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ECONOMIC CONSIDERATIONS FOR REGULATING MARITAL DISSOLUTIONS IN RESPONSE
TO NEW FAMILY STRUCTURES

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ECONOMIC CONSIDERATIONS FOR REGULATING MARITAL DISSOLUTIONS IN RESPONSE TO NEW FAMILY STRUCTURES

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1 INTRODUCTION

During the second half of the twentieth century family structures have changed significantly in western countries: individuals marry later in their lives once they have achieved a certain level of education and of professional stability, the level of education among men and women has come significantly closer, women's participation in the

¹ I am grateful to ALACDE, for awarding this paper with a Microsoft award and to participants of the ALACDE Conference 2009 that took place at Universitat Pompeu Fabra for useful ideas reflected in the paper. Of special value were the comments of Professors Josep Ferrer Riba and Fernando Gómez Pomar and of John R.B. Palmer All mistakes are my own.

labor market has significantly increased, families are increasingly supported by two incomes in the household, marriage rates have dropped, new family models have appeared and divorce rates have increased. These social changes have modified family roles and the position and function of each spouse within the marriage.

At the same time and directly related to the new family structures, family property, its composition and title have also experienced important modifications. While traditionally family economies were based on owning a house, farm, or piece of real estate, today it is not uncommon for families to own real estate but also to invest in human capital, that is, to enhance their education so that they can improve their professional career and professional prospects while having a family and raising children.

Despite of this remarkable evolution in family structures and family property, family law of most western countries does not reflect the new reality when regulating marital crises, particularly regarding dissolutions of the marital economic regimes. Western family regulations of family dissolutions are generally based on two parameters: compensation for household labor and division of family property. These two issues – compensation and division – are generally adjudicated together and generally based on the premise that spouses should be able, as much as possible, to maintain the standard of living they enjoyed while married. Up until today, this regulation of marital dissolutions has implicitly assumed that family realities were such that one spouse was mostly investing in the household and therefore in the family life while the other was developing a professional life outside the household. Hence, legal systems have clearly differentiated between the two traditional roles – household and professional - and compensation for investments in the family, which do not have market value and entail clear personal costs, has been regularly given to spouses who face serious difficulties in retaking their professional lives and thus enjoying economic independence. Further, such compensation has been generally assessed with respect to the spouse who will have to compensate the other - the debtor spouse – and not with respect to the spouse who will be compensated – the creditor spouse.

This structure of marital property division, though, does not reflect a significant amount of present family realities. Needless to say, not all family members or spouses make symmetrical investments in the family or have the same professional prospects. At the same time, not all family members had the same education level and therefore the same professional status. However, the current regulatory scheme in force in most western legal systems does not reflect that family roles have significantly changed and are increasingly balanced today. Nor does it reflect that family property is not only formed by tangible property but also includes intangible parameters that should also be taken into account.

This paper provides an overview of the basic highlights of family law in Western countries – Europe and the United States – and offers arguments to challenge current family law principles in marital dissolutions while presenting economic arguments that should be taken into account in marital dissolutions in light of the new family realities.

2. NEW FAMILY REALITIES IN EUROPE

The political and economic reality of families in Central and Eastern Europe and Northern, Western and Southern Europe has experienced a remarkable – but also different -evolution during the second half of the XXth century. Following the era of the

“golden age of marriage”² and the baby boom in the 50s and 60s, marriage has declined in importance, and its role as the main institution on which family relations are built has been reduced across Europe.

Today, family formation often takes place without a marriage. Family and living arrangements are very heterogeneous across Europe, but despite different social structures most European countries seem to be experiencing the same tendency: fewer people living together as a couple, especially in a marriage; an increased number of unmarried couples; more children born outside marriage; and fewer children living with their two parents.³

Changes in family structures have not come alone: the XXth century has witnessed a significant change in men and women’s levels of education, the availability of alternative family arrangements, a decrease in gender roles, fertility rates and the already mentioned decrease in marriage rates and the increase in divorce rates. Needless to say that this tendency is not uniformly experienced across western countries given the differences in traditions, gender roles, the importance of religion⁴ and economic differences in the different societies⁵ that has resulted in different family structures, formation and childbearing with a direct effect in fertility rates.⁶

As shown in the next diagram, there is a general tendency of a drop in marriage rates across European countries between 1985 until 2007. It is worth noting the exceptions to this tendency of Sweden, Denmark and Rumania where the marriage rate has increase in the period considered. Despite these exceptions, the rest of the countries

² See Sobotka, Tomáš and Toulemon, Laurent, Changing family and partnership behaviour: Common trends and persistent diversity across Europe, *Demographic Research*, vol.19, article 6, 85-138 (2008). This article can be found at <http://www.demographic-research.org/Volumes/Vol19/6>.

³ See Kalmijn, Matthijs, Explaining cross-national differences in marriage, cohabitation, and divorce in Europe, 1990-2000, *Population Studies*, Vol. 61, No. 3, 243-263 (2007).

⁴ It should be noted that up to today, literature considered that religion could be a significant factor influencing marriage and divorce rates. However, recent studies show that when union formation is considered – regardless whether is a marriage or cohabitation – religiosity seems to have no effect. There still seems to be an effect in divorce rates but not in marriage rates. See Kalmijn, Matthijs, Explaining cross-national differences in marriage, cohabitation, and divorce in Europe, 1990-2000, *Population Studies*, Vol. 61, No. 3, 243-263, 245 (2007).

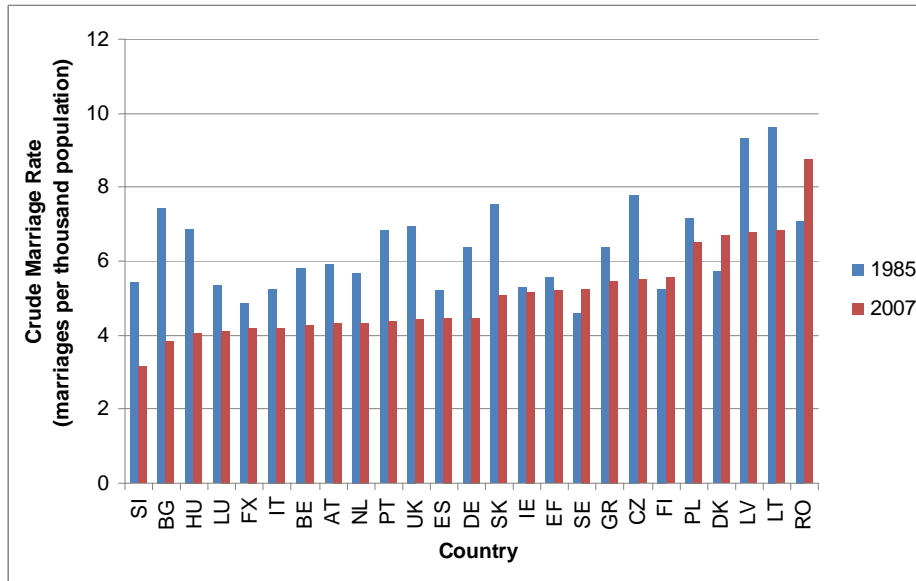
⁵ Cross national research on marriage and divorce is scarce. Some earlier studies such as Dixon, R. B., Explaining cross-cultural variations in age at marriage and proportions never marrying, *Population Studies* 25(2): 215-233 (1971) compared the timing and marriages rates in 57 countries and related them with indicators of economic development, women’s employment and sex rations and concluded that the variation in the feasibility and the desirability of marriage could explain many of the cross-national differences and concluded that marriage patters in European countries were converging. The problem with Dixon’s article is that at the time the article was written, marriage rates were increasing. Regarding divorce, South, Scott J.& Katherina Trent, Structural determinants of the divorce rate: a cross-national analysis, *Journal of Marriage and Family* 51(2): 391-404 (1989), analysed divorce rates in 66 countries in the late 1970s and found a significant relation with women’s employment but no associations with religion. There have been more recent comparative studies but mostly descriptive. See Schoenmaeckers, Ronald C. & Edith Lodewijckx, Demographic behavior in Europe: some results from FFS country reports and suggestions for future research, *European Journal of Population* 15(3): 207- 240 (1999); Andersson, Gunnar. 2003. Dissolution of unions in Europe: a comparative overview, MPIDR Working Paper No. WP-2003-004. Max Planck Institute for Demographic Research; Prioux, France. 2006. Cohabitation, marriage, and separation: contrasts in Europe, *Population & Societies* 422(April): 1-4.

⁶ For example, in Central and Eastern European countries, fertility rates declined during the 50s and 60s while it was relatively higher in the rest of Europe. In contrast, fertility declined rapidly in Northern, Western, and Southern Europe was low during the 70s and 80s while in Central and Eastern European countries had a high fertility level. Frejka, Tomas, Sobotka, Tomáš, Hoem, Jan M., Toulemon, Laurent, Childbearing Trends and Policies in Europe *Demographic Research*, vol. 19, article 2, 6, 5-14, (2008). This paper can be found at <http://www.demographic-research.org/Volumes/Vol19/2>.

taken into account show a clear drop in marriage rates, even though in different magnitude.

FIGURE 1⁷

Crude Marriage Rate (Marriages per Thousand Persons)
1985-2007



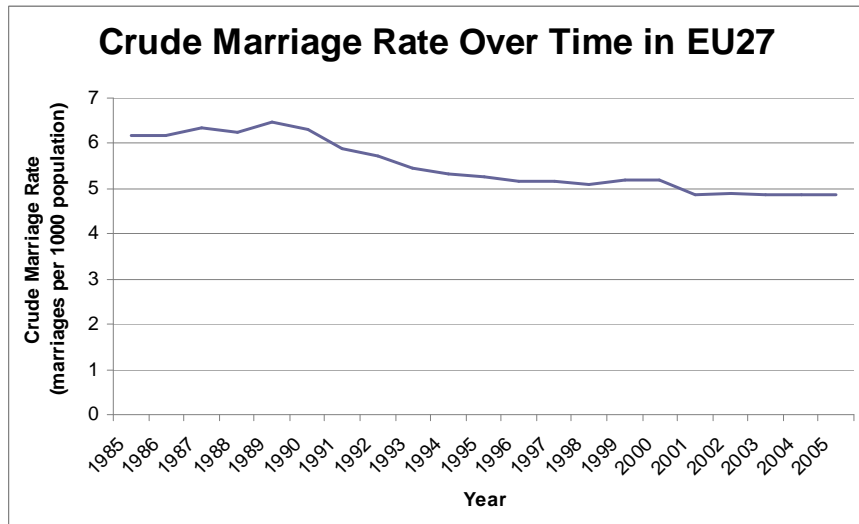
The importance of the drop in marriage rates in the European Union can be seen in the following diagram that shows the negative evolution of crude marriage rates of the 27 European Union member states that have diminished over one point – per thousand persons – from 1985 until 2005.

FIGURE 2⁸

Crude Marriage Rate in the European Union 27
1985-2006

⁷ See Table 1 in the Annex of this paper for the data used in this diagram.

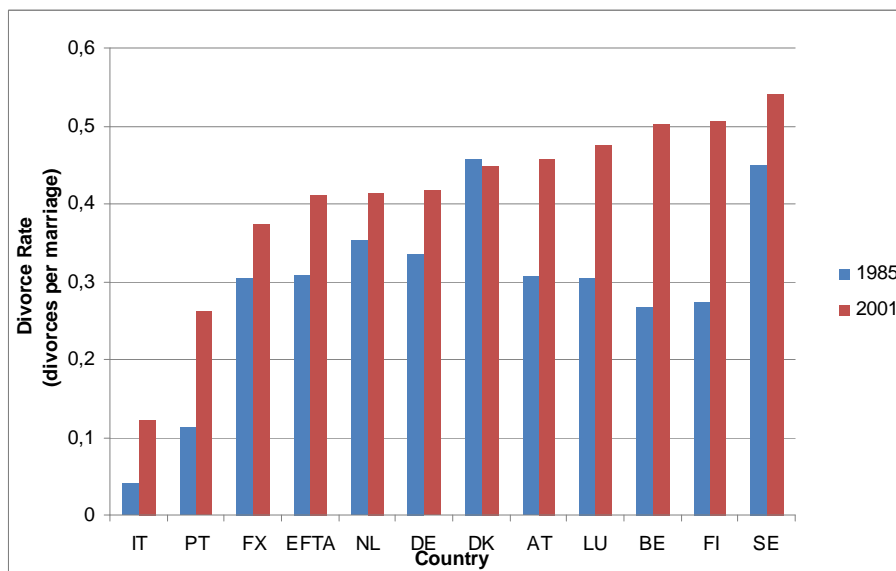
⁸ See Table 2 in the Annex of this paper for the data used in this diagram.



Parallel to the diminution of the marriage rate, the divorce rate -per marriage- in the European Union has increased significantly in the last 15 years.

FIGURE 3⁹

Divorce Rates by Duration of Marriage (Reached during the Year) 1985-2001



Given the evolving context of family structures in Europe, age of family formation – the childbearing age – and the level of births outside of marriage have also experienced important changes.

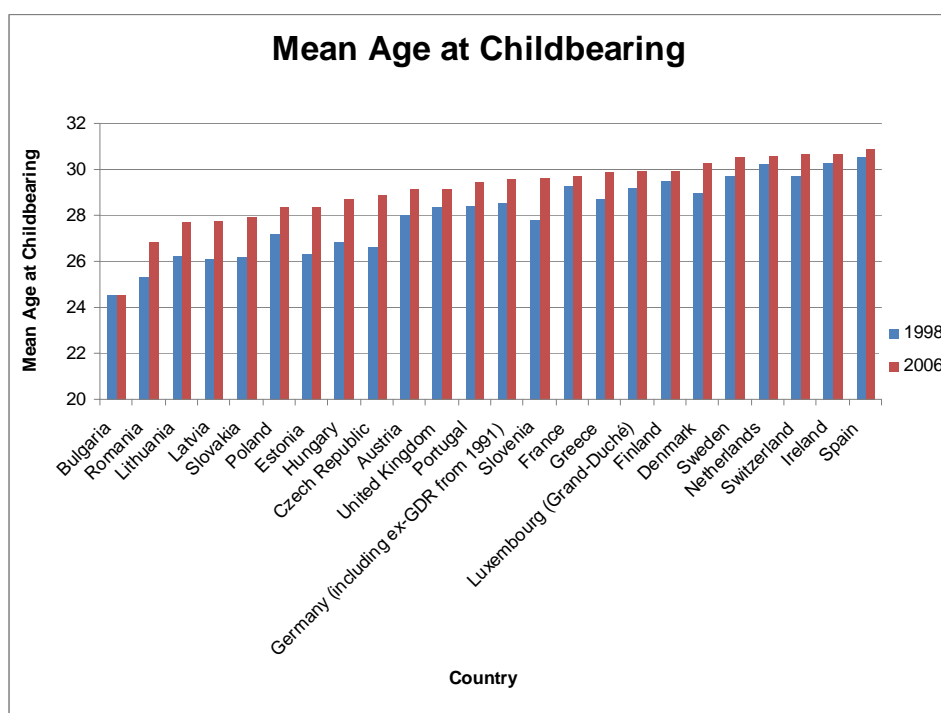
The average age of women at child bearing has been increasing steadily from 1998 to 2006 in all European countries. Women seem to postpone the age of their first

⁹ See Table 3 in the Annex of this paper for the data used in this diagram.

child in light of the family insecurity and their professional stability. The average age between the different European countries varies. While it is relatively low – around 25/26 years- in Bulgaria and Romania, it is relatively high - five years higher than in Bulgaria and Rumania - in Scandinavian countries, the Netherlands, Ireland.¹⁰

FIGURE 4¹¹

**Women’s Mean Age at Childbearing
1998-2006**



Data show that today, a significant amount of children are born outside marriage and that the tendency, from 1998 to 2006, has been increasingly positive. The importance of this phenomenon is different depending on the country. In this sense, in Greece there seems to be a high correlation between parenthood and marriage so that a very low percentage of children – not even 5 % - are born outside marriage and the overwhelming majority of them are born within marriage. But considering the data, Greece could be qualified as an outlier. It is fair to say that in the majority of European countries a third of the children are born outside marriages and this proportion reaches its maximum percentage in Sweden and Estonia, where half of the children are born in a marriage and the other half are born outside of it.

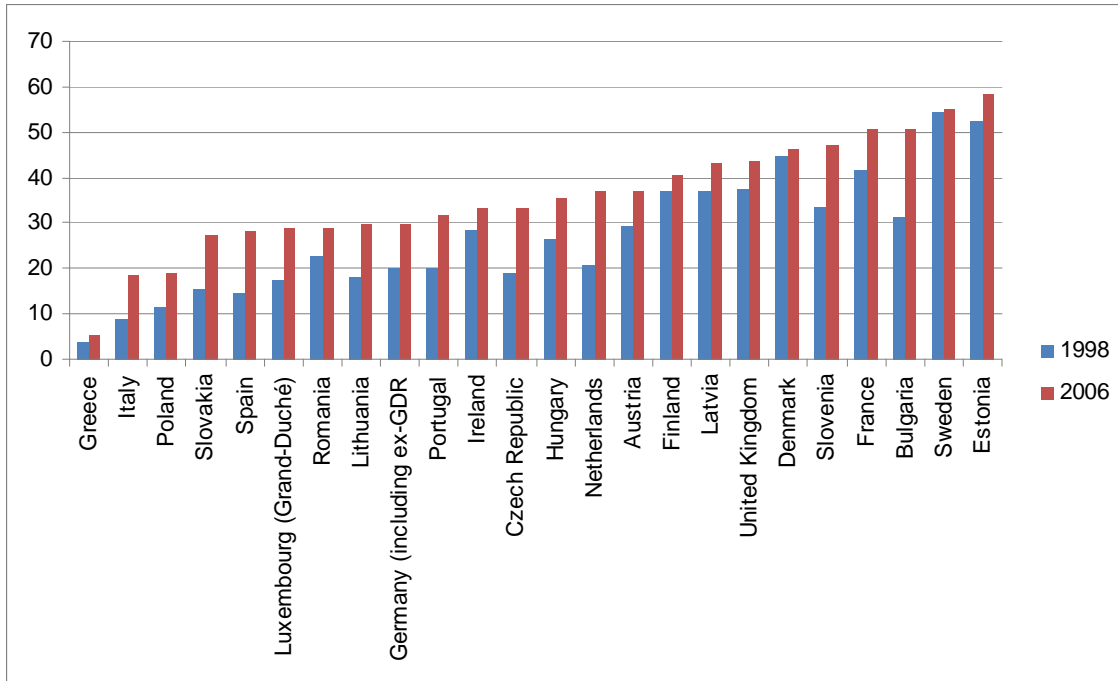
The data show that the proportion of children born outside marriage has increased from 1998 and 2006 in a different magnitude across the different European countries, but positively in all of them.

¹⁰ Report from the Commission to the Council, the European Parliament, the European Social and Economic Committee, and the Committee of the Regions on equality between women and men, COM (2007) 49 final.

¹¹ See Table 4 in the Annex of this paper for the data used in this diagram.

FIGURE 5¹²

**Live Births Outside Marriage In European Union Countries
1998-2006**



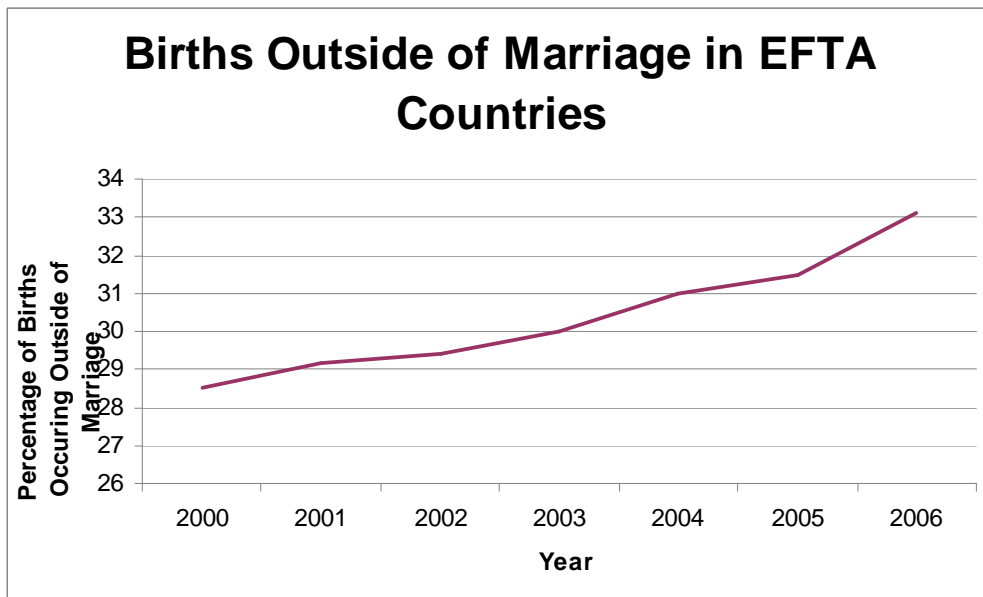
A similar positive evolution took place among EFTA countries.

FIGURE 6¹³

**Births Outside of Marriage in EFTA Countries
2000-2006**

¹² See Table 5 in the Annex of this paper for the data used in this diagram.

¹³ See Table 6 in the Annex of this paper for the data used in this diagram.



The graphs presented above clearly show the currently changing family structures in Europe and its consequences in marriage rates, marriage dissolutions as well as an increasingly weak relationship between marriage and childbearing. So European Union countries seem to be experiencing a general tendency of declining marriage rates, a rise in the marriage age, an increase in cohabitation, separate and divorce rates,¹⁴ the postponement of union formation and childbearing,¹⁴ the drop on fertility levels¹⁵ and the disconnection between marriage, sex, and reproduction, have been observed in all regions of Europe and seem to suggest an erosion of marriage¹⁶ in most European countries¹⁷ during the second half of the XXth century.¹⁸

Today, marriage is less attractive for single persons, cohabitation is more attractive or represent an equivalent instrument to marriage and separation and divorce are clear and available alternatives to opt out of marriage in most western countries.¹⁹ Regardless the important differences between countries there seems to be something clear: the individuals' decision regarding the family structure in which they will form a family, in

¹⁴ This phenomenon is what has been called a second demographic transition. See Van de Kaa, D. J. Europe's Second Demographic Transition, *Population Bulletin* 42(1): 1-59 (1987).

¹⁵ See the Fertility and Family Surveys (FFS), available at <http://www.unece.org/pau/ffs> for comparative data on living arrangements of adults, children and fertility in Europe.

¹⁶ "Erosion of marriage" is the expression used by Kalmijn in Kalmijn, Matthijs, Explaining cross-national differences in marriage, cohabitation, and divorce in Europe, 1990-2000, *Population Studies*, Vol. 61, No. 3, 243-263 (2007)

¹⁷ The study of the different factors affecting marriage, cohabitation rate and divorce rate has often been called a "study of the strength of marriage". See Kalmijn, Matthijs, Explaining cross-national differences in marriage, cohabitation, and divorce in Europe, 1990-2000, *Population Studies*, Vol. 61, No. 3, 243-263 (2007).

¹⁸ This evolution has been extensively analyzed in the literature. See Kuijsten, A. 1996. Changing family patterns in Europe, a case of divergence?, *European Journal of Population* 12(2): 115-143; Billari, F. 2005. Partnership, childbearing and parenting: trends of the 1990s, in UNECE/UNFPA (Eds.), *The New Demographic Regime. Population Challenges and Policy Responses*. Geneva: United Nations, pp: 63-94; Lesthaeghe, R., and G. Moors. 2002. Life course transitions and value orientations: selection and adaptation, in R. Lesthaeghe (Ed.), *Meaning and Choice: Value Orientation and Life Course Decisions*. The Hague, Brussels: NIDI/CBGS Publication, pp: 1-44; Prioux, F., 2006. Cohabitation, marriage and separation: contrasts in Europe, *Population & Societies* 422: 1-4.

¹⁹ Kalmijn, Matthijs, Explaining cross-national differences in marriage, cohabitation, and divorce in Europe, 1990-2000, *Population Studies*, Vol. 61, No. 3, 243-263 (2007).

addition to depend on the spouses' decision, is affected by their economic and legislative environment and many other social factors that make it difficult to derive cause effect explanations.

2.1 How could we explain the evolution of families and the appearance of the new family structures?

Explaining the incentives and reasons for individuals to marry, the causes for divorce or the different family realities of the different western countries, is a difficult challenge in light of the different context, institutions and factors affecting individuals when adopting their life decisions.

Empirical literature has studied the impact of different parameters such as the spouses' level of education, employment, income, age at the time of marriage, among others that seem to affect the likelihood of family formation and its potentially subsequent marital dissolution.

a. Education levels of men and women.

The level of education of men and women in the different European countries has experienced important change during the XXth century. Today, women in most European countries are outperforming men when it comes to successful completion of upper secondary education²⁰, women are forming the majority of university students and also increasingly breaking into male domains, such as mathematics, science and civil engineering.²¹

The level of education of the spouses is an essential parameter of the divorce risks of spouses. In this sense, the longer and higher education is, the higher the likelihood of getting married because highly educated are highly demanded in the marriage market.²² Further, evidence shows that there is a comparatively high divorce rate for spouses with little formal education compared to the divorce rate of spouses with a higher level of education.²³

At the same time, education leads to delays in marriage and in the birth of the first child. Higher education generally means longer education so that marriage age increases because marriage is delayed generally until education ends. At the same time, the age of the first child is also postponed because woman with higher education have better opportunities and higher professional expectations and are eager to have some professional stability when they have their first child.²⁴ It should be noted that there is

²⁰ Report from the Commission to the Council, the European Parliament, the European Social and Economic Committee, and the Committee of the Regions on equality between women and men – 2007, COM (2007) 49 final.

²¹ Despite the participation of women in this masculine disciplines, women's fields of study remain strongly stereotyped. See Report from the Commission to the Council, the European Parliament, the European Social and Economic Committee, and the Committee of the Regions on equality between women and men – 2007, COM (2007) 49 final at 6.

²² See Oppenheimer, V. K. and Lew, V., American marriage formation in the eighties: how important was women's economic independence?, 105-138, in K. Oppenheim Mason and A. Jensen (eds.), GENDER AND FAMILY CHANGE IN INDUSTRIALIZED COUNTRIES, Oxford: Clarendon (1995).

²³ Jalovaara, Marika, Socioeconomic Differentials in Divorce, Risk by Duration of Marriage, Demographic research, vol. 7, article 16, 537-564 (2002). This paper can be found at www.demographic-research.org/Volumes/Vol7/16

²⁴ Blossfeld, H.-P. and R. Muller, Union disruption in comparative perspective: the role of assortative partner choice and careers of couples, International Journal of Sociology 32(4): 3-35 (2002) and

evidence that shows that the parameter delaying marriage and childbearing is longer education rather than higher education.²⁵

The role and importance of education in marital dissolution is highly debated in the literature.²⁶ Results from different studies obtain different results regarding the relationship between marital dissolution rates when controlling by women's education level.²⁷ Descriptive results show that the women's educational level may not be a significant factor for women with completed college education. Marital dissolutions are higher for the upper middle part of the education distribution than in the lower middle part.

Hence, education levels could explain part of the increase in marital dissolution at the lowest education levels. But when the top third of the education distribution is compared with the remaining two thirds, there is a remarkable divergence in marital dissolution rates. Some authors have noted that these results suggest a growing relation between socioeconomic disadvantage and family instability.²⁸

Hence, education levels do not seem to explain marital dissolution within each education level²⁹ but are still robust and statistically significant when analyzing the different marital dissolution trends among the different education levels.³⁰

b. Labor market participation.

The female labor force continues to be the engine of employment growth in Europe. Since the launch of the Lisbon Strategy in 2000³¹, six of the eight million jobs created in the EU have been taken by women.³² One would expect that the trend towards

Liefbroer, Aart C. and Martine Corijn, Who, what, where, and when? Specifying the impact of educational attainment and labour force participation on family formation, *European Journal of Population* 15(1): 45-76 (1999).

²⁵ Blossfeld, H.-P. and J. Huinink, Human capital investments or norms of role transition: how women's schooling and career affect the process of family formation, *American Journal of Sociology* 97(1): 143-168 (1991).

²⁶ Some studies concluded there was no evidence of any relation between marital dissolution and educational divergence. See Teachman, J. D. 2002. Stability across cohorts in divorce risk factors. *Demography*, 39, 331 – 351 and South, S. J. 2001. Time-dependent effects of wives' employment on marital dissolution. *American Sociological Review*, 66, 226-245.

²⁷ See Raley, R. K., & Bumpass, L. 2003. The topography of the divorce plateau: Levels and trends in union stability in the United States after 1980. *Demographic Research*, 8, 245 – 259 and Sweeney, M. M. & Phillips., J. A. 2004. Understanding racial differences in marital disruption: Recent trends and explanations. *Journal of Marriage and Family*, 66, 639 - 650.

²⁸ Martin, Steven P., Descriptive Finding Trends in marital dissolution by women's education in the United States, vol. 15, article 20, 537-560, 545 (2006). This article can be found in <http://www.demographic-research.org/Volumes/Vol15/20>.

²⁹ Martin, Steven P., Descriptive Finding Trends in marital dissolution by women's education in the United States, vol. 15, article 20, 537-560, 552 (2006). This article can be found in <http://www.demographic-research.org/Volumes/Vol15/20>.

³⁰ These analysis have been conducted using history models with a time-varying measure of education to control for changes in the timing of education relative to marriage. See Martin, Steven P., Descriptive Finding Trends in marital dissolution by women's education in the United States, vol. 15, article 20, 537-560, 553 (2006). This article can be found in <http://www.demographic-research.org/Volumes/Vol15/20>.

³¹ The Lisbon strategy for growth and jobs was launched in 2000 as a response to globalization in order to facilitate the cooperation between the European Union and its member states on reforms aimed at generating growth and better jobs as well emphasizing green strategies for the economy and innovation. The Lisbon strategy can be found in http://ec.europa.eu/growthandjobs/index_en.htm

³² Report from the Commission to the Council, the European Parliament, the European Social and Economic Committee, and the Committee of the Regions on equality between women and men – 2007, COM (2007) 49 final.

symmetric education levels between men and women would be subsequently reflected in a symmetric participation in labor markets and in the kinds of professional positions held by men and women. However, data shows that the tendency to similar education levels – or even higher education levels by women compared to men– is not reflected by their position in the labor market.³³ So for example women’s jobs are clustered into a very restricted of economic sectors such as education, health and social care and certain occupations. Despite their often higher education level, female employment rates are 15 percentage points lower than men’s and women continue to face an average pay gap of 15% while men are still twice as likely to hold managerial positions and over three times as likely to be senior managers.³⁴

Further, balancing of professional and personal life for women is also challenging. Evidence suggests that mothers and fathers balance their work-life poorer than their peers without children the difference between mothers and non-mothers being bigger than the one between fathers and non-fathers. The impact of motherhood on work like balance is still very important.³⁵ Women often find their care responsibilities for children and other dependents jeopardize their professional career: 33 % of women, compared to 7% of men, are choosing to work part-time and therefore receive lower salaries and have fewer opportunities for career progression. Employers providing a family-friendly work environment are still in a minority.

As it can be shown in the following graph, there has been some progress towards the Lisbon target of reaching an employment rate of women of 60% by 2010.³⁶ The positive evolution of female employment was reflected in unemployment figures, as the gap between women's and men's unemployment rates narrowed. This graph shows that since 2004 women unemployment has dropped and therefore women’s employment rate has increased – from 53.6% in the year 2000 to 56.3% percent in 2005, whereas men employment rate has remained stable.³⁷ At the same time, this positive trend is also shown by the reduction of the unemployment gap between men and women that diminished around 2 percentage points.

At the national level, differences across European Union countries exist: Finland, Sweden and Denmark have an employment rate gap below 10% but above 20% in countries such as Cyprus, Spain, Italy, Greece and Malta.

³³ Report from the Commission to the Council, the European Parliament, the European Social and Economic Committee, and the Committee of the Regions on equality between women and men – 2007, COM (2007) 49 final.

³⁴ Report from the Commission to the Council, the European Parliament, the European Social and Economic Committee, and the Committee of the Regions on equality between women and men – 2007, COM (2007) 49 final at 6.

³⁵ The impact of motherhood on work–life, meaning the proportion of mother employed full time compared to women without children employed full time, significantly differs between countries. See European foundation for the improvement of living and working conditions, Combining family and full-time work (2007). This document is available at http://www.eurofound.europa.eu/ewco/reports/TN0510TR02/TN0510TR02_3.htm

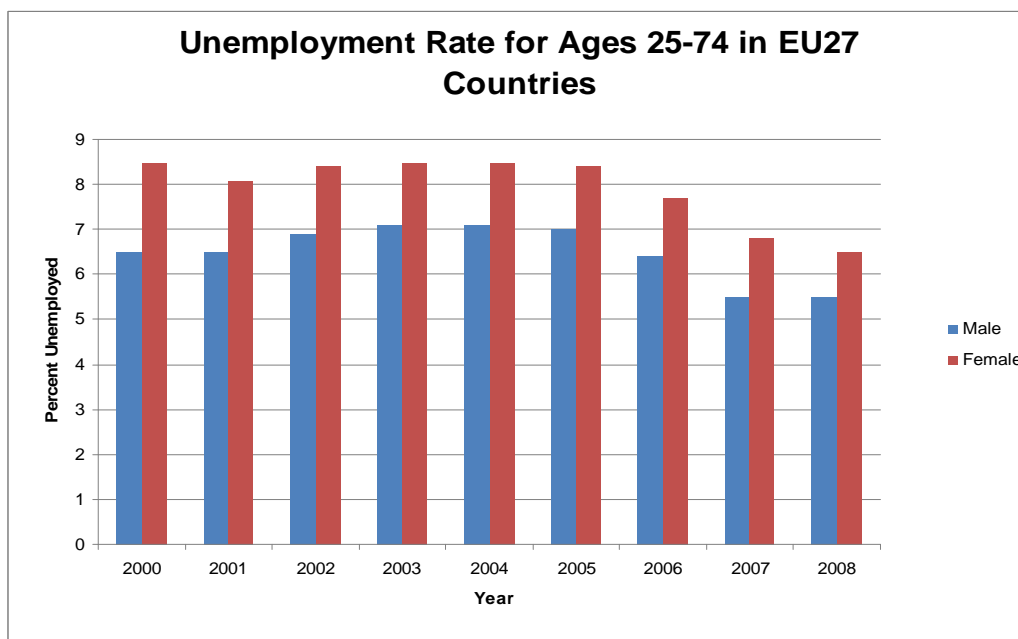
³⁶ Report from the Commission to the Council, the European Parliament, the European Social and Economic Committee, and the Committee of the Regions on equality between women and men – 2007, COM (2007) 49 final. At 10

³⁷ Report from the Commission to the Council, the European Parliament, the European Social and Economic Committee, and the Committee of the Regions on equality between women and men – 2007, COM (2007) 49 final. At 10-11. According to projections by the European Commission, the rate of female employment will continue to increase, reaching 65% in 2025, at which point it will stabilize. See http://ec.europa.eu/economy_finance/publications/european_economy/2006/eesp106en.pdf

Nevertheless, women are still more likely to be unemployed than men in most European Union countries.

FIGURE 7³⁸

**Unemployment Rate for Ages 25-74 in the European Union 27
2000-2008**



In addition to the different employment rates between men and women, women’s participation in the labor market, as it can be seen in the next graph, is still strongly characterized by a big proportion of part time work. In contrast, the level of part-time employment among men is significantly lower.³⁹

Between 2006 and 2009 the differences in percentage of part-time employment between men and women are significant given that there is around a 25 percentage point difference: while 30% of women work part time, only around 7 % of men do not have full time employment.

This gap in the percentage of part-time employment has not changed during these years. In fact, the percentage of part time employment over total employment increased one percentage point –from 17.8%, to 18.8%. However, it seems that most of this increase in part time employment has been caused by more women working part time. While during the third quarter of the year 2006 30.2% of women worked part-time, the last data available for the second quarter of 2009 is 31%.

³⁸ See Table 7 in the Annex of this paper for the data used in this diagram.

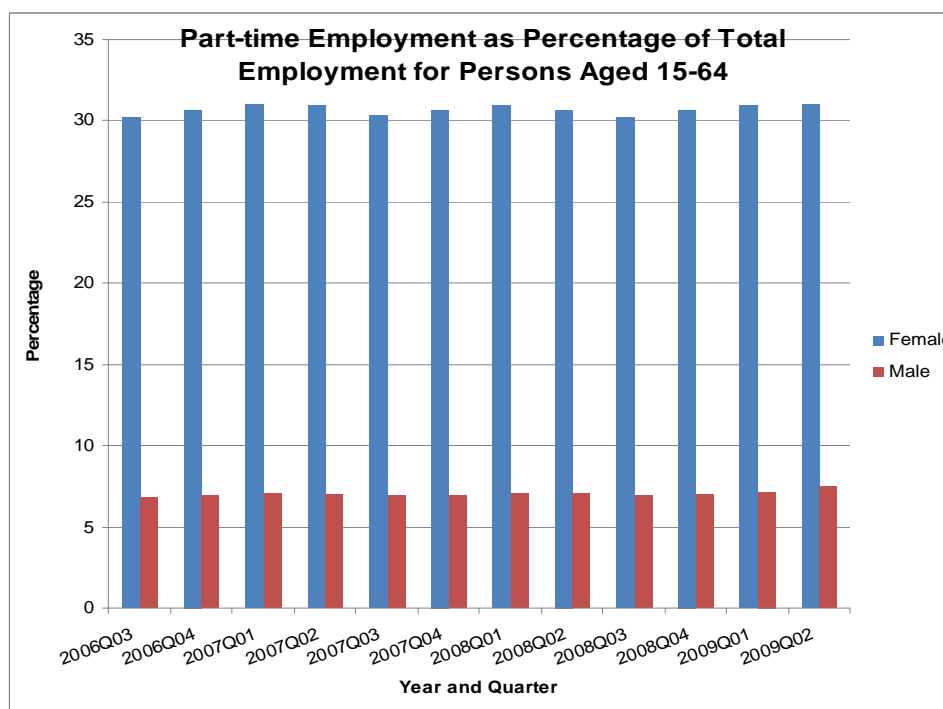
³⁹ Report from the Commission to the Council, the European Parliament, the European Social and Economic Committee, and the Committee of the Regions on equality between women and men – 2007, COM (2007) 49 final. At 7.

There also seems to be a difference between the European Union countries:⁴⁰ the share of female working part time exceeded 30% in France, Denmark and Luxembourg, 40% in Sweden, Austria, Belgium, United Kingdom and Germany and even reached 75% in the Netherlands. In contrast, the share of women working part time was very low in Bulgaria, Hungary and the Czech Republic.⁴¹

The increase in percentage of part time employment and in women working part time has not been very important in the last three years. What seems important and remarkable from the data available is that the gap between the percentage of men and women working part time is significant and does not seem to diminish or show a decreasing tendency.

FIGURE 8⁴²

**Part-Time Employment as Percentage of Total Employment for Persons Aged 15-64
2006 (Q3) – 2009 (Q2)**



Many factors seem to influence the employment-unemployment gap between men and women and the disparity on part-time employment between men and women. However, the next graph shows that there are two parameters, the individuals' level of education and number of children that seem to be of special importance.

Women's participation in employment is strongly affected by their role in the care of children and other dependents, such as elderly or disabled family members. The

⁴⁰ Report from the Commission to the Council, the European Parliament, the European Social and Economic Committee, and the Committee of the Regions on equality between women and men – 2007, COM (2007) 49 final at 10.

⁴¹ Report from the Commission to the Council, the European Parliament, the European Social and Economic Committee, and the Committee of the Regions on equality between women and men – 2007, COM (2007) 49 final at 10.

⁴² See Table 8 in the Annex of this paper for the data used in this diagram.

additional family responsibilities mostly born by women represent important difficulties in reconciling their professional and private life, as it can be seen by the strong impact they have on parenthood and on employment rates.⁴³

As the graph shows, the employment rate of women from no children to having one child increases in the three different levels of education. This increase could be interpreted by the need of counting with more economic means in order to support the new family member. However, when having the second and third child, the graph clearly shows that the employment rate of women drops.

Two issues are of special importance: first, the different impact of the second and third child on women depending on their education level; and second, the employment gap between men and women depending on their education levels. As mentioned above, the first child seems to increase the employment rate on men and women while the second and the third child seem to have a negative impact on both men and women employment rate. However, it is interesting to note the different impact on the employment rate of the second and third child depending on the level of education. The higher the education level, the lower the impact on the second and third child in both men and women.

Of particular interest is the impact on women's employment rate. When the level of education of women is low and they have no children, their percentage of employment is very low – 22%. Such percentage of employment is more than doubled when women have the first child and decreases to 33.4% when women have three or more children – a 50% increase. But when we look at this data for women with medium or high education, the increase in the percentage of employment is not so dramatic: for women with medium education increases from 52% - for women with no children – to 58.8 % for women with three or more children – a 13 % increase - and for women with high education the percentage of employment increase from 70.6% for women with no children to 73.9% for women with three or more children – a 4.6% increase. Hence, when comparing the employment rate by the number of children, the higher the level of education, the lower the impact on having children in the employment rate.

Further, it should be noted that the women's employment rate by level of education differs significantly. Not even half of women with low level of education are employed – regardless of the number of children they have. In contrast, at least half of women with medium level of education are employed and almost three out of four women with high level of education are employed.

The second issue of importance derived from this data is the gender gap on the employment rate of men and women depending on their level of education and number of children.

As the data show, the lower the level of education, the higher the gender gap in employment rate. So for men and women with low education, the gender gap goes from 18 percentage points when they have no children to 38 points when they have three or more children. For men and women with medium education such gap goes from 10 points when they have no children to 29 points when they have three or more children and finally, for high level of education, the gender gap is almost non existing for men and women with no children – one percentage point – and 20 points for men and women with three or more children.

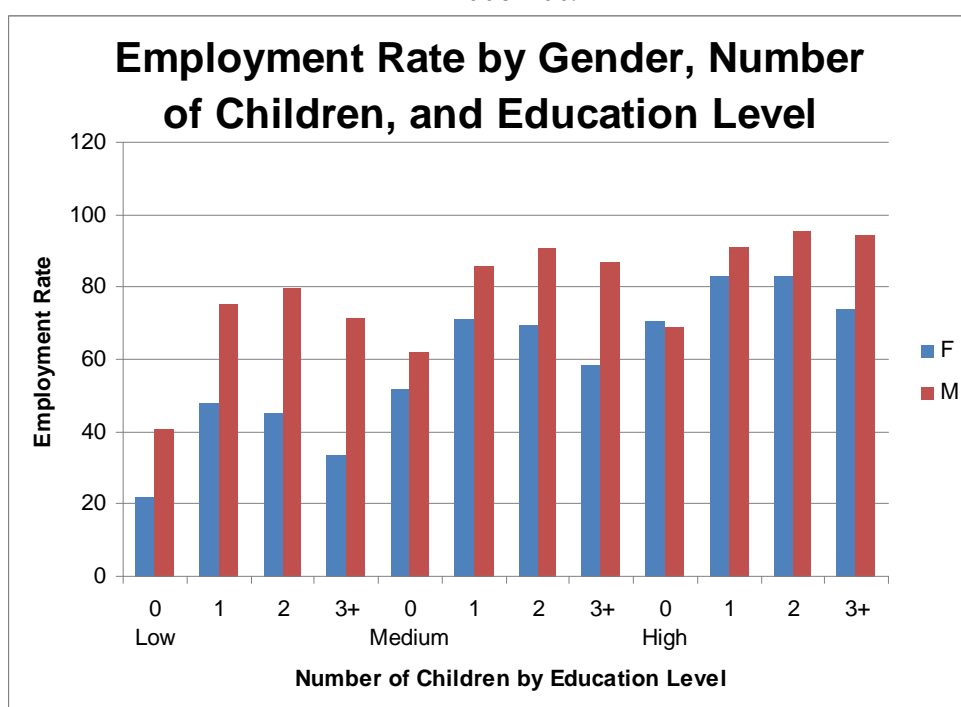
⁴³ Evidence shows that employed mothers report less sleep, spend slightly fewer hours in personal care and report significantly less free-time or spare-time. See BIANCHI S.M., Maternal employment and time with children: dramatic change or surprising continuity? *Demography*, Vol. 37, no. 4, 2000, p. 401, 406-410.

Hence, regarding the gender gap it seems possible to affirm that the higher level of education of men and women, the lower the gender gap regardless their number of children.

At the European Council of March 23 and 24 2006, the European member states approved a European Pact for Gender Equality.⁴⁴ This agreement shows the will of Member States to implement policies aimed at promoting women’s employment as well as facilitating a better balance between personal and private life. However, in light of the data available, there is still a lot to be done in order to achieve equality or at least, symmetry on the impact of parenthood on the employment rates of men and women.

FIGURE 9⁴⁵

**Employment Rate By Gender, Number Of Children And Education Level
2006-2009**



While women are driving the European Union’s work growth, they still face significant barriers to realize their professional potential, which has a direct impact on their family decisions concerning family formation and dissolution. Evidence shows that low earnings and unemployment decrease the probability of marrying and increase the likelihood of divorce.⁴⁶

Despite the gender gap still existing today regarding the different levels of participation in the labor market, the positions of males and females achieve and the different salary level they are often offered for similar positions, especially when women’s and male’s educational levels are considered,⁴⁷ the labor market seems to

⁴⁴ Conclusions of the Presidency, 7775/1/06/Rev 1.

⁴⁵ See Table 9 in the Annex of this paper for the data used in this diagram.

⁴⁶ Kalmijn, Matthijs, Explaining cross-national differences in marriage, cohabitation, and divorce in Europe, 1990-2000, Population Studies, Vol. 61, No. 3, 243-263 (2007)

⁴⁷ According to the Equal Initiative of the European Commission, almost half of the women (48%) gainfully employed in the EU in 2000 worked in only four areas of activity: health care and social services; education; public administration and retailing. By contrast, in the same year, only one third of

show some signs that move towards a more symmetric position between men and women.

c. Age of spouses for marriage as a parameter affecting the likelihood of divorce

Evidence shows that divorce is less likely when spouses are older, when spouses have married at a higher age, and when the marriages have lasted a longer time.⁴⁸

d. The spouses' level of income

Marriage length has often been thought to be affected by factors such as unemployment or the wife's income, especially in marriages with spouses with low education. However, evidence shows that such factors affect the marriage duration of all marriages despite their education level and it is the level of education of the spouses that strongly affects marital duration. In this sense, marriages with spouses with little formal education tend to have shorter duration than marriages with highly educated spouses.⁴⁹

e. Gender-Role specialization

The impact of gender roles in the decision of get married or in ending the marriage has been a topic studied by the literature since the 80s' when Becker⁵⁰ suggested that the declining of gender roles and specialization weakened marriage because the symmetric professional – and sometimes economic - position of women – who often where the ones specializing in the marriage – reduce the benefits of specialization.⁵¹ At the same time, the likelihood of divorce increases because costs of leaving the marriage drop significantly.⁵²

men worked in four sectors of activity: construction; public administration, retailing and business services. More information on this initiative can be found at http://ec.europa.eu/employment_social/equal/index_en.cfm

⁴⁸ There is extensive literature and research studying the different factors affecting the probability of a divorce or dissolution of a marriage. See Morgan, S. P. and Rindfuss, R. R., Marital disruption: Structural and temporal dimensions. *American Journal of Sociology*, 90, 1055–1077 (1985); South, S. J. and Spitze G., Determinants of divorce over the marital life course, *American Sociological Review* 51, 583–590 (1986) and Thornton, A. and Rodgers W. L., The influence of individual and historical time on marital dissolution, *Demography*, 24, 122 (1987).

⁴⁹ Jalovaara, Marika, Socioeconomic Differentials in Divorce, Risk by Duration of Marriage, *Demographic research*, vol. 7, article 16, 537-564 (2002). This paper can be found at www.demographic-research.org/Volumes/Vol7/16

⁵⁰ Becker, Gary S., *A TREATISE ON THE FAMILY*. Cambridge, MA: Harvard University Press (1981).

⁵¹ Making specific investments in the marriage implies making investments that have no value outside of the relationship. Becker, Gary S., *A TREATISE ON THE FAMILY*. Cambridge, MA: Harvard University Press (1981).

⁵² See Kalmijn, Matthijs, Explaining cross-national differences in marriage, cohabitation, and divorce in Europe, 1990-2000, *Population Studies*, Vol. 61, No. 3, 243-263, 244 (2007)

Despite the measures of the European Commission to address this issue,⁵³ today, data show⁵⁴ that women still do most of the household work for their families, even when they are employed full time. Research on the division of how house work in 22 countries,⁵⁵ shows that women do more housework than men do in all of the surveyed countries.⁵⁶

Empirical studies have found that even though women are doing less housework than they did in the past and men are doing slightly more than they used in past decades, women still do at least twice as much house work as men do.⁵⁷

f. Level of fertility

The elements presented above – education, employment, income and age – are of special importance when talking about fertility levels. On aggregate, the relationship between marriage rates and fertility has moved from negative so that a decline of marriages implied fewer births to positive so that fewer marriages today do not imply fewer births, but more births.

Hence the decline of marriage does not seem to be possible to consider it an important cause of the low fertility levels experiences in many European countries.⁵⁸

2.2 Summarizing

There are important differences in family structures and in the factors affecting them across the different European countries. As presented above, education, gender roles, employment, income levels, create incentives of spouses to marriage and their subsequent decision to dissolve their marriage and therefore divorce. These elements

⁵³ Roadmap for equality between women and men, COM (2006) 92 final, where the European Commission defined its priorities and its framework of action and policies to be implemented in order to promote equality in the period from 2006 to 2010.

⁵⁴ Buber, I., The influence of the distributions of household and childrearing tasks between men and women on childbearing intentions in Austria. Max-Planck-Institute for Demographic Research; Working paper, January 2002. Available at: <http://demogr.mpg.de>.

⁵⁵ The countries surveyed were Norway, United States, Sweden, Canada, East Germany, Israel, New Zealand, Great Britain, Slovenia, Hungary, West Germany, Netherlands, Austria, Russia, Bulgaria, Poland, northern Ireland, Czech Republic, Australia, Ireland, Italy and Japan. BATALOVA, J.A. and COHEN, P.N., Premarital Cohabitation and Housework: Couples in Cross-National Perspective, *Journal of Marriage and Family* 64 (2002): 743-755, at 746.

⁵⁶ BATALOVA, J.A. and COHEN, P.N., Premarital Cohabitation and Housework: Couples in Cross-National Perspective, *Journal of Marriage and Family* 64 (August 2002): 743-755.

⁵⁷ There are important differences across the European Union countries. In the Nordic countries is where men report a higher level of house work while in Greece and Portugal they spend the least. Buber, I., The influence of the distributions of household and childrearing tasks between men and women on childbearing intentions in Austria. Max-Planck-Institute for Demographic Research; Working paper, January 2002, at 9 Available at: <http://demogr.mpg.de>. See also Smith, A., Working fathers in Europe earning and caring?, Centre for research on families and relationships, Research briefing 30, The University of Edinburgh, January 2007. Available at: http://www.sps.ed.ac.uk/_data/assets/pdf_file/0004/6538/rb30.pdf noting that fathers who spend more time with children also earn more per hour and work fewer hours than those fathers who spend less time with their children.

⁵⁸ See Sobotka, Tomáš and Toulemon, Laurent, Changing family and partnership behaviour: Common trends and persistent diversity across Europe, *Demographic Research*, vol.19, article 6, 85-138 (2008). This article can be found at <http://www.demographic-research.org/Volumes/Vol19/6>.

seem to explain – in more or less degree – the decline of marriage rates, increase of cohabitation rates, increase of divorce rates and the raising of new family structures during the second half of the XXth century in European – or more generally Western – countries.

Based on the data and graphs presented above, there is still a lot of work to be done to tend and achieve equality both in the professional setting and within households, where household work is still unequally distributed among men and women.⁵⁹ At the professional level, in addition to the gender gap in employment rates, the European Commission noted in a report regarding equality between men and women⁶⁰ that the labor market is still partitioned and there is still significant gender segregation in the different industrial sectors that does not show signs of diminishing.⁶¹

But despite the challenges still present today, it should not be neglected that during the last century, western societies experienced a deep transformation of traditional roles that incremented even further during the second half of the last century. Today, the vast majority of male and female employees in the EU countries - even working mothers - work full time.⁶² This new structure of dual-earner households has caused an increase in fertility rates⁶³ and a demand for pre-primary education⁶⁴ as well as an increase in the likelihood of divorce.⁶⁵

Drawing causes and effects of education levels, employment, unemployment, part-time employment age and child-bearing and number of children is a very difficult task. Many of these factors are causes as well as consequences. What seems to be clear is that all these parameters condition, determine and affect family formation, family size and the chances of family dissolution and family law should take into account these new realities.

3. TRADITIONAL GOALS IN MARRIAGE DISSOLUTIONS

The dissolution of a marriage is a complicated situation both from an emotional and economic perspective. It is not only that former spouses will have to get used to

⁵⁹ Bianchi S.M., Maternal employment and time with children: dramatic change or surprising continuity? *Demography*, Vol. 37, no. 4, 2000, p. 401, 406-410 and European foundation for the improvement of living and working conditions, *Combining family and full-time work* (2007). This document is available at http://www.eurofound.europa.eu/ewco/reports/TN0510TR02/TN0510TR02_3.htm

⁶⁰ Report from the Commission to the Council, the European Parliament, the European Social and Economic Committee, and the Committee of the Regions on equality between women and men – 2007, COM (2007) 49 final.

⁶¹ In light of the increase of women employment in European Union countries, the European Commission suggested that it would be possible that such increase would have taken place in industries or sectors of activity with an important presence of women such as education, health or social work. See Report from the Commission to the Council, the European Parliament, the European Social and Economic Committee, and the Committee of the Regions on equality between women and men – 2007, COM (2007) 49 final.

⁶² European Foundation for the Improvement of living and Working Conditions, *Combining family and full-time work* (2007). This report can be found at <http://www.eurofound.europa.eu/ewco/reports/TN0510TR02/TN0510TR02.pdf>

⁶³ Because household can more easily afford the costs of children.

⁶⁴ Further information about educational levels may be found at http://ec.europa.eu/education/lifelong-learning-policy/doc62_en.htm

⁶⁵ Jalovaara, M., The joint effects of marriage partners' Socioeconomic positions on the risk of divorce, *Demography* 40(1): 67-81 (2003); De Rose, A., Socioeconomic factors and family size as determinants of marital dissolution in Italy, *European Sociological Review* 8(1): 71-91 (1992) and Blossfeld, H.-P. and R. Muller, Union disruption in comparative perspective: the role of assortative partner choice and careers of couples, *International Journal of Sociology* 32(4): 3-35 (2002).

move on from the marriage and reshape a new phase in their lives without sharing it with the other spouse but also economically, marriage has an important economic content in terms of property entitlements – who holds title to the different goods owned by them before the marriage and bought during the marriage -, in terms of managing and having the power to alienate the goods of the marriage and finally, in terms of liabilities derived from the assets owned by the spouses.⁶⁶ At the same time, marriage represents an efficient life arrangement in terms of economies of scale given that it is more costly to live two individuals by themselves, than living together.

Therefore, marriage dissolution entails a costly process both emotionally and economically. The emotional side of marriage dissolutions is beyond the scope of this paper that will mostly focus on the economic consequences derived from such process.

Once two individuals marry, there are important economic consequences derived from this new civil status, particularly regarding the origin of an economic marital regime, that will determine the economic relations of spouses in case they have not entered into any premarital agreement. Assuming spouses have not determined the economic relations between them, legal systems provide a series of default rules that will be applied. Western societies have mostly chosen between two economic marital regimes: on one side, a separate property regime and on the other, a community property regime.

Regardless of the economic marital regime ruling the spouses' relationship, the procedure to liquidate the marital economic regime requires some pre-qualifications that are common to all procedures. A first step is to classify property as marital or non-marital. Once each property element is classified into one of these categories, a second step will require to value marital assets and marital liabilities of the parties and finally, divide the marital estate between the spouses.

a. Marital v. non-marital property.

Spouses may determine what will be considered marital or non-marital property in a prenuptial or postnuptial agreement. However, in cases where spouses have not determined such qualification, family codes provide certain guidelines that will be applied in order to dissolve the economic marital regime and distribute the marital property among the spouses.

So in cases where spouses have not entered into a pre or post nuptial agreement, non-marital property is property owned prior to marriage or subsequently acquired as an inheritance or gift from a third party and increases of value of non-marital property.⁶⁷ In the absence of a pre or post-marital agreement, in order to be able to claim that an asset is non-marital, it will be necessary that the spouse claiming it proves that the asset was always non-marital or at least it was non-marital at the moment when parties entered into the marriage. The fact that the title of an asset is held jointly does not preclude a court from determining that such property is non-marital but the burden of proof to establish the property is non-marital remains on the spouses claiming it. Documents such as income tax, gift tax, inheritance tax or any other document that could demonstrate title and ownership before or during the marriage will be necessary to meet the burden of proof. Examples of non-marital assets are contribution to pensions prior to the marriage or after the dissolution of the marriage or bank accounts owned prior to the marriage.

⁶⁶ Carrión García de Parada, Pedro, Regímenes económicos matrimoniales, 3 Notaria 42, 72 (2007).

⁶⁷ Therefore, spouses do not share the economic fruits of property that was owned by them prior to the marriage.

It should be noted that when non-marital assets are used to acquire different assets during the marriage, it could be possible to qualify this recently bought asset as marital, at the moment of the marriage dissolution and such asset should be traced back to its origins so that if such asset could be originally qualified as premarital, it should remain so regardless of its use during marriage.

Marital property is property acquired during marriage regardless of which funds – personal or joint – were used to fund such acquisition.

In some cases, an asset may have marital and non-marital components. These are cases where non-marital assets experience an increase in value⁶⁸ during marriage as a consequence of the investment of personal funds of one of the spouses or as a consequence of his or her personal work. Accordingly, increases in the value because of marital effort of non-marital property held by one party such as investment accounts, retirement accounts, unvested stock options and pensions may be found to be marital property. In such cases, the marital and non-marital part of value of the asset will have to be determined and subsequently distributed. It should be noted that contributing to a non-marital asset does not necessarily result in treating the property as a marital asset. Spouses will determine how such contribution should be reimbursed or courts may determine whether such contribution should be compensated monetarily or with another asset.

b. Valuing marital assets and marital liabilities

One of the most important and complicated issues arising in divorce proceedings is the valuation of assets, especially marital assets. Property value fluctuates over time and is subject to market cycles. Hence, it is possible that property acquired by the spouses when they married has a totally different value when they enter into a divorce proceeding and therefore liquidate their economic marital regime. The same is true for any contributions and improvements that resulted in an increased value of the asset.

Even though the issue is not settled in the literature and the everyday practice in courts, there seems to be a general understanding that property at the latest will be valued at the moment when spouses filed their divorce claim. Hence, the valuation may look backwards but never forward. Further, in light of the lack of general rule of valuation, courts will consider the case-by-case circumstances of each situation but will generally try to value marital assets at a date that at least bears a relationship with the property and that therefore can provide an accurate assessment of its value.

c. Division of the marital estate between the spouses.

There is no general rule to determine how the division of marital property will be done and despite general criteria provided by the regulation of the economic marital regime in force in that country, there is a lot of case-by-case considerations that make it difficult to derive conclusions.

There are two important issues that could be highlighted: First, the existing conceptual distinction between property division and payment awards; second, the lack of 50-50 percent presumption of division of the marital property between spouses.

Regarding the relationship between payment awards and property division, it is important to differentiate between both concepts. Even though award payments are

⁶⁸ Such an increase in value should be different from the passive appreciation caused by market fluctuations that could not be attributable to the marriage and therefore would remain non-marital property.

often taken into account when determining the division of property between spouses, their purposes are clearly different: while award payments intend to rehabilitate, compensate and provide support for the spouse who made higher specific investments⁶⁹ in the marriage; the purpose of the division of marital property is to distribute marital assets equitably between parties. Even though both concepts are related, they are not equivalent or share the same goals.

The second important aspect to consider regarding property division is that there is no presumption in favor of an equal share of property between spouses. Hence, spouses through negotiation or through Courts' determination will divide their property according to equitable considerations, which do not mean equal shares. Therefore, the spouses need to meet the burden of proof necessary to prove that their share of the marital property should be the one they claim to be entitled to.

Today, the variety of economic marital regimes in Europe remains significant.⁷⁰ The introduction of community property regimes in Europe was brought by Eastern European states,⁷¹ which, after World War II and as a consequence of the influence of the Soviet Union on them, adopted such regime understanding that it was based on principles of equality and emancipation.⁷² Separate property regimes were originally applied in common law countries while common property regimes were implemented generally in Continental Europe as a consequence of the influence of the adoption of such common regime by the Soviet Union.

3.1 A brief overview of the separate property regime

The distribution of assets under a separate property regime is quite simple. Some authors suggest that when a separate property is in force, there might be court intervention in order to determine certain entitlements or credits between spouses but there is no liquidation of a marital property regime as such given that no community is created.⁷³

Under a separate property regime, spouses keep the property they had prior to their marriage as their own private property and property generated during marriage will

⁶⁹ Specific investments, a concept often used in the context of long term contracts, are investments that have no value outside of the contract relationship. In the marriage context, specific investments would be family-specific investments so that they do not have market value and that the spouse making them assumes a higher level of risk compared to the other spouse, who may be investing in his or her professional career. See Gerrit De Geest, Long-term Contracts and Distribution Chains: Binding Force, *Mimeo*; Klein, B., Transaction cost determinants of “unfair” contractual arrangements, *American Economic Review* 70: 356-362 (1980) and Williamson, Oliver E., *THE ECONOMIC INSTITUTIONS OF CAPITALISM*, FREE PRESS (1985). See also Becker, Gary S., *A TREATISE ON THE FAMILY*. Cambridge, MA: Harvard University Press (1981).

⁷⁰ Pintens, W., “Europeanisation of Family Law”, in Boele-Woelki, K. (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, Intersentia, Antwerp/Oxford/New York, 9-11 (2003).

⁷¹ Antokolskaia, M., “Harmonisation of Family Law in Europe: A Historical Perspective”, Intersentia, Antwerp/Oxford, 240, (2006).

⁷² Rešetar, Branka, *Matrimonial Property in Europe: A Link between Sociology and Family Law*, *Electronic Journal of Comparative Law*, vol. 12.3 (2008). This article can be found at <http://www.ejcl.org> and Antokolskaia, M., “Harmonisation of Family Law in Europe: A Historical Perspective”, Intersentia, Antwerp/Oxford, 240, (2006)

⁷³ Roca, Encarna, *La liquidació del règim de separació de béns a Catalunya*, *Revista Jurídica de Catalunya*, 3/2008, 653 (2008). See also Jesús Delgado Echeverría, *El régimen matrimonial de separación de bienes en Cataluña*, Madrid, Tecnos, 1974.

also be considered owned jointly and individually and therefore will not be divided between spouses at the time of divorce. Each spouse will be entitled to manage and alienate the goods and property without the need of the consent of the other spouse.⁷⁴ Therefore, under a separate property regime all property is considered non-marital and therefore is not subject to division between spouses. In most cases, separate property includes any asset spouses owned prior to marriage; assets inherited or received as a gift during marriage and assets that either spouse earned after separation.

Whenever separate property mixes with joint property or joint funds it is important to be able to trace the payments and show which part of the asset was bought with separate or with common funds. It should be noted that under a separate property regime, assets but also debts are private. Hence, spouses' liabilities will be private and therefore should be paid off with private funds.

Given that a strict separation of property could result in unfair results, some legal regimes where separate property is the default property regime have some payments between spouses that aim smoothing the potential unfairness that could result from the strict application of such regime.

An example of this regulatory model is Catalonia⁷⁵, where the Family Code⁷⁶ establishes a separate property regime as the default marital property regime.⁷⁷ In order to determine which assets belong to each spouse, articles 38, 39 and 40 of the Family Code are applicable. In the separate property regime there are two groups of assets, the ones belonging to the wife and the others belonging to the husband, that are formed by the assets belonging to spouses before marriage and the ones acquired by each of them during marriage as well as any return produced by any of these assets.⁷⁸

The separate property regime may be liquidated under two circumstances: death of one of the spouses or a marital crisis. The first situation, the death of one of the spouses, is beyond the purpose of this article but the second, the marital crisis, will be explained here.

Given that the contributions to the family is not symmetric and not all contributions have the same economic value or even economic value at all, the separation of property is not applied strictly and the Catalan Family Code provides for two kinds of payments that may be awarded to former spouses under certain circumstances. A first payment is the one established by article 41 CF that is awarded whenever there is an imbalanced financial situation involving unjust enrichment of one spouse against the other.⁷⁹ This payment is applicable whenever one spouse has worked for the other spouse in a professional context or has worked in domestic tasks and in

⁷⁴ There are important exceptions to this general rule such as the family home where consent of both spouses will be necessary in order to be able to alienate it. See Carrión García de Parada, Pedro, *Regímenes económicos matrimoniales*, 3 Notaria 42, 72 (2007).

⁷⁵ Spain is a pluri-legislative state in certain civil matters, among those, family matters. The applicable law to individuals is determined by their personal law, regulated in article 14 of the Spanish Civil code. Article 9 of the Spanish civil code establishes the criteria to determine the rules applicable to the economic marital regime that vary depending on whether each spouse has the same or different personal law. The Spanish civil code can be found at <http://civil.udg.edu/normacivil/estatal/cc/INDEXCC.htm>

⁷⁶ The Catalan Family Code regarding is available at <http://civil.udg.edu/normacivil/cat/fam/CF/CF.html>

⁷⁷ Catalan Family law is regulated by Law 9/1998, de 15 de juliol, of the Family Code (DOGC núm. 2687, de 23-07-1998) attended by Law 3/2005 of April 8 (DOGC núm. 4366, de 19-04-2005, p. 9935). However, the economic marital regime has not been attended. The Catalan Family Code may be found at <http://civil.udg.edu/normacivil/cat/fam/CF/CF.html>

⁷⁸ These two asset groups will be include bank accounts, real estate assets and personal assets. Article 38, 39 and 40 of the Catalan Family Code. The Catalan Family Code may be found at <http://civil.udg.edu/normacivil/cat/fam/CF/CF.html>

⁷⁹ Superior Court of Justice of Catalonia, June 20 2005, 28/2005.

both cases has either not received compensation at all or has received insufficient compensation.⁸⁰ Such payment must be made in cash and the debtor spouse must effectively pay within three years – applying the legal interest rate at the time - from the date of the judgment determining the amount owed.

The second payment is established in article 84 of the Family Code and establishes a compensatory payment in favor of the spouse that, as a consequence of the divorce or separation, was financially worse affected by it and cannot continue enjoying the standard of living enjoyed while married.⁸¹ In order to determine the amount that should be awarded, the Family Code provides certain factors such as the financial situation of both spouses after the divorce, the length of marriage, age and health of both spouses, the compensation established by article 41 of the Catalan Family Code, if applicable and any other factor the court may deem relevant. Such compensation may be reduced if the creditor spouse improves its financial situation or may be increased if the debtor spouse worsens his.⁸²

These payments, though, do not imply an equilibrium of assets between spouses once the marriage has dissolved and the marital economic regime has been liquidated.⁸³

The scope of discretion of courts when determining these payments is significant. The Superior Court of Catalonia has repeatedly established that the determination of the amount of such payments should be done applying the criteria provided by the family code considering the circumstances of each case. The factors that should be taken into account when determining the amount that should be awarded are personal and professionally based. These factors are the length of the marriage, the creditor's contribution to the family, the amount of private property of the debtor spouse, the assets of each spouse or whether they worked outside of the household.⁸⁴ Hence, the final amount should be determined on a case by case basis.⁸⁵

Such payments will not be awarded always and under any circumstance. Only whenever there has been an increase of personal assets during the marriage by one of the spouses, a payment under article 41 or article 84 of the Catalan Family Code may be necessary in order to avoid a potential injustice derived from the different nature of the investments that spouses did to the marriage.⁸⁶

3.2 Community property regime

Under a community property regime, property earned during marriage and the profits generated by it are considered common and therefore are jointly held.⁸⁷ Assets brought by one party into the marriage as well as assets acquired from third parties either by gift or by inheritance would be separate property and therefore not jointly

⁸⁰ Article 41.1 of the Catalan Family Code. The Catalan Family Code may be found at <http://civil.udg.edu/normacivil/cat/fam/CF/CF.html>

⁸¹ Article 84.1 of the Catalan Family Code. The Catalan Family Code may be found at <http://civil.udg.edu/normacivil/cat/fam/CF/CF.html>

⁸² Article 84.4 of the Catalan Family Code. The Catalan Family Code may be found at <http://civil.udg.edu/normacivil/cat/fam/CF/CF.html>

⁸³ Roca, Encarna, La liquidació del règim de separació de béns a Catalunya, *Revista Jurídica de Catalunya*, 3/2008, 660 (2008).

⁸⁴ STSJ of February 2nd 2006 (RJC, V, 2006, 1573)

⁸⁵ STSC of February 3rd 2005 (RJC V, 2005, 1503)

⁸⁶ Superior Court of Justice of Catalonia, May 29 2007 (RJC, V 2007, 1415)

⁸⁷ Community property laws exist in Arizona, California, Idaho, Nevada, New Mexico, Texas, Washington, and Wisconsin.

owned by spouses and not subject to division. All assets earned by either of them from the date of marriage until the date of separation or dissolution of the economic marital regime and all property acquired during marriage with common funds regardless who effectively purchased it are considered community property and assumed to be owned by both spouses equally. Joint ownership is automatically presumed by law in the absence of specific evidence that would point to a contrary conclusion for a particular piece of property. The management and power to alienate marital and non-marital assets is different given that under the former, that is, the separate property, assets will only be managed or alienated by the spouse who hold title while under the latter, community property, will need the consent of both spouses in order to legally alienate them. . The community property system is usually justified by the idea that such joint ownership recognizes the theoretically equal contributions of both spouses to the creation and operation of the family.

As mentioned above, economic marital regimes provide rules for distributing assets but these rules are also applicable to liabilities and debts. Hence, all liabilities assumed from the date of the marriage until the date of separation are considered common liabilities or debts and therefore community property. Therefore, each spouse is equally liable for them.

The goal of community property regimes was ensuring the economic protection of what was considered the weaker spouse – generally women – whenever marriage was terminated. In its origins, the idea behind the community property regime was to position women and men in symmetric economic positions in order to balance their traditional roles as male professionals and therefore, income earners, and female housewives and therefore economically dependent.⁸⁸ Such family structure has been traditional and quite common until today, when as mentioned above, family realities are changing.

There are different mechanisms to divide community property depending on the country applying such regime. Some jurisdictions divide each asset belonging to the community property; others split all assets or finally, a third group divides its value. In some countries the default percentage of division of community property is 50% and other, may result in an unequal division depending on whether an alternative mechanism – such as equitable distribution – is available.

An example of a community property regime is the one in force today under the Spanish civil code, applicable to all Spanish autonomous communities⁸⁹ that do not have their own civil code. Under the Spanish community property regime, joint property – the assets jointly held – will have to be divided. In addition to the share of common property each spouse will be entitled; a spouse may be further entitled to an economic compensation from the other under certain circumstances. In that respect, article 97 of the Spanish Civil code⁹⁰ establishes that where separation of divorce causes an economic inequity of one spouse compared to the other so that such spouse would

⁸⁸ Rešetar, Branka, Matrimonial Property in Europe: A Link between Sociology and Family Law, *Electronic Journal of Comparative Law*, vol. 12.3 (2008). This article can be found at <http://www.ejcl.org>

⁸⁹ Spain is a pluri-legislative state in civil law matters where different marital property regimes coexist. Thus, while in Catalonia and in the Balearic Islands separate property is the default rule, in the other territories of Spain - including the civil law regimes in Aragon, Galicia, Navarre and the Basque Country - community property is the default rule. See Albert Lamarca i Marquès et al. Separate Property and Family Self-Determination in Catalonia: A Peaceful Model under a Change?, Working Paper of Catalan Law No: 164 , Indret 04/2003. This paper is available at www.indret.com

⁹⁰ Article 97 of the Spanish Civil Code can be found at <http://civil.udg.edu/normacivil/estatal/CC/1T4bis.htm>

enjoy a worse economic situation than the one enjoyed during marriage, this spouse will be entitled to an economic compensation either as a lump sum payment, limited time pension or a pension for an unlimited period of time. The final amount of such economic compensation will be determined by judicially taking into account a number of factors listed in the code such as agreements reached by spouses, their age and health, their professional careers, their family responsibilities, length of the marriage, among others.⁹¹

These two marital economic regimes would be the most common marital regimes in continental Europe. In the United States, though, in light of the new roles of spouses within the marriage, courts started to reconsider the equal distribution of common property between spouses in order to better assess the percentages of common property that each spouse should be assigned at the moment of a divorce. Common and jointly owned property did not necessarily have to be distributed equitably. Hence, the distribution of common property became equitable but not necessarily equal. Instead of the fifty-fifty split, in which each spouse receives one half of the marital or separate property, equitable distribution looks at the financial situation that each spouse will have after the termination of the marriage. At the same time, in application of equitable distribution principles, it is possible to leave outside from distribution, assets that in principle would be qualified as common, as long as the spouse who claims they are except from distribution, proves so. While equitable distribution is more flexible and intends to be more adjusted to the financial contributions of spouses when gaining marital property and to their financial situation after the divorce, it is also harder to predict the actual outcome of the division, since the various factors are subjectively weighed. When distributing community property equitably, courts consider certain factors such as the earning capacity of spouses, the separate property of spouses, the work or effort done by each of them to acquire the property, the value of the domestic work done by one spouse, the duration of the marriage, the age and relative health of spouses, among others determined by the judge.

3.3 Equitable distribution in some U.S. states

Equitable distribution is a method of distributing property acquired and owned by either spouse. In some states, such as New York, equitable distribution replaced the common property regime in force.⁹² The most significant difference between community property and equitable distribution is the under the former, upon the dissolution of the marriage, property owned by either spouses was distributed according to the manner in which title was held. Under the latter, that is, under equitable distribution, marital property is distributed *equitably* among spouses regardless of the manner in which title is held. Further, spouses' management duties are different under a community property regime or under equitable distribution. Under community property, both spouses are equal owners of the common property from the date it was acquired – assuming such date was during the marriage –. In contrast, under equitable distribution

⁹¹ The list of factors of article 97 of the Spanish Civil Code can be found at <http://civil.udg.edu/normacivil/estatal/CC/1T4bis.htm>

⁹² Section 236B of the Domestic Relations Law of New York is referred to as the Equitable Distribution Law.

a spouse has no claim to assets that, despite having been earned during marriage, are non-marital.⁹³ The spouse with no title over those assets could only claim rights over them when divorce is filed or when the economic marital regime is liquidated.

All property acquired by either or both spouses during the marriage and before separation, and before the commencement of a matrimonial action, regardless of the form title is held, will be subject to equitable distribution. It does not include non-marital property but may include business or professional practice of each spouse, as well as human-capital-based assets such as any professional license, educational degree or any degree or skilled acquired during marriage by spouses that could result in an enhanced earning capacity of one of the spouses

Equitable distribution does not mean equal distribution. Therefore, an equitable distribution of marital property does not require a 50/50 division but may be distributed under any proportion the court will consider adequate taking into account certain factors, which are required to be taken into account by some U.S. states in order to ensure reaching an equitable result: the income of each spouse at the time of marriage; the income of each spouse at the time of the commencement of the action; the property of each spouse at time of marriage; the property of each spouse at the time of commencement of action; the duration of marriage; the age of both spouses; the health of the spouses; the loss of inheritance rights upon dissolution as of date of dissolution; the loss of pension rights upon dissolution as of date of dissolution; any maintenance award; liquid or non-liquid character of all marital property; potential future financial circumstances of each party; accuracy of valuation of any asset or interest in a business, corporation or profession; the tax consequences to each party; the wasteful dissipation of assets by either spouse; any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration; and any factor the Court could consider just and proper to consider.⁹⁴

4 A PROPOSAL FOR RESHAPING THE TRADITIONAL PRINCIPLES FAMILY DISSOLUTIONS IN LIGHT OF THE NEW FAMILY REALITIES

The legal trends regarding marital dissolutions seem or should be moving towards the direction of recognizing the status, composition, duration and content of the marital relationships in our societies. Evidence shows that the traditional social scheme where families were structured around the institution of a marriage; were long term – and often long lasting – relationships; and gender roles defined the functioning and structure of the family, should at least be reconsidered. Today our societies seem to show that relationships may intend long term goals but are often of short term duration, individuals enter into multiple marriages – or form multiple families – during their lifetime, gender roles, even though still existing, are of less important in the current family structures, and families often have two income earners.

⁹³ An example of non-marital asset with no claim by the other spouse could be each spouses' salary unless such salary would be deposited in a joint account, in which case, it would become jointly owned by both spouses.

⁹⁴ In addition to these factors, some authors suggest that professional goodwill should also be considered an asset potentially subject to division. See Kelly, Alicia B., Sharing a Piece of the Future Post-Divorce: Toward a More Equitable Distribution of Professional Goodwill, 51 Rutgers Law Review 569 (1999).

However, family law today is still applied and interpreted referring to the legal protection of the weaker spouse or the home-making spouse⁹⁵ and some authors today still emphasize that family regulations should reflect the women's economic disadvantage and vulnerability within families.

But the contemporary concept of marriage and family, more generally, does no longer refer to the traditional relationship with a male breadwinner and a housewife but as modern union with an equal division of labor inside and outside the home. Rather than describing dependence within households, as Becker suggested⁹⁶, households could be characterized as units with labor specialization. The principle of equal sharing between spouses regardless of the type of contribution seems to be the general rule.⁹⁷

Despite the continuing reality of women's labor and economic disadvantage and the inequality in the distribution of household work,⁹⁸ there are signs to believe that younger and highly educated individuals have different approaches from the traditional breadwinner and homemaker roles. The division of household work and childbearing responsibilities seems to be undergoing a change. There seems to be signs to believe that the classical ideology of a traditional family is changing.⁹⁹

The new roles of spouses within marriages, their participation in the labor market and therefore their economic independence make it necessary to reconsider and reshape the principles that traditionally have been applied in the dissolution of the economic marital regimes.

Consequently, these different concepts of marriage and matrimonial – and hence economical – relations between spouses require a reassessment of the functioning and dissolution of marital property regimes.

This paper proposes three issues that will be the focus of the next sections: first, outlining the external elements that may strongly affect the individuals' position within the family as well as their family decisions; second, the assets that should be taken into account when determining the spouses' property in order to award alimony. Third, when assigning maintenance payments or awards, this paper argues for introducing opportunity cost considerations.

This section will end with a note suggesting that such principles should signal to society, and particularly to spouses, what are the consequences and risks of certain decisions adopted while married. This way, individuals would better internalize the consequences of their decisions. Nevertheless, the application of such principles should be carefully made on a case by case basis so that no injustice would result.

⁹⁵ DETHLOFF, N. and KROLL, K., The constitutional court as driver of reforms in German family law, Bainham, A. (ed.), *The International Survey of Family Law*, 2006 Edition, Family Law, Jordan Publishing Limited, Bristol, 2006; p.232.

⁹⁶ Becker, Gary S. *A Treatise on the Family*. Cambridge, Mass.: Harvard Univ. Press, 1991.

⁹⁷ SVEDRUP, T., Maintenance as a Separate Issue – The Relationship Between Maintenance and Matrimonial Property, in Boele-Woelki, K. (ed.) *Common Core and Better Law in European Family Law*, Intersentia, Antwerp/Oxford, 2005, p. 122-127.

⁹⁸ See European foundation for the improvement of living and working conditions, *Combining family and full-time work* (2007). This document is available at http://www.eurofound.europa.eu/ewco/reports/TN0510TR02/TN0510TR02_3.htm and Buber, I., *The influence of the distributions of household and childrearing tasks between men and women on childbearing intentions in Austria*. Max-Planck-Institute for Demographic Research; Working paper, January 2002. Available at: <http://demogr.mpg.de>.

⁹⁹ See the Roadmap for equality between women and men 2006-2010 /SEC(2006)275/ which outlines six priority areas for EU action on gender equality for: equal economic independence for women and men; reconciliation of private and professional life; equal representation decision-making; eradication of all forms of gender-based violence; elimination of gender stereotypes; promotion of gender equality in external and development policies. COM(2006)92.

4.1 Not all parameters are family-based: external factors affecting the distribution of house vs. professional work of family members

Deciding how much to invest in one's professional career and in house work is one of the key decisions that strongly affect the composition of family property and the position of the spouses – their bargaining power - within the marriage.

The decision of how much to invest privately – in one spouse's career- and on the common good – the family – is affected by many factors, many of them outside the marriage. One factor may be the marriage market. Becker¹⁰⁰ was the first author who emphasized that the marriage market – a factor outside the family itself - is an important determinant of intrahousehold utility distribution. According to Becker, the marriage market and the sex ratio between men and women significantly determine family decisions, and particularly the decision to invest in family goods. So, following Becker's argument, the gender of which there is less supply in the market and therefore has the gender ratio in his or her favor, has a higher bargaining power and hence receives more gains from marriage. Some authors have suggested that under these circumstances, the better bargaining position of one of the spouses would cause an income effect that would result in a reduction in the labor supply of this spouse while increasing the labor supply of the other spouse.

Another important factor is legislation. Laws governing divorce – whether based on fault, bilateral or unilateral divorce – and regulation regarding the marital economic regime such as separate property, community property or equitable distribution affect the spouses' position within marriage, their bargaining positions within marriage, their possibilities of leaving marriage and their financial expectations once marriage is dissolved.¹⁰¹ For example, the decision to invest in the family or the position of spouses within marriage is not the same for spouses when the divorce law in force is based on fault or when unilateral divorce is available.

Hence, all these parameters will also be important when designing family policies and decide how family assets should be divided and how the marital economic regime should be liquidated.

4.2 What should we divide? New asset structures deserve a comprehensive approach to property division

When dissolving a marital property regime, one of the major issues to determine is the assets that should be subject to division. As mentioned above, assets subject to division will be those qualified as marital assets. However, regardless of the economic marital regime – separate or community property-, the issue is which assets will be considered marital.

Traditionally, the kind of property to be divided upon divorce was fairly easy to determine given that such property was formed by assets such as real estate, financial instruments or tangible goods the value of which was relatively easy to assess. Today, these assets do not seem to reflect the composition of marital assets. As mentioned above, marriage age and child bearing age have been postponed¹⁰² as well as education,

¹⁰⁰ Becker, Gary S. *A Treatise on the Family*. Cambridge, Mass.: Harvard Univ. Press, 1991. chapter 3

¹⁰¹ For example, the adoption of unilateral divorce laws changed women's labor supply. Pierre-André Chiappori, Bernard Fortin, Guy Lacroix, *Marriage Market, Divorce Legislation, and Household Labor Supply*, *The Journal of Political Economy*, Vol. 110, No. 1 (Feb., 2002), pp. 37-72, 41.

¹⁰² See Figure 4, *Women's Mean Age at Childbearing 1998-2006*, above.

that has expanded over a longer period of individual's life and often takes place while individuals are married. Hence, obtaining education degrees and therefore investing in personal assets so that the individual human capital is enhanced during marriage, is not an exception. Further, marriages today also count with intangible assets, unvested pensions, stock options, intellectual property, and increased earning potential, professional goodwill and investment funds and other assets the return of which accrue during marriage but that their cash flow is received at a further point in time, when in some cases marriages are dissolved.¹⁰³

Even though a new asset composition of family property – or marriage property – is a reality courts are still reluctant to consider these new assets, value them and treat them as marital property subject to distribution. But broader principles in considering, valuing and dividing marital assets should be applied so that intangible, human capital and any assets with economic value and subject to division should be taken into account.

4.3 What did you obtain or what did I lose? A proposal for determining maintenance payments

The first question that should be answered is whether maintenance payments for former spouses exist at all. If the answer to this question is affirmative and therefore we should award compensation to the spouse who is less economically capable or who is less economically viable of the two, a second question is then how this compensation should be valued.

a. Justifying award payments between spouses

The existence of such payments is not exempt from debate. The nature of these award payments, named alimony maintenance or support payments, has been traditionally based on the imbalance of economic resources between spouses after marriage.

If the contributions between spouses during marriage were equivalent in terms of professional, household work and care of children, a strict application of the economic marital regime – either separate or community property – in force, would seem equitable enough to dissolve and liquidate the economic marital regime.¹⁰⁴ Equal sharing regardless of the type of contribution would be a generally economic marital regime.¹⁰⁵

¹⁰³ See generally Alicia Brokars Kelly, *Sharing a Piece of the Future Post-Divorce: Toward a More Equitable Distribution of Professional Goodwill*, 51 Rutgers L. Rev. 569 (1999)

¹⁰⁴ The Principles of European Family law were drafted by the Commission on European Family law (CEFL), which is a scientific initiative independent of any organization or institution. The Principles of European Family law regarding Divorce and Maintenance between former spouses were published in 2004 and can be found in <http://www.ceflonline.net>. These principles were elaborated on the basis of a questionnaire of 105 questions that expert members of the different countries responded. From these answers, the CEFL elaborated the Principles concerning Divorce (Part I) and the Principles concerning maintenance between former spouses (Part 2). The principles and information about the CEFL can be found at <http://www.ceflonline.net>. With respect to divorce and maintenance between former spouses, the European Principles suggest that if family duties have been shared, the right of maintenance will diminish or even disappear.

¹⁰⁵ Svedrup, T., *Maintenance as a Separate Issue – The Relationship Between Maintenance and Matrimonial Property*, in Boele-Woelki, K. (ed.) *Common Core and Better Law in European Family Law*, 122-127. Intersentia, Antwerp/Oxford (2005).

But as noted above, contributions between spouses are not symmetric and of equal nature. While the tendency is towards equality, the fragmentation of the labor market based on gender, the gender gap in employment rates,¹⁰⁶ the unequal distribution of household work and of care of children¹⁰⁷ show that there is no gender equality yet. Families are not yet in a situation of factual equality between spouses. If such symmetry was ever achieved, it would be possible to talk about marriage as a partnership which should be based on autonomous, independent and symmetric positions of wife and husband and that could be assumed to negotiate the decisions they jointly adopt.¹⁰⁸ In light of the still existing gender inequality, some authors argue that it should be compensated with a symmetrical division of property between spouses¹⁰⁹ and further claim that a community property regime is a better marital property regime compared to the separate property regime.¹¹⁰

Regarding the kind of contributions spouses do during the marriage, it is possible to distinguish, using contract language, between private investments beneficial for the whole family and for the one making the investment and specific investments that would be family investments that benefit the whole family but do not reverse in a private benefit for the one making them.¹¹¹ An example of the first kind of investments would be the spouses' profession. Professional life is important for the family life because it provides economic resources and stability but at the same time, it is important for the one having such a professional life because it assures a position in the labor market as well as a role within society and economic independence. Further, having a professional life diminishes the risk derived from family dissolution - and hence marital property division - because this spouse is economically independent and potentially self-sufficient. The second kind of investments is specific investments in the family. It is well known in the contract literature¹¹² - particularly in long term contracts - that such investments are investments that have a value within the relationship but do not have value outside of it. Hence, these investments are beneficial for the family as a community, as a whole unit, but put the spouse doing such kind of investments in a risky position. A typical example of such investments is household work or the care for

¹⁰⁶ See Figure 7, Unemployment Rate for Ages 25-74 in the European Union 27, 2000-2008, above.

¹⁰⁷ Buber, I., The influence of the distributions of household and childrearing tasks between men and women on childbearing intentions in Austria. Max-Planck-Institute for Demographic Research; Working paper, 2002. Available at: <http://demogr.mpg.de>. Roadmap for equality between women and men, COM (2006) 92 final, where the European Commission defined its priorities and its framework of action and policies to be implemented in order to promote equality in the period from 2006 to 2010.

¹⁰⁸ If that was the situation, marital property and family law would see their regulation and role in solving disputes involving family property significantly minimized. See SCHWENZER, I. in collaboration with DIMSEY, M., *Model Family Code - From a Global Perspective*, Intersentia, Antwerp-Oxford 2006.

¹⁰⁹ Branka Rešetar, *Matrimonial Property in Europe: A Link between Sociology and Family Law*, *Electronic Journal of Comparative Law*, vol. 12.3, 16 (2008). This article is available at <http://www.ejcl.org>.

¹¹⁰ Branka Rešetar, *Matrimonial Property in Europe: A Link between Sociology and Family Law*, *Electronic Journal of Comparative Law*, vol. 12.3, 13 (2008). This article is available at <http://www.ejcl.org>.

¹¹¹ See Che, Yeon-Koo and Chung, Tai-Yeong, *Contract Damages and Cooperative Investments*, 30 *Rand Journal of Economics* (1999).

¹¹² See, for example, Gerrit De Geest, *Long-term Contracts and Distribution Chains: Binding Force*, Mimeo; Klein, B., *Transaction cost determinants of "unfair" contractual arrangements*, *American Economic Review* 70: 356-362 (1980); Williamson, Oliver E., *THE ECONOMIC INSTITUTIONS OF CAPITALISM*, FREE PRESS (1985); Che, Yeon-Koo and Chung, Tai-Yeong, *Contract Damages and Cooperative Investments*, 30 *Rand Journal of Economics* (1999); Coase, Ronald, *The Nature of the Firm: origin, meaning, influence*, 4 *J.L. Econ & Org.* 3 (1988) and Crawford, Vincent P., *Long-Term Relationships Governed by Short-Term Contracts*, 78 *American Economic Review*, 485-499, 1988.

children. This kind of work is essential and crucial for family life and hence is of extreme value of the family but has no market value and additionally, does not have value outside of the family context. Further, specific investments, despite being of crucial importance for the family, involve a high level of risk for the spouse making them given that once family is dissolved and the economic marital regime is liquidated, the professional and economic position of the spouse making such investments is worse than the position of the other.¹¹³

Evidence shows that despite the social changes and evolution of family patterns presented in section 2 of this article, these two kinds of investments are still significantly gender based. Despite the decrease of traditional gender roles, the two kinds of investments are not equally distributed between men and women. While both men and women work both outside and in the house, they do not do it in equal shares. The first kind of investment, the private investment –investing in one’s professional life-, is still mostly or greatly performed by men and also by women – even though in lower rates - while the specific investments in the house, are still significantly performed by women. This does not imply that women are not working outside of the house and therefore pursue a professional career but in light of the data available, there is still a gender and pay gap between men and women.¹¹⁴ Further, evidence shows that housework is not equally shared between men and women.¹¹⁵

Authors such as Thomas¹¹⁶ and Browning et al.¹¹⁷ have provided evidence that the distribution of total intra-household income has a significant impact on outcomes. Up to today, all European marriage property systems, regardless whether they are separate or community property regimes include these award payments so that the imbalanced position between spouses is equilibrated.

So, in light of the still existing imbalance on the type of contributions spouses do during the marriage and their effects on the spouses’ present and future personal and professional prospects, such payments are still necessary.

b. Determining the amount of award payments between spouses

With respect to the second issue, how this compensation should be valued, this article argues that the traditional valuation of such payments should be reconsidered in favor of more accurate economic considerations and valuations that would reflect more the spouses’ decisions and position within the marriage. Let’s develop such idea.

Marriage dissolution in a way intends to distribute the loss caused by the reversal of the economies of scale produced by marriage. During marriage both spouses

¹¹³ Rešetar claims that the importance and meaning of such contributions in the acquisition and division of marital property requires a broader look at elements such as household work and childbearing responsibilities from a legal but also from a sociological perspective. Branka Rešetar, *Matrimonial Property in Europe: A Link between Sociology and Family Law*, *Electronic Journal of Comparative Law*, vol. 12.3, 9 (2008). This article is available at <http://www.ejcl.org>.

¹¹⁴ See Table 7, *Unemployment Rate for Ages 25-74 in the European Union 27, 2000-2008*, above.

¹¹⁵ See the European Commission’s document “Roadmap for equality between women and men”, COM (2006) 92 final, and Buber, I., *The influence of the distributions of household and childrearing tasks between men and women on childbearing intentions in Austria*. Max-Planck-Institute for Demographic Research; Working paper, January 2002. Available at: <http://demogr.mpg.de>.

¹¹⁶ Thomas, Duncan. "Intra-household Resource Allocation: An Inferential Approach." *J. Human Resources* 25 (Fall 1990): 635-64.

¹¹⁷ Browning, Martin; Bourguignon, Francois; Chiappori, Pierre-Andre; and Le-chene, Valerie. "Income and Outcomes: A Structural Model of Intrahousehold Allocation." *J.E.* 102 (1994): 1067-96.

benefit from the economies of scale created. The issue then is to determine who and in what amount one spouse should be compensated for the diseconomies arising from the marriage dissolution.

Most European economic marital regimes understand that such compensation should exist and include such payments. From a procedural perspective, what varies across the different European countries is who determines such payments. Some countries apply legal guidelines and it is the law that determines the amount to be awarded, other countries leave it to the discretion of the courts to ultimate the final amount of the award. But in all European countries, the law is crucial to the nature and principles of such payments while provide courts with a certain level of discretion.¹¹⁸ Hence, these payments are generally awarded on a case by case basis.

The fundamental purpose of maintenance after divorce is providing economic support for the dependent or less economically capable former spouse in need of such support.¹¹⁹ These award payments aims to compensating one spouse considering the economic imbalance between the two spouses based on the value of the specific investments made by one of them either at home, or in some other form of additional contribution to the common family life, with respect to the amount the debtor spouse has presumptively benefited from this work.¹²⁰ Hence, these awards intend to compensate the additional common contribution that one of the spouses has performed and that has enabled the other to better invest in his or her professional career, has therefore invested more in private investments, less in the marital life and therefore is in a better position when the marriage is dissolved.

Another justification provided in the literature is that whenever marriage has been of long duration, once it is dissolved there is still a post divorce solidarity obligation between spouses¹²¹ but this philosophical argument will not be the focus of this section.

Going back to the compensatory nature of these payments, the goal now is to determine how the specific amount of such compensation should be determined. It is difficult to make general statements given that as mentioned earlier, the amount of these awards is generally determined on a case by case basis in the different legal systems.

However, it is generally accepted in most European legal systems that these compensation awards are determined based on the gains of the debtor spouse. Another approach to these compensatory payments could be fixing them with respect to the losses suffered by the creditor spouse, as opposed to the gains obtained by the debtor spouse. When talking about compensation, the law and economics literature – especially in torts - has often noted that in order to avoid either under/over deterrence or

¹¹⁸ Branka Rešetar, *Matrimonial Property in Europe: A Link between Sociology and Family Law*, *Electronic Journal of Comparative Law*, vol. 12.3, 9 (2008). This article is available at <http://www.ejcl.org>.

¹¹⁹ In its origin, when divorce was granted based on guilt, the condition of such maintenance was the creditor's spouse lack of guilt. Today, with the grounds of divorce expanded, maintenance payments are not linked to guilt of one of the spouses. Currently, we determining maintenance payments guilt is irrelevant. See Boele-Woelki, Katharina, Pintens, Walter, Ferrand, Frederique, González-Beilfuss, Cristina, Jänterä-Jareborg, Maarit and Lowe, Nigel, *PRINCIPLES OF EUROPEAN FAMILY LAW REGARDING DIVORCE AND MAINTENANCE BETWEEN FORMER SPOUSES*, 73-76, Dieter Martiny (ed.), Intersentia, Antwerp Oxford (2004).

¹²⁰ This is the nature of the compensation payment provided b article 97 of the Spanish Civil Code that can be found at <http://civil.udg.edu/normacivil/estatal/CC/1T4bis.htm>

¹²¹ Boele-Woelki, Katharina, Pintens, Walter, Ferrand, Frederique, González-Beilfuss, Cristina, Jänterä-Jareborg, Maarit and Lowe, Nigel, *PRINCIPLES OF EUROPEAN FAMILY LAW REGARDING DIVORCE AND MAINTENANCE BETWEEN FORMER SPOUSES*, 69, Dieter Martiny (ed.), Intersentia, Antwerp Oxford (2004).

over/under compensation, compensatory awards should be determined based on the losses of the creditor – or victim, when talking about torts – and not with respect to the gains of the debtor – or tortfeasor.

i. Relevant parameters when determining the alimony maintenance or support payments

When liquidating the economic marital regime, the need of the dependent or less economically capable spouse is considered. It should further noted, though, that this need is also conditioned to the ability of the debtor spouse to meet this need.¹²²

Very often, award payments are set as a fix amount, fractional share of the debtor's income or an amount assessed individually.¹²³

In order to determine whether the creditor spouse has the need to receive compensation from the other spouse, certain factors related to the economic situation of the spouses are taken into account. These factors could be classified as economic-based; personal-based and marriage-life based.

From an economic perspective, one of the essential factors to consider is the income and assets of the spouses. In principle only real income is taken into account but it is more common today that potential or imputed income can also be considered.¹²⁴ Assets are generally interpreted broadly to include capital assets, property, and reasonable living expenses.

Two additional economic parameters that should also be taken into account are the tax consequences – the tax costs- of making and receiving such payments that can be considerably significant. Finally, the economic costs inherent to these payments should also be considered such as the capacity to access to additional loans or mortgages considering that the economic solvency and the credit score of the debtor spouse are reduced as a consequence of these payments. Maintenance and support payments may affect the economic capacity of the debtor spouse in terms of accessing to future funding and credit opportunities. These economic elements, even though sometimes difficult to quantify, should also considered when determining the spouse's need of these payments and the other spouse's ability to meet such need.

Another group of factors, even though also with economic consequences, refer to the personal situation of the spouses that could strongly affect their economic possibilities, potential needs or ability to meet them. These factors are such as the spouses' employment ability, their age and health.

¹²² Boele-Woelki, Katharina, Pintens, Walter, Ferrand, Frederique, González-Beilfuss, Cristina, Jänterä-Jareborg, Maarit and Lowe, Nigel, *PRINCIPLES OF EUROPEAN FAMILY LAW REGARDING DIVORCE AND MAINTENANCE BETWEEN FORMER SPOUSES*, 69, 82, Dieter Martiny (ed.), Intersentia, Antwerp Oxford (2004).

¹²³ European Principles of Family Law regarding divorce and maintenance between former spouses. Boele-Woelki, Katharina, Pintens, Walter, Ferrand, Frederique, González-Beilfuss, Cristina, Jänterä-Jareborg, Maarit and Lowe, Nigel, *PRINCIPLES OF EUROPEAN FAMILY LAW REGARDING DIVORCE AND MAINTENANCE BETWEEN FORMER SPOUSES*, 83, Dieter Martiny (ed.), Intersentia, Antwerp Oxford (2004).

¹²⁴ The countries that consider imputed income are Austria, Bulgaria, Belgium, Czech Republic, Denmark, England and Wales, Germany, Hungary, Ireland, The Netherlands, Norway, Poland, Scotland, Sweden and Switzerland. In some other countries such as Finland, France, Greece Italy, Portugal and Spain this possibility is not used or does not exist. For a comment on the regulation of the different European countries See Boele-Woelki, Katharina, Pintens, Walter, Ferrand, Frederique, González-Beilfuss, Cristina, Jänterä-Jareborg, Maarit and Lowe, Nigel, *PRINCIPLES OF EUROPEAN FAMILY LAW REGARDING DIVORCE AND MAINTENANCE BETWEEN FORMER SPOUSES*, 81, Dieter Martiny (ed.), Intersentia, Antwerp Oxford (2004).

Finally, a third group of factors could be named as marriage-related factors refer to the life of the spouses during marriage, the length of the marriage; the care of children; the division of family duties during the marriage;¹²⁵ the marriage standards of living¹²⁶ and any new marriage or long term relationship.¹²⁷

ii. The determination of the specific award amount

Maintenance award payments are payments based on the future, not the past, given that the element determining whether they will be awarded is the need originated at the moment of liquidating the marital property regime considering the situation of each spouse from that moment onwards. It should be noted, though, that even in cases where need is present, these maintenance payments will not be always and under any circumstances awarded. Today the tendency is to encourage spouses or former spouses to support her or himself and if able to, she or he will be expected to do so.¹²⁸

Once it is determined that, as a consequence of the divorce, one of the spouses is economically dependent or in need and the other spouse is capable of meeting these needs, the factors mentioned above will have to be evaluated. However, this is not a simple task given that some of the factors to consider – division of family duties, marriage standard of living or the employment ability, for example – are not easily quantifiable. Hence, how all these factors are quantified is of crucial importance. Most of these parameters are often valued with respect to the gains obtained by the debtor spouse and not with respect to the losses of the creditor spouse – as would be done under tort law. This way of quantifying the economic imbalance between spouses and the economic need of one of them should be reconsidered given that it could result in strategic behavior by the spouses and over or under compensation of the creditor spouse.

Let's think about some cases.

¹²⁵ The division of family duties during marriage is considered regardless of the spouses; age and as long as such care has affected the prospect of obtaining gainful employment. See Boele-Woelki, Katharina, Pintens, Walter, Ferrand, Frederique, González-Beilfuss, Cristina, Jänterä-Jareborg, Maarit and Lowe, Nigel, *PRINCIPLES OF EUROPEAN FAMILY LAW REGARDING DIVORCE AND MAINTENANCE BETWEEN FORMER SPOUSES*, 93, Dieter Martiny (ed.), Intersentia, Antwerp Oxford (2004).

¹²⁶ The consideration of the marriage standard of living is not uniform. A first group of countries consider that the purpose of the maintenance claim is to provide compensation for the loss of these standards; a second group understands that the standard of living is a factor to be taken into consideration and a third group, are countries where the standard of living enjoyed during the marriage is not considered. See Boele-Woelki, Katharina, Pintens, Walter, Ferrand, Frederique, González-Beilfuss, Cristina, Jänterä-Jareborg, Maarit and Lowe, Nigel, *PRINCIPLES OF EUROPEAN FAMILY LAW REGARDING DIVORCE AND MAINTENANCE BETWEEN FORMER SPOUSES*, 90, Dieter Martiny (ed.), Intersentia, Antwerp Oxford (2004) for a list of countries forming each country group regarding the consideration of the standard of living in the determination of maintenance payments.

¹²⁷ Principle 2.4 of the Principles of European family law suggest including also the time devoted or still to be devoted to the caring of children given that this factor may limit, or at least condition, the capacity to pursue a full professional career or in the worst cases, the possibility to access to gainful employment. <http://ceflonline.net/Reports/Principles%20-%20English.pdf>

¹²⁸ Boele-Woelki, Katharina, Pintens, Walter, Ferrand, Frederique, González-Beilfuss, Cristina, Jänterä-Jareborg, Maarit and Lowe, Nigel, *PRINCIPLES OF EUROPEAN FAMILY LAW REGARDING DIVORCE AND MAINTENANCE BETWEEN FORMER SPOUSES*, 77, Dieter Martiny (ed.), Intersentia, Antwerp Oxford (2004).

¹²⁸ Boele-Woelki, Katharina, Pintens, Walter, Ferrand, Frederique, González-Beilfuss, Cristina, Jänterä-Jareborg, Maarit and Lowe, Nigel, *PRINCIPLES OF EUROPEAN FAMILY LAW REGARDING DIVORCE AND MAINTENANCE BETWEEN FORMER SPOUSES*, 77, Dieter Martiny (ed.), Intersentia, Antwerp Oxford (2004).

A first situation we could imagine could be one where both spouses have a similar or equivalent professional qualification – two doctors, two lawyers, an economist and a lawyer, for example - but one of them performs a higher share of specific investments in the common family and does not develop the full potential of his or her professional activity.

A second situation we could imagine could be one in which there is an imbalance of professional qualification – that could be a potential economic imbalance - between both spouses. These could be cases where for example, we could have different educational degrees – a doctor and a court secretary, an engineer and a teacher, for example – or different similar education levels but different professional careers that could result in a different economic situation of both spouses and one of them would assume a higher division of family duties during the marriage.

Finally, a third situation could be one in which regardless of the spouses' professional qualification, one of them has a special skill or talent – in art, medicine, or engineering, for example – that generates a significant amount of income compared to the one of the other spouse and there is an unequal distribution of family duties.

The situations presented above are very different and the positions of each spouse during marriage and once marriage has been dissolved, are also significantly different. However, the principles applicable to the three cases should be the same. As mentioned above, one of the most difficult issues arising from marital dissolutions is how specific investments or the additional share of family duties assumed by one of the spouses will be valued. The question is: will the additional family work valued in terms of the most successful - and debtor - spouse? Or should it be valued in terms of the value for the creditor spouse? Should the additional share of family duties be valued in terms of the doctor or in terms of the court secretary? At the price of the spouse who has a special skill or talent – such as an artist or engineer – or in terms of the other spouse?

Up to today, the valuation of the economic imbalance between spouses is generally done considering the gain or value of the debtor spouse, the one with a better economic situation. But this could result in overcompensation of the creditor spouse. Going back to the cases presented especially the second and third cases, where there is a professional and/or economic and/or talent imbalance between the spouses, this could mean that when the compensation paid to the creditor spouse would be valued in terms of the qualifications or professional position of the debtor spouse, which is an amount that often would not have been obtained by the creditor spouse when devoting these hours in the labor market. In other words, when each spouse decides how much to invest privately and how much to invest in the family, if the private investment is valued at the price this spouse is able to obtain when participating in the labor market and the common investment or the family investment is valued at the price of the other spouse's market value, there is a potential distortion in this decision that could result in a low private investment and a high common investment, just because this has a higher value than this spouses' capacity to generate income.

The argument behind this mechanism is considering that because one of the spouses has been assuming a higher share of family duties, the other spouse was able to develop a full professional career and invest more privately. However, the cause-effect relationship traditionally established between a spouse's lower private investments and high family investments does not necessarily imply additional private investments by the other spouse.

In addition to the price distortion in the investment decision of each spouse, there is the risk element inherent to individuals' professional and personal lives. As

mentioned earlier, lower private investments by one spouse involve risk for being able to be economically self-sufficient if and when the marriage is dissolved.

Therefore, valuating specific investments inaccurately distort the spouses' investment decisions and hence their future possibilities of being self-sufficient so that they could support themselves in case of a potential marital dissolution and may impose an excessive burden on one of the spouses.

Thus, a different perspective should be adopted when quantifying the spouses' specific investments and the costs of such investments for the spouses' professional life and their possibilities of supporting him or herself. This perspective should include the opportunity cost of such decisions for each spouse. Considering the spouses' opportunity cost implies factoring in the value of the best alternative available to him or to her.¹²⁹ This analysis has the fundamental objective of avoiding any kind of unfair economic consequence of divorce.¹³⁰

Continuing with the earlier examples:

In the first case, valuating specific investments does not seem especially complicated given that both have a symmetric position and therefore the opportunity cost of both spouses should be similar.

But in the second and third cases, the valuation of specific investments is of significant importance. In the second case where there could be a potential economic imbalance between spouses, if we had for example an engineer and a teacher and, assuming that the economic capacities of the engineer were higher than the ones of the teacher, valuing specific investments at the price of an engineer could encourage the teacher to invest more in the family because it would be economically more profitable than investing privately and developing a career as a teacher.

The same would be true in the third case. If we had a situation where one of the spouses would have a special talent and would be a successful artist, valuing specific investments in terms of this spouse's talent would be more profitable than investing privately and hence developing a professional life. In these cases, the creditor spouse would have incentives to under-invest privately and overinvest in the common family life.¹³¹

However, if the opportunity cost of the creditor spouse would be considered, three side effects would take place: first, spouses would not rely on the private investments of the other spouse and therefore would have incentives to internalize the risk and consequences of their private and family investment decisions. Second, the creditor spouse would not be overcompensated, and would therefore have incentives to invest privately and to minimize the negative impact of the potential dissolution of the marriage. But on the other, it should also be noted that when both spouses make significant private investments at the expense of their common family, the probability of failure of the marriage significantly increases. It is difficult to quantify those effects and

¹²⁹ Mankiw, Gregory N., *PRINCIPLES OF ECONOMICS*, 54, South-Western College Pub (5th ed.) (2008).

¹³⁰ Boele-Woelki, Katharina, Pintens, Walter, Ferrand, Frederique, González-Beilfuss, Cristina, Jänterä-Jareborg, Maarit and Lowe, Nigel, *PRINCIPLES OF EUROPEAN FAMILY LAW REGARDING DIVORCE AND MAINTENANCE BETWEEN FORMER SPOUSES*, 69, Dieter Martiny (ed.), Intersentia, Antwerp Oxford (2004).

¹³¹ Compensating contract breach based on reliance damages results in overinvestment in reliance expenses and is therefore inefficient. Further, reliance damages present a problem of valuation given that damages should in principle compensate a plaintiff for the loss of forgone alternatives, but such opportunity costs are often difficult to verify ex post so that often, courts presume that the forgone opportunity would have yielded the same profits as a breach of contract. See Hermalin, Benjamin E., Katz, Avery W. and Craswell, Richard, Chapter on the Law & Economics of Contracts, 96-97, 101, *THE HANDBOOK OF LAW & ECONOMICS* (2007).

to conclude which one would dominate over the others but considering the current roles and participation of spouses in the labor market and the divorce rate in most western societies;¹³² it seems fair to anticipate that such reform would not increase significantly the probability of divorce much further than we already have it today and would create incentives to individuals to adopt decisions that would not put them in risky positions in the case of a breakdown of the marriage while discouraging free riding of one spouse from the other. Thus, introducing opportunity cost considerations would imply that each spouse would fully internalize the consequences of their investment decisions and therefore would not expect a share of the other spouse's private investments – or professional and economic earnings - while obtaining the benefit of the marriage.¹³³

This idea is totally coherent with the modern tendency of most jurisdictions is to promote independence of spouses following divorce.¹³⁴ Therefore, a more modern approach of family law should be implemented.

iii. Kinds of maintenance payments

The kind of payment awarded and the economic consequences of such payment for the debtor spouse should be considered when awarding maintenance payments given that they may have a strong impact on his or her financial situation and its prospect ability to carry on with his or her life and the capacity to meet such payments. The award payments are monetary payments¹³⁵ paid either through periodical payments or through a lump sum. Periodical payments are the general rule. The most common payment method in most European systems are regular installment payments once a month given that maintenance debtors usually collect their income once a month but other possibilities are available.¹³⁶ Lump sum payments, either as a one time payment or in addition to periodical payments, are possible in most European legal systems.¹³⁷

¹³² See Table 3, Divorce Rates By Duration Of Marriage (Reached During the Year) 1985-2001, above.

¹³³ The contract literature differentiates between expectation damages, that attempt to put the injured party in a position as he would have been if the contract had been performed, and reliance damages, where the breaching party has to compensate the non-breaching party enough to leave the non-breaching party with the same utility level he would have enjoyed if he or she had not entered into the contract. The contract literature has shown that expectation damages are Pareto-superior to the reliance measure. See Bebhuk, Lucian Arye, *Damage Measures for Inadvertant Breach of Contract*, IRLE 19:319 –331, 329 (1999) available at http://www.comp.nus.edu.sg/~ipng/research/contract_IRLE.pdf and Hermalin, Benjamin E., Katz, Avery W. and Craswell, Richard, Chapter on the Law & Economics of Contracts, 97, *THE HANDBOOK OF LAW & ECONOMICS* (2007).

¹³⁴ Article 2.2 of the European Principles of Famil Law regarding divorce and maintenance between former spouses. Boele-Woelki, Katharina, Pintens, Walter, Ferrand, Frederique, González-Beilfuss, Cristina, Jänterä-Jareborg, Maarit and Lowe, Nigel, *PRINCIPLES OF EUROPEAN FAMILY LAW REGARDING DIVORCE AND MAINTENANCE BETWEEN FORMER SPOUSES*, 78, Dieter Martiny (ed.), Intersentia, Antwerp Oxford (2004).

¹³⁵ Poland is the only European country that provides a payment in kind that is exceptional in practice. Boele-Woelki, Katharina, Pintens, Walter, Ferrand, Frederique, González-Beilfuss, Cristina, Jänterä-Jareborg, Maarit and Lowe, Nigel, *PRINCIPLES OF EUROPEAN FAMILY LAW REGARDING DIVORCE AND MAINTENANCE BETWEEN FORMER SPOUSES*, 96, Dieter Martiny (ed.), Intersentia, Antwerp Oxford (2004).

¹³⁶ Some legal systems allow courts' discretion to establish a time interval to make such payments. Article 99 of the Spanish Civil Code (<http://civil.udg.es/normacivil/estatal/CC/1T4bis.htm>) and article 85 of the Catalan Family Code (<http://civil.udg.edu/normacivil/cat/fam/CF/CF3.html>).

¹³⁷ They are available in 19 out of the 22 jurisdictions surveyed by the European principles. Poland, where lump sum payments do not seem to be allowed, is the exception. See Boele-Woelki, Katharina, Pintens, Walter, Ferrand, Frederique, González-Beilfuss, Cristina, Jänterä-Jareborg, Maarit and Lowe, Nigel, *PRINCIPLES OF EUROPEAN FAMILY LAW REGARDING DIVORCE AND MAINTENANCE BETWEEN FORMER SPOUSES*, 97, Dieter Martiny (ed.), Intersentia, Antwerp Oxford (2004).

Depending on the country, lump sum payments can be requested by the creditor spouse; or requested by either party or less often, at the court's discretion.¹³⁸

The consequences of lump sum or periodical payments are remarkably different for both spouses. For the creditor spouse a lump sum payment imply not depending from the monthly or periodical payment – or default payment – from the creditor spouse and therefore provides important economic certainty. At the same time, it requires financial management so that no future maintenance claims are necessary as a consequence of bad finance management. For the debtor spouse a lump sum payment is also important given that collecting a certain amount could be of extreme difficulty as well as have a direct impact on being able to access to future financing possibilities. For that reason, some national laws exclude lump some payments whenever they would be an inequitable burden to the debtor.¹³⁹ So whether lump sum payments are available or not considers the circumstances of the case.

The duration of the maintenance obligation is generally determined by the court's discretion.¹⁴⁰ They generally do not have time limits so that the claim may exist while the conditions for granting maintenance continue to exist.¹⁴¹ Sometimes maintenance is considered to be a lifelong obligation presupposing the need of the creditor spouse and the debtor spouse's ability to pay but in many countries, maintenance is established for a limited period of time by the competent authority.¹⁴²

It should also be noted that the emotional situation of the creditor spouse is relevant when determining whether the maintenance obligation of the other spouse ceases. If the creditor spouse remarries or establishes a new long term relationship the maintenance obligation of the former spouses will terminate.¹⁴³ A long term relationship or new marriage by the debtor spouse does not affect the length or is not a ground for termination of the maintenance obligation. This is important given that if, as mentioned earlier, one of the challenges of liquidating marital property regimes is sharing the diseconomies of scale created by the divorce of the spouses, whenever the creditor spouse enjoys the economies of scale of a new marriage or relationship, any economic obligation of a former spouse should terminate.

4.4 Signaling is important: General principles and a case by case application

¹³⁸ Article 85 of the Catalan Family Code (<http://civil.udg.edu/normacivil/cat/fam/CF/CF3.html>).

¹³⁹ See the national reports of Austria and Germany that are available at <http://www.ceflonline.net>.

¹⁴⁰ Courts generally take into account the length of the relationship and the overall situation of the creditor spouse even though a spousal agreement to fix the period of the maintenance payments prevails in some countries.

¹⁴¹ A few European countries consider that the duration of maintenance ought to be limited. See Boele-Woelki, Katharina, Pintens, Walter, Ferrand, Frederique, González-Beilfuss, Cristina, Jänterä-Jareborg, Maarit and Lowe, Nigel, *PRINCIPLES OF EUROPEAN FAMILY LAW REGARDING DIVORCE AND MAINTENANCE BETWEEN FORMER SPOUSES*, 112, Dieter Martiny (ed.), Intersentia, Antwerp Oxford (2004).

¹⁴² This period is often called transitional period from marriage to divorce. See article 85 of the Catalan Family Code (<http://civil.udg.edu/normacivil/cat/fam/CF/CF3.html>) and article 100 of the Spanish Civil code (<http://civil.udg.edu/normacivil/estatal/CC/1T4bis.htm>).

¹⁴³ This is the general trend in all European countries and has been included in the European Principles of Family law regarding divorce and maintenance between former spouses in its principles 2.9. See <http://ceflonline.net/Reports/Principles%20-%20English.pdf>

Legal rules should provide general principles that should signal the consequences of each spouses' decisions. However, they should not be uniformly applied but should be applied to the case by case and shape them there.

This article defends a reconsideration of the underlying principles and parameters under which the dissolution of marital property regimes, in the context of family law, is applied today.

As presented in the first part of this article, men and women face different challenges and their different circumstances have a strong impact on their family decisions and the likelihood of success of such decisions. Hence, this article does not advocate for a uniform application of such principles but intends to provide family law scholars, policy makers and also lawyers with arguments to reconsider the application of traditional family law principals in the context of the new family realities.

It may not be a job to be done at once. However, it is important to, as the European Family principles do, signal to society that autonomy and self-sufficiency should be the rule once marriage has dissolved.¹⁴⁴ Individuals within a family should be able to anticipate and know what they may expect and what the consequences of their decisions may be in the case of a family dissolution. It is essential for individuals to be able to internalize and anticipate the consequences and risk involved in the professional personal decisions in order to be aware of the consequences of the life decisions they take.

Signaling to society and particularly to family members may be also a way of protecting families and reducing family dissolutions in light of the information family members will have when adopting their personal and professional decisions.

However, a special mention should be made to the application of the principles and arguments presented in this paper. It is important to emphasize that such principles should be applied on a case by case basis. As explained above, when considering different education levels, not all men and women are affected similarly by parenthood. Further, employment rate of men and women is also strongly affected by the education level of individuals. Such parameters, just to present two examples, strongly affect family formation and family decisions and most importantly, affect the individual's potential bargaining power and his or her position within the family.

Consequently, the arguments and principles presented in this paper should be considered as signals so that individuals, men and women, make their professional and family choices fully informed of the nature, content, consequences and risk such decisions impose on them and on others. The tendency of our societies toward more symmetric positions between men and women urge new considerations in family law.

5. CONCLUSIONS

This paper challenged traditional family principles in marital dissolutions and argued for the introduction of a new perspective on the economic aspect of marital dissolutions. The evolution of traditional family structures and family roles to new family realities through the more symmetric labor participation of men and women; the drop in marriage rates and the increase of divorce rates represent social changes that

¹⁴⁴ Boele-Woelki, Katharina, Pintens, Walter, Ferrand, Frederique, González-Beilfuss, Cristina, Jänterä-Jareborg, Maarit and Lowe, Nigel, *PRINCIPLES OF EUROPEAN FAMILY LAW REGARDING DIVORCE AND MAINTENANCE BETWEEN FORMER SPOUSES*, 69, Dieter Martiny (ed.), Intersentia, Antwerp Oxford (2004).

have modified family roles and the position and function of each spouse within the marriage.

One of the most important issues in family law is marital dissolutions and property distribution. Using economic arguments, this paper claims that the valuation principles of the contribution of each spouse to the family life and the determination of the compensation that one of the spouses might be entitled to should be revised. Additionally, this article suggests that the concept of family assets should be broadened in order to include and consider new family property structures while at the same time emphasizes the importance of introducing opportunity cost considerations so that spouses internalize the consequences and risk of their investment decisions.

Societies are changing and family law should adjust to such changes. Hence, family law should introduce economic arguments so that, whenever appropriate, spousal compensation should be accurately determined in order to avoid under and overcompensation of a former spouse. In light of the current divorce rates and the importance of property marital dissolution in divorce proceedings, this is a crucial issue in individuals' life worth reconsideration.

ANNEX

The data used in this paper have been obtained from the Eurostat database.¹⁴⁵ Even though each data table provides the hyperlink to the Eurostat data table, the web address where all tables can be found is <http://epp.eurostat.ec.europa.eu/portal/page/portal/eurostat/home>.

With respect to the figures representing the evolution of a variable for the European Union 27 or for EFTA countries, it should be noted that the data have not been weighted by the population size of given countries and regions and therefore have been used in absolute terms as provided by the Eurostat. Given that this paper used the Eurostat data mostly for showing the evolution of certain variables, the fact that the values are absolute and not weighted does not seem to be of crucial importance for the paper.

The general disclaimer of the European Commission regarding Eurostat data can be found at http://europa.eu/geninfo/legal_notices_en.htm.

¹⁴⁵ The data regarding Population is available at <http://epp.eurostat.ec.europa.eu/portal/page/portal/population/data/database>
The data regarding Employment and unemployment (Labour Force Survey) are available at http://epp.eurostat.ec.europa.eu/portal/page/portal/employment_unemployment_lfs/data/database

TABLE 1**Crude Marriage Rate (Marriages per Thousand Persons)
1985-2007**

COUNTRIES	1985	2007
SI	5,45	3,17
BG	7,44	3,87
HU	6,88	4,06
LU	5,35	4,1
FX	4,87	4,21
IT	5,27	4,21
BE	5,84	4,29
AT	5,93	4,33
NL	5,71	4,34
PT	6,83	4,37
UK	6,95	4,43
ES	5,2	4,47
DE	6,39	4,48
SK	7,54	5,08
IE	5,31	5,17
EFTA	5,55	5,21
SE	4,59	5,24
GR	6,41	5,48
CZ	7,8	5,53
FI	5,25	5,58
PL	7,17	6,52
DK	5,73	6,7
LV	9,32	6,8
LT	9,65	6,83
RO	7,08	8,78

Data Description

The crude marriage rate refers to the ratio of the number of marriages during the year to the average population in that year. The value is expressed per 1,000 inhabitants.

Hyperlink to the table:

<http://nui.epp.eurostat.ec.europa.eu/nui/submitViewTableAction.do>

TABLE 2**Crude Marriage Rate in the European Union 27
1985-2005**

COUNTRIES	EU27
1985	6,18
1986	6,19
1987	6,33
1988	6,23
1989	6,46
1990	6,3
1991	5,89
1992	5,73
1993	5,46
1994	5,32
1995	5,25
1996	5,16
1997	5,15
1998	5,11
1999	5,2
2000	5,18
2001	4,87
2002	4,89
2003	4,85
2004	4,86
2005	4,88

Data Description

The crude marriage rate is the ratio of the number of marriages during the year to the average population in that year. The value is expressed per 1,000 inhabitants.

Hyperlink to the table:

<http://nui.epp.eurostat.ec.europa.eu/nui/submitViewTableAction.do>

TABLE 3**Divorce Rates By Duration Of Marriage
(Reached During the Year)
1985-2001**

COUNTRIES	1985	2001
IT	0,0407	0,12301
PT	0,11288	0,26205
FX	0,3041	0,37562
EFTA	0,30798	0,41074
NL	0,35295	0,41301
DE	0,33609	0,4179
DK	0,45863	0,44883
AT	0,30744	0,45882
LU	0,30479	0,47564
BE	0,26717	0,50195
FI	0,27434	0,50662
SE	0,44981	0,54221

Data Description

The measure used here is the number of divorces expressed by the duration of marriages. For each calendar year n , if the number of divorces ranked according to the duration of marriage in years x is available, divorce rates by duration of marriage can be calculated by relating the number of divorces at the end of x years of marriage to the number of marriages in year $n-x$.

Hyperlink to the table:

http://nui.epp.eurostat.ec.europa.eu/nui/show.do?dataset=demo_ndivrt&lang=en

TABLE 4

**Women's Mean Age at Childbearing
1998-2006**

COUNTRIES	1998	2006
Bulgaria	24,54	24,57
Romania	25,32	26,85
Lithuania	26,25	27,7
Latvia	26,15	27,76
Slovakia	26,2	27,94
Poland	27,19	28,34
Estonia	26,31	28,36
Hungary	26,82	28,7
Czech Republic	26,62	28,91
Austria	28	29,17
United Kingdom	28,35	29,17
Portugal	28,41	29,48
Germany (including ex-GDR from 1991)	28,57	29,56
Slovenia	27,81	29,62
France	29,26	29,72
Greece	28,72	29,87
Luxembourg	29,24	29,94
Finland	29,54	29,96
Denmark	28,99	30,29
Sweden	29,72	30,53
Netherlands	30,24	30,58
Switzerland	29,69	30,64
Ireland	30,32	30,66
Spain	30,53	30,88

Data Description

This table indicates the mean age of women when their children are born for the different European Union countries. For a given calendar year, the mean age of women at childbearing is calculated using the fertility rates by age as weights (in general, the reproductive period is between 15 and 49 years of age). When calculated in this way, the mean age is not influenced by a specific population structure (number of mothers in each age group) and is therefore better for geographical and temporal comparisons.

Hyperlink to the table:

<http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=0&language=en&pcode=tps00017>

TABLE 5**Live Births Outside Marriage In European Union Countries
1998-2006**

COUNTRIES	1998	2006
Greece	3,81	5,28
Italy	9,04	18,6
Poland	11,55	18,89
Slovakia	15,33	27,49
Spain	14,51	28,38
Luxembourg (Grand-Duché)	17,47	28,82
Romania	22,97	28,97
Lithuania	18,02	29,64
Germany (including ex-GDR from 1991)	20,01	29,96
Portugal	20,15	31,61
Ireland	28,71	33,15
Czech Republic	19,01	33,32
Hungary	26,6	35,59
Netherlands	20,78	37,06
Austria	29,45	37,16
Finland	37,2	40,55
Latvia	37,06	43,36
United Kingdom	37,62	43,66
Denmark	44,8	46,36
Slovenia	33,61	47,24
France	41,67	50,49
Bulgaria	31,46	50,79
Sweden	54,65	55,47
Estonia	52,46	58,24

Data Description

Live births indicate the births of children that showed any sign of life. This data reflects the share of all live births that are born outside marriage. This would be births where the mother's marital status at the time of birth is other than married.

Hyperlink to the table:

<http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=1&language=en&pcode=tps00018>

TABLE 6

**Births Outside Of Marriage In EFTA Countries
2000-2006**

COUNTRIES	EFTA percentage births outside of marriage
2000	28,53
2001	29,15
2002	29,43
2003	29,99
2004	30,98
2005	31,47
2006	33,13

Data Description

Live births indicate the births of children that showed any sign of life. This data reflects the share of all live births that are born outside marriage. This would be births where the mother's marital status at the time of birth is other than married.

Hyperlink to the table:

<http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=1&language=en&pcode=tps00018>

TABLE 7

**Unemployment Rate for Ages 25-74 in the European Union 27
2000-2008**

Unemployment rates - yearly averages by sex and age group (%)

COUNTRIES	Male	Female
2000	6,5	8,5
2001	6,5	8,1
2002	6,9	8,4
2003	7,1	8,5
2004	7,1	8,5
2005	7	8,4
2006	6,4	7,7
2007	5,5	6,8
2008	5,5	6,5

Data Description

The definitions of employment and unemployment, as well as other survey characteristics follow the definitions and recommendations of the International Labour

Organisation. The definition of unemployment is further precised in Commission Regulation (EC) No 1897/2000.

Unemployed persons are all persons 25 to 74 years of age who were not employed during the reference week, had actively sought work during the past four weeks and were ready to begin working immediately or within two weeks. Figures show the number of persons unemployed in thousands.

Data are expressed in unemployment rates and thousands of persons.

Hyperlink to the table:

<http://nui.epp.eurostat.ec.europa.eu/nui/show.do>

TABLE 8

**Part-Time Employment as Percentage of Total Employment for Persons Aged 15-64
2006 (Q3) – 2009 (Q2)**

COUNTRIES	Female	Male	Total
2006Q03	30,2	6,8	17,8
2006Q04	30,7	6,9	18,1
2007Q01	31	7,1	18,4
2007Q02	30,9	7	18,3
2007Q03	30,4	6,9	18
2007Q04	30,7	6,9	18,1
2008Q01	30,9	7,1	18,4
2008Q02	30,7	7,1	18,3
2008Q03	30,2	6,9	18
2008Q04	30,7	7	18,3
2009Q01	30,9	7,2	18,6
2009Q02	31	7,5	18,8

Data Description

Part-time employment rates represent persons employed on a part-time basis as a percentage of the same age population.

The distinction between full-time and part-time employment is made on the basis of a spontaneous answer given by the respondent in all countries, except for the Netherlands, Iceland and Norway, where part-time is determined on the basis of whether the usual hours worked are fewer than 35, while full-time on the basis of whether the usual hours worked are 35 or more, and in Sweden where this criterion is applied to the self-employed persons as well..

Hyperlink to the table:

http://nui.epp.eurostat.ec.europa.eu/nui/show.do?dataset=lfqsq_eppga&lang=en

TABLE 9**Employment Rate by Gender, Number Of Children And Education Level
2006 (Q3) – 2009 (Q2)**

	Low				Medium				High			
	0	1	2	3+	0	1	2	3+	0	1	2	3+
F	22	48	44,9	33,4	52	71,2	69,4	58,8	70,6	83	83	73,9
M	40,7	75,3	79,5	71,5	62,1	85,9	90,9	87,1	69,3	91,2	95,6	94,7

Data Description

The indicator is calculated by dividing the number of employed people within age group 25-64 years having attained a specific level of education, by the total population of the same age group.

Level is coded according to the International Standard Classification of Education (ISCED, 1997):

- Pre-primary, primary and lower secondary education: levels 0-2.
- Upper secondary and post-secondary non-tertiary education: levels 3-4.
- Tertiary education: levels 5-6.

The indicator is based on the EU Labour Force Survey (LFS), covering the entire population living in private households.

Hyperlink to the table:

http://nui.epp.eurostat.ec.europa.eu/nui/show.do?dataset=lfsq_ergaed&lang=en

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