup> I consider the greatest advantage of the Hungarian regulations to be that it broadly ensures the enforcement of the will of the parties since the parties can apply any property law system, and the rules that allow deviations from

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<sup>74</sup> KRISTON (2019): op cit 441.

<sup>75</sup> LOWE QC – BARLOW: op cit 6.

<sup>76</sup> MOLNÁR: op cit 231.

<sup>77</sup> SISÁK: op cit 664.

<sup>78</sup> Bronislava Pavelkova: Slovakian family and succession law recognise one form of couple's relationship.

<sup>79</sup> JEŽOVÁ, D. : Family Laws and Regulations Slovakia 2023.

<sup>80</sup> Couples in Slovakia.

<sup>81</sup> BATA, D. : The emergence of alternative property law systems in the new Civil Code (Az alternatív vagyoni jogi rendszerek megjelenése az új Ptk.-ban). In: Családi Jog, 2017/3. 27.

matching will provide the opportunity to create a specific property law system applicable only between the contracting spouses.

The increasing number of international marriages and the free movement of persons justify the unification of matrimonial property law regulations. Although it is an area with traditional values, despite the differences in property law, there seems to be an increasing degree of legal cohesion, the spontaneous approximation of the relevant rules, and the reduction of the differences between the continental and common law legal systems. Unification is simpler in matters of procedural law, but in the field of substantive law, it greatly limits the independence of the states. That is why, in my opinion, in the case of the latter, it is sufficient to ensure the conclusion and execution of the matrimonial property contract and to outline the possible property law systems as a model. With regard to harmonisation in the area under consideration, I consider it sufficient to ensure, also within the framework of the European Union, that future spouses and spouses can freely shape the content of their property agreement.

In the examined countries and based on the Principles, both future spouses and spouses can enter into a matrimonial property contract. The difference between the continental and common law legal systems is manifested in the fact that, in the latter, marriage does not affect the property relations of the spouses in a legal sense, and the binding force of the negotiated agreements cannot be considered general. The greatest differences can be observed regarding the freedom of contractual content: the solution most adapted to the needs of the parties exists in Austria, similar to the Hungarian one: the existing types can be modified or new ones can be created. Poland is one of the strictest in this regard: you can only choose from the specified systems, without changing the rules. The stipulations typically refer to deviations from the applicable liability rules or modify the compensation rules. In connection with the form of the contract, it can be stated that in the countries following the examined continental legal order, the qualified document form is required everywhere and also in the Principles. In England, in comparison, the documentary form or the approval of the court is sufficient. Regarding the register, there is no such thing in Poland and England, but it exists in other countries, and Austria's solution, by connecting the registers so that the examined contract also appears in the company register, seems to be followed because the security of business life requires the public.

## KEÚČOVÉ SLOVÁ

Manželská majetková zmluva, zmluvná sloboda, Maďarsko, Európska únia

## KEY WORDS

matrimonial property contract, freedom of contract, Hungary, European Union

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