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Matrimonial property regimes

 Germany

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1 Is there a statutory matrimonial property regime in this Member State? What does it provide?

Who owns the property acquired during a marriage and how this property is divided after the end of the marriage is always determined by the particular family-law property regime. The effects of marriage on property rights are governed by the regulations on matrimonial property regimes in the German Civil Code (*Bürgerliches Gesetzbuch* - BGB). The BGB recognises the following property regimes: community of accrued gains (*Zugewinnngemeinschaft*), separation of property (*Gütertrennung*) and 'optional community of accrued gains' (*Wahl-Zugewinnngemeinschaft*).

2 How can spouses arrange their matrimonial property regime? What are the formal requirements in this case?

Community of accrued gains applies unless the married couple agree otherwise by means of a notarial marriage contract. Community of accrued gains means separation of property during the marriage and equalisation of gains accrued during the marriage once the property regime has ended.

By contrast, separation of property must be agreed by the spouses by means of a notarial contract. The separation of property means complete separation of the spouses' respective assets, without any equalisation of accrued gains at the end of the marriage. Each spouse keeps as their own the assets they acquired before and during the marriage. Separation of property may also arise without an explicit contract between the spouses, for example if the property regime is rescinded or excluded under the marriage contract without another property regime being agreed at the same time.

Community of property must likewise be agreed by the spouses by means of a notarial contract. Under community of property, the assets owned prior to the marriage and the assets acquired during the marriage usually become the common property of the couple (*Gesamtgut* - jointly owned property). In addition to that, the spouses may each have their own separate property (*Sondergut*), which does not form part of the common marital property. These are things that cannot be transferred by legal transactions, for example non-attachable claims or a share in a partnership. Finally, each spouse may reserve certain items as separate property. Spouses may also establish a special form of community of property, namely community of acquired assets (*Errungenschaftsgemeinschaft*). To this end, they must declare in the marriage contract that all assets acquired before the marriage are to be reserved property.

The optional community of accrued gains is a Franco-German property regime designed to avoid potential problems in legal relations between a French and a German national because of the differences in matrimonial property regimes. If the spouses opt for this type of property regime, their assets will remain separate during the marriage, as in the case of the German community of accrued gains regime. Only at the end of the property regime is the increase in the value of the couple's property equalised between the two spouses. Despite the similarity in content with the German community of accrued gains, the optional community of accrued gains has

a number of special features influenced by arrangements in France. For example, damages for pain and suffering and any random increases in the value of real estate (e.g. via zoning as building land) are not taken into account in the equalisation of accrued gains.

3 Are there restrictions on the freedom to arrange a matrimonial property regime?

If the spouses feel that the statutory property regime - community of accrued gains - is not suitable for their marriage, they may enter into a notarial marriage contract. In that contract they can agree on separation of property or community of property, or make arrangements other than the statutory ones within a specific property regime. The contract may also specify arrangements on pension splitting or maintenance.

When entering into a marriage contract, however, care should be taken that the arrangements provided for are actually valid. For example, if a marriage contract unilaterally disadvantages one of the spouses and certain other circumstances are present, it may be considered contrary to accepted principles of morality and therefore null and void. In that case, the statutory regulations which are theoretically excluded by the marriage contract continue to apply. Case law in this area is very diverse. Whether an arrangement is really contrary to accepted principles of morality and therefore null and void, or whether it must be adjusted, can ultimately be decided only on a case-by-case basis.

4 What are the legal effects of divorce, separation or annulment on the matrimonial property?

Under the statutory property regime - community of accrued gains - equalisation of the accrued gains takes place if the property regime is ended (e.g. by the death of one of the spouses, by divorce or by contractual agreement on a different property regime). The equalisation of the accrued gains means that the spouse who, during the marriage, acquired more assets than the other one, has to compensate that spouse by half of the difference in accrued gains in the form of a cash payment.

Under the community of property regime, the common property is divided in the event of a divorce, following the settlement of any liabilities. Each of the spouses is, as a rule, entitled to half of the surplus that remains. If, on the other hand, the spouses have agreed separation of property, there will be no equalisation following the end of the matrimonial regime because of the complete separation of the assets of the two spouses.

The right to maintenance is independent of the matrimonial property regime. If the spouses are living apart, without having divorced, the spouse in need is generally entitled to maintenance from the economically-able spouse. The claim for maintenance will only exist until the divorce comes into effect. Following divorce, however, the spouse in need may, under certain circumstances, be able to demand post-marital maintenance. The law recognises the following entitlements to maintenance: maintenance for childcare, maintenance due to age, illness or infirmity, maintenance because of unemployment, top-up maintenance, maintenance for the duration of education, further training and retraining, and maintenance for reasons of equity.

Where there are grounds for annulment of a marriage, there may be entitlements to compensation and maintenance in individual cases even after the annulment.

5 What are the effects of death of one of the spouses on the matrimonial property regime?

In a community of accrued gains, the accrued gains are equalised on the death of one spouse in the form of a flat-rate increase of one quarter in the statutory portion of the inheritance (*gesetzlicher Erbteil*), irrespective of whether the deceased spouse actually accrued any gains during the marriage. If the surviving spouse is not an heir or rejects the inheritance, they may demand equalisation of the gains that were actually accrued and also claim the compulsory minimum share (*kleiner Pflichtteil*). This compulsory minimum share is calculated on the basis of the statutory portion of the inheritance, whereby the flat-rate one quarter of accrued gains is not taken into account.

If the spouses agreed the separation of property, there will be no flat-rate equalisation of accrued gains at the end of the marriage. The generally applicable legal order of succession applies.

Under the community of property regime, the estate comprises half of the common property, the reserved property and the separate property of the deceased. The share of inheritance of the surviving spouse is determined according to the general provisions.

6 Which authority has the competence to decide in a case relating to a matrimonial property regime?

The family court is competent for matters involving property law, i.e. proceedings that concern claims based on matrimonial property law, in particular equalisation of spouses' accrued gains.

7 What are the effects of the matrimonial property regime on legal relationships between a spouse and a third party?

A married person is typically liable only for their own debts and only with their own assets. This excludes transactions for the reasonable coverage of the family's everyday needs.

In a community of accrued gains, however, there are exceptions to the principle that a spouse is free to dispose of their own property. If one of the spouses wishes to dispose of (sell, give away etc.) all or nearly all of their own assets, they need the consent of the other spouse. The same applies if a married person wishes to dispose of objects which are owned solely by that person but form part of the married couple's household.

On the other hand, under the separation of property regime, each spouse may freely dispose of all their entire assets and does not need the consent of the other spouse to dispose of items forming part of the household.

If the spouses have agreed the community of property regime, they will as a rule manage their common property jointly, unless the marriage contract assigns management to one spouse. The common property is only liable for an obligation arising from a legal transaction that a spouse has entered into during the community of property if the other spouse has agreed to the legal transaction, or if the legal transaction is effective for the common property even without their consent.

8 A short description of the procedure for the division, including partition, distribution and liquidation, of matrimonial property in this Member State.

The matrimonial home and the household items may be distributed while the spouses are living apart or after the divorce. If co-ownership has otherwise arisen and the spouses are unable to agree, the item is to be auctioned and the proceeds divided up.

9 What is the procedure and documents or information typically required for the purpose of registration of immovable property?

If the spouses opt for community of property as the matrimonial property regime, they must submit the notarial marriage contract to the land register and apply for the land register to be revised. In all other cases, i.e. if the spouses do not opt for the community of property as the matrimonial property regime, the land register does not have to be revised.

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