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POSSIBILITIES OF HARMONISATION IN THE FIELD OF FAMILY PROPERTY LAW*

EDIT KRISTON–EDIT SÁPI
assistant research fellows, Department of Civil Law
University of Miskolc
jogedit@uni-miskolc.hu; jogsapi@uni-miskolc.hu

1. The emergence of family property law in the European Union

For a long time after the emergence of the contemporary legal systems, it has not been a problem for the states of Europe to keep their legal disputes within the borders. This was also true for family law disputes as well, but the number of so-called *'mixed relationships'*[1] where the parties were of different nationalities increased.

The cross-border acquisition is the necessary implication of mixed relationships, which goes beyond the framework of national regulations, and it made necessarily international regulation. After the born of the European Union, the settlement of family law disputes has not been on the agenda of the EU for a long time. However, the cross-border legislative process began later.

The aim of the unification is to facilitate the resolution of cross-border family law disputes and to enforce the requirement of legal certainty at the highest possible level. At the same time, many factors stand in the way of unification efforts. Such a problematic factor is the diversity of legal systems on the property law solutions between family members.[2] *Wopera Zsuzsa* emphasizes that there are significant differences in the property regimes of the Member States, but it can be a common point that the parties can generally decide whether to separate their property or to choose another property settlement at the time of the marriage.[3] The biggest difference can be found between common-law and continental law systems. The basis of the difference it that the common-law regime does not know the concepts of property law during the cohabitation and of property system and there are no special regulations for them.[4]

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1 From 2008 to 2012 approximately 200 000 citizens are affected in the dissolution of international marriages in every year. Zsuzsa WOPERA–Barbara TÓTH: A nemzetközi párok vagyoni viszonyainak uniós rendezése. In: Katalin RAFFAI (ed.): *Határokon átnyúló családjogi ügyek. Nemzetközi személyes- és családjogi kérdések a XXI. században.* Pázmány Press, Budapest, 2018, p. 190.

2 WOPERA–TÓTH 2018, p. 198.

3 Zsuzsa WOPERA: *Az Európai Családjog Kézikönyve*. HVG-Orac, Budapest, 2012, p. 220.

4 WOPERA 2012, p. 220.

1.1. Common law vs. continental law

In 1882 the regulation[5] was initiated in England, which made it clear that an existing marriage could have no property consequences. However, this does not mean that there is no property dispute between the parties in the event of the termination or dissolution of marriage. The Act of 1973[6] provided an opportunity for the courts to settle[7] the property relations of the parties in the light of *"requirements of rationality"*[8] in the event of dissolution of marriage. This meant particularly that the judge had to consider the parties' standard of living and other circumstances at the time of the marriage and then had to decide on a sort of financial compensation.[9] Later, however, the adjudication criteria of courts were changed and beside the criterion of rationality, the social and equity aspects were also emphasized in these disputes.[10] The change of viewpoints has not only occurred in practice, but it can be found in the amendments of the Act of 1973.[11] Article 25(2) lists those aspects and circumstances, which shall be examined by the courts in the event of the dissolution of marriage. Such aspects are the income of parties, their earning capacity, the owned properties and other financial sources and their living conditions during the marriage.[12] This change represented significant progress in the application of the effective law, but according to the consistent points of view of the experts, the application of case law of the English courts can be difficult.[13] The status of prop-

5 This was the Married Women's Property Act – Walter PINTENS: *Matrimonil Property Law in Europe*. Intersentia, Antwerpen, 2011, p. 20.

6 Matrimonial Causes Act 1973 – it is in effective nowadays as well.

7 *Thorpe* emphasizes that the abandonment of matrimonial property regimes was necessary to eliminate the possibility of marrying primarily for material gain – as he says *"the gold miners and those who disregard the marriage vow".* An appropriate solution was the empowerment of the courts to make a reasonable decision by considering all the circumstances of the case. – Mathew THORPE: *Financial consequences of divorce: England versus the rest of Europe.* Intersentia, Antwerpen, 2011, p. 5.

8 THORPE 2011, p. 4. – The most significant and most precedent case was the Preston v. Preston, where the parties had significant property at the time of the divorce, much of their property was acquired by the husband during their cohabitation. The Court stated that the reasonable interpretation of the term *"financial needs"* in the Article 25(1) b) of the Act 1973 means only the actual costs and expenses and does not mean the actual distribution of the total assets. – Preston v. Preston [1982] Fan 17.

9 This compensation is called *"financial needs"*. The compensation shall be paid by the party in the better financial position after the dissolution of the marriage to ensure a fair standard of living. It also shows that this type of compensation is quite different from the property law solutions of the continental legal systems. It is less a classical property law element and is rather an ancillary issue related to dissolution of marriage.

10 THORPE 2011, p. 5. See also: Rebecca BAILEY-HARRIS–Judith MASSON–Rebecca PROBERT: *Cretney's Principles of Family Law.* 8th edition, Sweet & Maxwell, London, 2008.

11 Orsolya SZEIBERT: Házassági vagyonjogi megoldások Európában. *Családi Jog*, 2009/1., p. 44.

12 Nicola PEART–Mark HENAGHAN: Children's Interests in Division of Property on Relationship Breakdown. In: Jessica PALMER–Nicola PEART–Margaret BRIGGS–Mark HENAGHAN (eds.): *Law and Policy in Modern Family Finance – Property Division of the 21st Century*. Intersentia, Cambridge–Antwerp–Portland, 2017, p. 73.

13 THORPE 2011, p. 5.

erty law agreements that play a significant role in the English legal development also need to be mentioned. Taking into consideration, that the common-law legal system does not know the settlement of the matrimonial property for the duration of the marriage, it would be logical that property agreements are not regulated and their application is not widespread at all. However, this statement is only partially true, because it is true that the Act of 1973 does not deal with the specific rules of property contracts, but it is possible to conclude such contracts in the practice. The pre-marital and matrimonial property agreements are formulated as a result of the reform proposals of 1998,[14] which covers the agreements on financial relations based on the free will of the parties. The Matrimonial Causes Act was amended in 2003, and according to Article 34–36 the spouses can already conclude matrimonial property contracts anytime[15] , and the agreements concluded at the time of dissolution of the marriage are also becoming widespread.[16] The latter kind of agreements were disapproved by the common-law system for a long time because the agreement eliminated the discretionary power of the courts to settle disputes over property rights between the parties. Beyond that, the contractual freedom of contracts created a collision and competed with the provisions of the Act of 1973, from which the discretionary power of the courts was considered stronger by the legal practice.

Later the *Mcleod v. Mcleod case* brought a breakthrough because it was stated, that the term *"at any time"* in the Act covers the agreements concluded for the dissolution of marriage, so it should not be disadvantaged in relation to other property agreements.[17] It can be stated upon the above mentioned that common-law legal systems seek to create autonomous property laws for those affected, while in the common-law systems, there are no rules on property issues for the time of marriage. Another important difference is that the household and the protection of family home is an integral part of marital property in the continental-law systems, as opposed to other elements.[18] In the common-law system, this distinction has no importance because the property elements shall be judged as equal. Another important difference between the two systems is that the continental-law rules separately the property and maintenance situations, while in the common-law, they are

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[14] Pre-nuptial agreement.

[15] THORPE 2011, p. 8.

[16] post-nuptial agreement

[17] Mcleod v. Mcleod [2008] UKPC 64. – In the case the dissolution of a second marriage of both spouses happened. The parties entered into 3 agreements with each other taking into account the significant differences in their wealth, because the husband, as an entrepreneur, made millions of dollars in assets during the cohabitation. He intended to give a certain portion of it to his wife if the marriage is terminating and the parties observe the *"loyalty clause"* throughout their cohabitation. Two of the three agreements were made during the cohabitation, and the third was an agreement at the time of the divorce, in which the husband increased the share of the wife and changed the content of the loyalty clause as well.

[18] *Pintens* calls this primary property law – PINTENS 2011, p. 20.

often combining.[19] The spousal support can only be considered in the common-law system if the amount provided in the divorce does not ensure an adequate standard of living.[20] However, the common point in both systems is the guaranteeing of the freedom of contract, because the spouses' private autonomy has priority in both legal systems, so they can determine their financial situation according to their own needs, regardless of most of the legal requirements.

1.2. The content and procedure of harmonization

The content of harmonization is another great problem with the procedure of the harmonization. There is a constant dilemma among professionals to harmonize procedural issues or some substantive law provisions, as with other EU sources.[21] There are lots of pros and cons of both viewpoints, but the unification of substantive law is much more controversial indeed. This would constitute a significant restriction on the sovereignty of the Member States, which is the reason the European Union prefers the harmonization of procedural issues. The unification process itself supports this tendency which has led to the development of the contemporary legislation of the European Union. The history goes back to the agreements of The Hague Conference on Private International Law. The first inter-state agreement was born in 1905, which contains the conflict-of-laws rules on the personal and financial situation of spouses.[22]

This agreement was ratified by only a few European states, so it only came into force in February 1915, but remained in force until 1987.[23] Subsequently, The Hague Convention on the conflict-of-laws governing matrimonial property law was

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[19] Tone SVEDRUP: Maintenance as a Separate Issue – The Relationship Between Maintenance and Matrimonial Property. In: Katharina BOELE-WOELKI (ed.): *Common Core and Better Law in European Family Law*. Intersentia, Antwerp–Oxford, 2005, pp. 127–128.

[20] PINTENS 2011, p. 21.

[21] The European Union's legislative process clearly considers the harmonization of procedural law to be acceptable, but there are authors in the legal literature who support the harmonization of substantive law. One such example is *Dieter Heinrich*, who sees the future of unification in a "limited community of property" as a universal system – Dieter HEINRICH: *Zur Zukunft der Güterrecht in Europa*. FamRZ, 2002, p. 1524.
Anne Röthel examines is similarly, according to the examination of the applicability of the German community system as a European model. See: Anne RÖTHEL: Die Zugewinngemeinschaft als europäisches Modell? In: Volker LIPP–Eva SCHUMANN–Barbara VEIT (eds.): *Die Zugewinngemeinschaft – ein europäisches Modell?* 7. Göttinger workshop zum Familienrecht, Göttinger Juristische Schriften, Göttingen, 2009.
See also: Branka RESETAR: Matrimonial Property in Europe: A Link between Sociology and Family Law. *Electronic Journal of Comparative Law*, 2008/12.

[22] Orsolya SZEIBERT: A házassági vagyonjogi rnedszerek közötti eltérések áthidalhatósága, különös tekintettel a házastársi vagyonközösségre és a közszerzeményi rendszerre. *Családi Jog*, 2016/1., 4–5.

[23] The ratifying states included Germany, Belgium, France, Italy, the Netherlands, Poland, Portugal, Romania and the free cities of Gdansk. – Lucia VALENTOVÁ: Property regimes of spouses and partners in new EU regulations – Jurisdiction, prorogation and choice of law. *International and Comperative Law Review*, 2016/16., p. 223.

born in 1978, which was of even lesser interest, was ratified only by France, Luxembourg and the Netherlands.[24] The *Vienna Action Plan of 1998*, which was followed by some experiments considered partially unsuccessful, also focused on the creation of a community matrimonial property law.

The program, which was adopted on 30th November 2000, provided for the adoption of an act on jurisdiction and the recognition and enforcement of judgments.

Four years later, *The Hague Program* was adopted by the European Council, which defined the implementation of the mutual recognition program as a priority and in line with the Action Plan called on the Commission to draw up[25] a *Green Paper on property law.*[26]A special feature of this document is that it examines such problematic issues that affect the property of spouses and registered partners at the same time. *The Stockholm Program of 2003* emphasized the harmonization of matrimonial property rules and envisaged the extension of the rules to the property consequences of the separation of non-spouses. On 16th March 2011, the Commission issued a *Communication* to terminate the uncertainty of property rights of international couples and presented two proposals for regulations.[27] The *Impact Assessment summary of the Communication* drew attention to three possible solutions to ensure legal certainty. First of all, it examined the applicability of bilateral agreements such as the 2010 inter-state agreement of Germany and France[28] , but it did not consider it feasible for all EU Member States. The second option was the harmonization of substantive law, but it is excluded by the Treaties of the Union, so the Union cannot have the power to enforce it. The third option was the submitted draft Regulations, which focused primarily on the harmonization of procedural issues. [29] The debate of the Commission's proposals lasted until 2015 when the Council concluded that it was impossible to achieve the required unanimity for the regulations. In 2016 there was a turnaround when 17 Member States indicated that they want to establish enhanced cooperation, which resulted in two Regulations being published in the Offi-

[24] The Convention came into force in 1992.

[25] WOPERA–TÓTH 2018, p. 193.

[26] 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) 400 final */

[27] Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes. COM(2011) 126 final Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships. COM(2011) 127 final.

[28] The aim of the German-French bilateral agreement was to set up a common contractual property regime between the two states, in which the rules of the German system and the French system were mixed. To the process of harmonization and the details of the agreement, see: Maria Giovanna CUBEDDU WIEDEMANN (ed.): *The Optional Matrimonial Property Regime – The Franco-German Community of Accrued Gains*. Intersentia, Cambridge–Antwerp–Portland, 2014, pp. 12–16. and 95–138.

[29] Anita Krisztina TRUNKOS: A házassági vagyonjog szabályozási tendenciája az Európai Unióban. *Sectio Juridica et Politica*, 2011/2., p. 654.

cial Journal of the EU this year.[30] Their common feature is that the rules cover property matters arising from contractual[31] and statutory property laws of the Member States as well. The private autonomy of the parties is also strongly enforced because both regulations give priority to the parties' choice of law. Its disadvantage can be found mostly regarding to the conceptual issues, which is regarded the most hindering factor of unanimous acceptance by the *Wopera–Tóth* co-authors.[32]

1.3. Problems of conceptual interpretation

The *Matrimonial Property Regulation*[33] does not define the concept of marriage but leaves it to the Member States to decide what shall be considered a marriage. We can find divergent opinions on the necessity of a uniformed definition, but the Union still does not consider it necessary to settle it in legal sources.[34] The *Wopera–Tóth* co-authors seek the solution to this problem in the principle of proportionality, which means that a uniform concept can only be formed to the extent of necessity.[35] Nevertheless, a uniform definition regarding the Matrimonial Property Regulation would be necessary.[36] This is not an unprecedented solution, because the Regulation on the registered partnership[37] contains a definition of registered partnership, which shall be interpreted solely in relation to the Regulation.

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[30] They are the 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 (OJ L 183, 8. 7. 2016, pp. 1–29) and the Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships (OJ L 183, 8. 7. 2016, pp. 30–56).
The reason of the split regulation is that the Commission considered it easier to take into account the specialities of each form of cohabitation or partnership if two separate legal acts were adopted. – WOPERA 2011, p. 223.

[31] Almost all states of Europe recognize and regulate matrimonial property agreements. The exception is Romania, where such contracts shall be null and void. Orsolya SZEIBERT: Házassági vagyonjogi szerződés az Európai Unióban. *Családi Jog*, 2007/1., p. 23.

[32] WOPERA–TÓTH 2018, pp. 197–198. One of the most problematic definition is the marriage. See in details: Zsuzsa WOPERA: Az uniós jog hatása a határokon átnyúló családjogi ügyekre – fogalmi zavarok. *Iustum Aequum Salutare*, 2016/2., pp. 61–70.

[33] Council Regulation 2016/1103.

[34] According to *Szeibert Orsolya's* point of view there is no need to define marriage. She adds that solving a single dispute is not merely a matter of law, but it goes far beyond that, and the court sometimes shall decide on a matter not settled by law and the lack of terminology makes is much more difficult. Orsolya SZEIBERT: Az élettársi kapcsolat fogalma – itthon és Európában különös tekintettel a de facto élettársi viszonyokra. *Magyar Jog*, 2011/5., p. 297.

[35] WOPERA–TÓTH 2018, p. 197.

[36] Taking into consideration that some European states still do not incorporate same-sex marriage into their legal systems, uniform terminology would be necessary, at least in line with the applicability of the Regulation. The EU CJEU has also emphasized in a decision that a Member State cannot be obliged to regulate a legal institution which is not accepted, but that does not mean that the Member State shall not recognize rights stemming from a legal relationship recognized by another Member State. See in details: C-673/16.

[37] Council Regulation 2016/1104.

This is reinforced by the recital 17 of the Registered Partnership Regulation, which states that *"[n]othing in this Regulation should oblige a Member State whose law does not have the institution of registered partnership to provide for it in its national law".* [38]

The practical problem of the applicability of the abovementioned property law regulations can be found in their relationships with other EU regulations. Family property law is a part of private law and within it, an integral part of family law, but it is closely linked to and mixed with other areas of law. The number of disputes that have already been closed by the Court of Justice of the European Union is slight, while the existing ones deal with this issue.

In a concrete case,[39] the spouses had common real estates in several EU countries, and after the death of the husband, the applicability of the matrimonial property regulation and the succession regulation were conflicted.

The matrimonial property regimes were governed by the rules of marital property acquisition regime of the German law,[40] and no matrimonial property contract was concluded.

In this case, the question was, which regulation is applicable in such a case where succession law and matrimonial property law are confusing so much? The question is important because both regulations exclude the other from the scope of the case. In the present case, the Court decided on the basis of succession regulation. In the justification, the Court primarily referred to the fact that the purpose of the Matrimonial Property Regulation is mainly to settle the issues arising due to marriage and dissolution of marriage and to divide the spouses' existing assets.[41] Notwithstanding, in this case, the most important issue was the determination of the amount of the share in the succession to be paid to the surviving spouse which is closer to the law of succession.

Overall, it can be said that the road to the EU harmonization is long and rough, but the attitude of the Member States is more positive day by day. This slow but ultimately successful change of approach is what makes the area of family law, and especially marital property law, suitable for the harmonization.[42] This is reinforced

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[38] According to this, the Member State cannot be obliged to establish internal rules, but can be obliged to recognize a legal relationship established in another Member State. – Council Regulation 2016/1104. recital (17).

[39] C-558/16.

[40] It is a speciality of the German legal system, that if the parties' marriage is terminated because of the death of one of them, the rules of family law is mixing with the rules of succession law in the case of the matrimonial property regime, the *Zugewinngemeinschaft*. In these cases, the amount of the share of the acquisition community will be higher and the spouse is entitled to the share of the succession as well. See in: Wilfried SCHLÜCHTER–Helga SZABÓ: A német családi jog áttekintése. *Forum Acta Juridica et Politica,* 2013/2., pp. 236–237.

[41] C-558/16, 40–41.

[42] M. ANTOKOLSKAIA: *Harmonisation of Family Law in Europe: A historical perspective*. Intersentia, Antwerpen–Oxford, 2006, pp. 483–484.

by the fact that national legislators are increasingly seeking to give room for new trends and changes.[43]

2. Matrimonial property law according to the Guidelines of the CEFL

Another group that supports the harmonization of family property law is those who aim a certain level of harmonization of substantive law in addition to the harmonization of procedural issues. The *Commission on European Family Law* (henceforward: CEFL) is at the forefront of this field. The CEFL has produced such conceptual findings that can help to harmonize this area more effectively.

The CEFL was formed in September 2001 at a professional meeting organized by the University of Utrecht.[44] Its members are university professors and senior researchers in the field of family law from various European countries.[45] The CEFL is be based on a scientific initiative and is independent of any other organization or institution.[46] The organization aims to develop such proposals that will facilitate the free movement of European citizens more largely and efficiently and to enhance all the fundamental freedoms of the European Union.[47] In order to achieve these objectives, CEFL is primarily developed the so-called *Principles of European Family Law*, which aims to raise the awareness of national legislators to the current trends and social changes.[48] The Principles are clearly intended to be guidelines, but they are not model rules.[49] The Principles have been elaborated separately in accordance with the internal parts of family law, and currently, there are three recommendations.[50]

The elaboration of the Principles poses a great challenge to the CEFL because as it was mentioned before, the regulation of member states is different. However, their researches show several identities so it is always a constant dilemma of the CEFL that whether the similar elements (so-called "common core") shall be the basis or the so-called "better law," which is based on the differences. Both solu-

43 VALENTOVA 2016, p. 223.

44 Orsolya SZEIBERT: *A családjogi harmonizáció kérdései és lehetőségei Európában*. HVG-Orac, Budapest, 2014, p. 25.

45 Hungary was represented by prof. dr. Weiss Emília firstly, and now the member is dr. habil. Szeibert Orsolya in the CEFL.

46 Katharina BOELE-WOELKI: The principles of European Family Law: its aims ans prospects. *Ultrecht Law Review*, 2005/1., p. 160.

47 Walter PINTENS: Europeanisation of Family Law. In: Katharina BOELE-WOELKI (ed.): *Perspectives for the Unification and Hamonisation of Family Law in Europe*, Intersentia, Antwerp–Oxford–New York, 2003, p. 29.; Emília WEISS: Kezdeti lépések a családog egyes intézményeinek harmonizálása irányában. In: András KISFALUDI (ed.): *Emlékkönyv Lontai Endre egyetemi tanár tiszteletére*. Bibliotheca Iuridica ELTE ÁJK Polgári Jogi Tanszék, Budapest, 2005, p. 204.

48 Katharina BOELE-WOELKI–Frédérique FERRAND–Cristina GONZÁLEZ BEILFUSS–Maarit JÄNTERA-JAREBORG–Nigel LOWE–Dieter MARTINY–Walter PINTENS: *Principles of European Family Law regarding Property Relations between Spouses.* Intersentia, Cambridge–Antwerp–Portland, 2013, p. 2.

49 SZEIBERT 2014, p. 25.

50 These are the Principles on Divorce and Maintenance Between Former Spouses, the Principles on Parental Responsibilities and the Principles on Property Relations between Spouses.

tions have advantages and disadvantages. The advantage of the *common core* is that it is a set of rules accepted and applied in most legal regimes, so it would be easier for the Member States to accept them. However, this feature means the disadvantage as well, because the CEFL has found in many cases that the national solutions are based on a common theoretical framework and system, but in the details, there can already be such differences which can cause disputes and can delay the adoption. Using *better law* as a basis is a much more difficult case, and it is challenging to identify arguments that may have made a previously unused principle attractive to a given nation, so much depends on the method and approach which is used to develop the content of better law.[51] The advantage of it is that this solution can be better adapted to the needs and expectations of society and it can be able to keep up with the fast development of the world.

The principle, including property law issues, is the *„Principles on Property Relations between Spouses"*[52]. It can be stated, that the CEFL deals with the issues of matrimonial property law and it does not dedicate the family property issues in a wider sense.

Chapter, I of the Principles, sets out the general requirements emphasizing the equality of spouses[53] and sets out the requirements in line with the contribution to the needs of the family. It declares a high level of protection in respect of family home and household equipment, which can be feasible as a common disposition, regardless of the system of marital property.[54] In addition, it proposes issues on matrimonial property contracts in a separate chapter, where it sets the unification of formal requirements, the obligation of information of spouses and the protection of third parties, in line with a high degree of freedom of contract. This third chapter includes detailed descriptions of two mixed matrimonial property regimes, including their share of the acquisition and the acquisition community. According to this, it can be stated that the Principles of the Commission explicitly strive toward a substantive law harmonization.

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[51] SZEIBERT 2014, p. 28.

[52] http://ceflonline.net/wp-content/uploads/Hungarian-translation-of-CEFL-Principles-on-property-relations-of-spouses.pdf (02/07/2019). The Hungarian translation of the Principles is made by dr. habil. Szeibert Orsolya, associate professor of the Eötvös Loránd University and member of the CEFL.

[53] Orsolya SZEIBERT: *Az élettársak és vagyoni viszonyaik: különös tekintettel a magyar ítélkezési gyakorlatra és a házasságon kívüli partnerkapcsolatok szabályozási megoldásaira Európában*. HVG-Orac, Budapest, 2010, p. 11.

[54] The protection of family home can be found in the regulation of several European countries, e.g. Austria, England, Wales or France – Franco Salerno CARDILLO: Javaslat az "Európai" Házassági Szerződésre. *Közjegyzők Közlönye*, 2006/1., p. 4.