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The Legal Regime of (commercial) Companies incorporated by Spouses (under Romanian law)

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In the context of the legislative framework in Romania, shaped by Law No. 31/1990 on companies, the new Romanian Civil Code (which entered into force in 2011) brings important clarifications regarding the incorporation of companies by spouses during marriage, as well as the acquisition of company shares by spouses using jointly owned assets. This paper aims to examine the conditions under which such operations may occur, the legal nature of company shares, the person entitled to exercise the corporate rights and the person authorised to transfer those shares. Furthermore, we seek to highlight the legal challenges that stem from the intersection between company law (Law No. 31/1990) and family law (as governed by the Romanian Civil Code), in relation to the topic under discussion.

Keywords: *Romanian commercial companies incorporated by spouses; Contribution of jointly owned assets*; *Jointly held equity interests by spouses; Jointly held shares by spouses; Corporate rights*.

Introduction. Scope and Limitations of the Legal Inquiry

In Romania, prior to 2011, the possibility for one spouse to contribute jointly owned assets to the incorporation of a company[1]—and especially the legal regime governing the partnership interests, membership interests, or shares acquired as consideration for such contribution—was the subject of doctrinal controversy and a source of inconsistent jurisprudence.

The difficult situation faced by both legal academics and practitioners was largely the result of the legislative framework in force prior to 1 October 2011. The Romanian Family Code offered no solutions to these issues, a gap that can be explained by historical factors. Unfortunately, neither did the romanian special legislation on companies—Law No. 31/1990 on Companies[2]—provide any legal remedy, despite its numerous amendments.

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[1]Until 15 February 2013, the companies governed by Law No. 31/1990 were designated as "commercial companies", and the official title of the legislative act was "Law No. 31/1990 on Commercial Companies". This amendment was introduced by Article 18 point 31 of Law No. 76/2012 for the implementation of Law No. 134/2010 on the Civil Procedure Code.

[2]Law No. 31/1990 on Companies amended by Law No. 164/2006, amended by Law No. 441/2006, amended by Law No. 85/2006, amended by Government Emergency Ordinance No. 82/2007, amended by Government Emergency Ordinance No. 52/2008, amended by Law No. 88/2009 amended by Government Emergency Ordinance No. 43/2010, amended by Government Emergency Ordinance No. 54/2010, amended by Government Emergency Ordinance No. 90/2010, amended by Law No. 202/2010, amended by Government Emergency Ordinance No. 37/2011,

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The Romanian legislator, receptive to the issues identified, attempted to address the regulatory gap through several articles included in the current Romanian Civil Code, which shall constitute the object of our analysis.

The proposed topic will be analysed solely within the matrimonial regime of the legal community of property, which is also the most frequently encountered.

At present, the Romanian Civil Code provides for three matrimonial regimes applicable to the patrimonial relationships between spouses, who may freely choose any of them: the legal community property regime, the regime of separation of property, and the conventional community property regime. Whenever future spouses do not conclude a matrimonial agreement, the matrimonial regime of the legal community of property shall apply by operation of law[3]. When such an agreement is concluded[4], they will also clarify matters relating to their participation to the incorporation of companies[5]. Accordingly, in what follows, we shall analyse the proposed topic exclusively within the framework of the matrimonial regime of the legal community of property.

In order to define as precisely as possible the limits of our analysis, a further clarification is necessary: we shall consider exclusively the contribution of jointly owned assets by the spouses to the incorporation of a legal entity governed by Law No. 31/1990 on Companies, and only in relation to the limited liability company. According to Article 2 of the aforementioned law, companies may be incorporated in one of the following forms: general partnership, limited partnership, joint-stock company, partnership limited by shares, or limited liability company, unless the law expressly provides that a legal entity shall take a different form[6]. We shall exclude from our analysis the simple partnership (which lacks legal personality), the joint venture, and other forms of companies with legal personality.

We shall also limit our analysis to situations in which jointly owned assets are transferred to the company as a contribution or are used in order to acquire membership interests, without considering the situation in which jointly owned assets are transferred to the company under a different legal title, Article 349 of the Romanian Civil Code constituting the cornerstone of our research.

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amended by Government Emergency Ordinance No. 2/2012, amended by Law No. 76/2012, amended by Government Emergency Ordinance No. 47/2012, and lastly amended by Law No. 299/2024 amending and supplementing Law No. 31/1990 on Companies.

[3]"After at least one year from the conclusion of the marriage, the spouses may, at any time, replace the existing matrimonial regime with a different one or amend it", pursuant to Article 369 paragraph (1) of the Romanian Civil Code.

[4]The matrimonial regime of separation of property and the matrimonial regime of conventional community require the conclusion of agreements between the spouses (or future spouses). For this reason, they are referred to as conventional matrimonial regimes.

[5]A matrimonial agreement concluded before the marriage produces effects only from the date of the conclusion of the marriage. An agreement concluded during the marriage produces effects either from the date specified by the parties or, in the absence thereof, from the date of its conclusion, pursuant to Article 330 paragraphs (2) and (3) of the Romanian Civil Code.

[6]Article 1888 of the Romanian Civil Code, bearing the marginal title "Types of companies", provides that: "According to their form, companies may be: a) simple; b) joint ventures; c) general partnerships; d) limited partnerships; e) limited liability companies; f) joint-stock companies; g) partnerships limited by shares; h) cooperatives; i) another type of company expressly regulated by law".

This paper examines the possibility for one of the spouses to contribute jointly owned assets to the incorporation of a company, as well as the legal conditions under which the obligation to make such a contribution may be validly undertaken.

The legislator's choice to recognise the status of associate only in favour of one of the spouses, as well as the manner in which the prerogatives attached to such status may be exercised solely by the spouse holding that status, will constitute another part of our analysis.

The paper will conclude with an examination of the potestative right granted by the legislator to the non-associate spouse to subsequently request the recognition of associate status and, as a result, to become the exclusive owner of 50% of the membership interests acquired as jointly owned property.

The Incorporation of a Company by both Spouses jointly, or by one of the Spouses alone or together with Third Parties

Article 1882 paragraph (1) of the Romanian Civil Code states that any natural or legal person may acquire the status of associate, a principle also reflected in Article 1 of Law No. 31/1990 on Companies[7]. The second sentence of Article 1882 addresses the specific situation in which the potential associate is also a spouse: ”a spouse may not become an associate by contributing jointly owned assets without the consent of the other spouse [...]”. What is subject to the other spouse's consent is not the obtaining of associate status itself, but the contribution of jointly owned assets. In conclusion, spouses may incorporate a company either by themselves or together with third parties.

Categories of Spouses' Assets that may be contributed to the Incorporation of a Company

Starting from the reality that, in many cases, the prospective associate is also a spouse, that the default matrimonial regime is the legal community of property, and that, consequently, many of the assets used to initiate a business are jointly owned, Article 348 of the Romanian Civil Code — bearing the marginal title ”Contribution of Jointly Owned Assets” — provides: ”Jointly owned assets may be contributed to companies, associations, or foundations, in accordance with the law”. It may thus be concluded that, at present, one or both spouses may contribute to the incorporation of a company either personal assets or jointly owned assets[8].

[7]With regard to the possibility of incorporating such companies prior to 1 October 2011, see: Costin & Costin (1999) at 31–43; Piperea & Tomescu (1999) at 91–98; Turianu (2008) at 110–115; & Dumitru (2010) at 66–68.

[8]Pursuant to the provisions of Article 34 of Law No. 71/2011 on the implementation of the Romanian Civil Code, the legislator allows the contribution to the incorporation of a company of jointly owned assets acquired during a marriage concluded under the former law, provided that the act of subscription takes place after the entry into force of the Romanian Civil Code: ”The provisions of Articles 345–350 of the Civil Code shall also apply to marriages existing at

Conditions for the Contribution of jointly owned Assets

According to the Romanian Civil Code, in the absence of a matrimonial agreement between the future spouses, the legal matrimonial regime shall apply to their patrimonial relations, namely the regime of legal community[9]. Under this matrimonial regime, assets acquired by either spouse during the marriage are deemed to be jointly owned, subject to certain exceptions provided by law.

One of the fundamental principles underlying the legal community regime is the principle of equality between spouses[10], enshrined in Article 308 of the Romanian Civil Code. This principle implies, among other things, that the administration, use, and disposition of jointly owned assets are regulated in such a manner as to confer upon each spouse, in practice, equal powers over the common property. At present, in the application of this principle, the presumption of mutual tacit mandate has been abandoned, and the rule of parallel management[11] has been established, according to which each spouse may independently perform acts of preservation, administration, and acquisition concerning jointly owned assets. Likewise, each spouse may use a jointly owned asset individually, without the express consent of the other. However, acts of disposal and encumbrance involving real rights over jointly owned property may only be concluded with the consent of both spouses. There is, however, an exception to this rule: acts of disposal for consideration of jointly owned movable property which are not subject to publicity formalities may be concluded by only one of the spouses. In other words, acts of disposal and encumbrance involving real rights over immovable property, as well as acts of disposal of movable property whose transfer is subject to publicity formalities, may be validly concluded only by both spouses.

In light of the controversies that existed in the past, the legislator deemed it appropriate to expressly regulate the situation in which one spouse disposes of jointly owned assets for the purpose of acquiring membership interests or shares, either at the time of the company's incorporation or thereafter. In order to prevent potential abuses that could prejudice the community of property, the contribution of jointly owned assets is subject to conditions. One of the spouses may dispose of jointly owned assets as a contribution to the incorporation of a company or for the acquisition of membership interests or shares only with the written consent of the other spouse[12]. This requirement is laid down in paragraph (1) of Article 349 of the Romanian Civil Code: "Under the sanction provided by Article 347 of the Civil Code, neither spouse may, on their own and without the written consent of the other

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the time of the entry into force of the Civil Code, if the legal act or fact concerning a jointly owned asset occurred after that date".

[9]With regard to the notion of "matrimonial regime" and the connection between the patrimonial relations of spouses and matrimonial regimes, see Aniţei (2012) at 18–20; Vasilescu (2003) at 16–18.

[10]See Aniţei (2012) at 39, 119; Avram& Nicolescu (2010) at 228–233.

[11]Frenţiu (2012) at 224.

[12]Articles 348–349 of the Romanian Civil Code are inspired by the provisions of Articles 1832-2 of the French Civil Code, according to which, essentially, a spouse may not contribute jointly owned assets to the incorporation of a company without the other spouse being informed in order to express their opinion on the proposed act.

spouse, dispose of jointly owned assets as a contribution to a company or for the acquisition of membership interests or, as the case may be, shares". The rule is reiterated in Article 1882 of the Civil Code, under the marginal title "Conditions of Validity": "A spouse may not become an associate by contributing jointly owned assets without the consent of the other spouse, the provisions of Article 349 applying accordingly"[13].

Undoubtedly, one of the spouses may contribute jointly owned assets to the incorporation of a company. However, this may only be done with the written consent of the other spouse. Article 349 of the Romanian Civil Code requires the written form for the consent of the non-associate spouse, a requirement that is not found in the content of Article 1882 of the Romanian Civil Code, which concerns the very conditions of validity of the company contract. However, by the explicit reference that Article 1882 paragraph (1) of the Romanian Civil Code makes to Article 349 of the Civil Code — "(...) the provisions of Article 349 shall apply accordingly" — we consider that the non-associate spouse must express their consent in writing.

The solution differs from the previous one, which allowed one spouse to carry out all these legal acts based on the mutual tacit mandate, except for the contribution of immovable assets.

Situations in which the Consent of the Non-associate Spouse is required

The marginal title of Article 349 of the Romanian Civil Code — "Regime of Contributions" — suggests that the text provides express legislative solutions addressing exclusively the issue of contributions of jointly owned assets, that is, the transfer of a common patrimonial value for the incorporation of a company. In reality, as emerges from its content, it also regulates any other situations in which jointly owned assets are used for the acquisition of membership interests or shares through any other legal operations subsequent to the incorporation of the company. The established rule applies both to acts by which a spouse disposes of jointly owned assets as a contribution to a company (the incorporation phase) and to acts of acquiring membership interests or shares in exchange for jointly owned assets (during the course of the company's business). Article 1882 paragraph (1) of the Romanian Civil Code refers to the existence of the non-associate spouse's consent only for the contribution of jointly owned assets, but, as previously shown, through its reference to the application of the provisions of Article 349 of the Romanian Civil Code, the requirement in question is a condition of validity and must be fulfilled whenever one of the spouses disposes of a jointly owned asset to acquire membership interests or shares.

Article 349 paragraph (1) of the Romanian Civil Code establishes the necessity of the written consent of the non-associate spouse, regardless of the movable or immovable nature of the contributed jointly owned asset, and irrespective of

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[13]The situation is similar to that of the primary (mandatory) matrimonial regime, where, for certain special cases, the written consent of the other spouse is required (for example, regarding legal acts related to the family home, pursuant to Article 322 of the Romanian Civil Code).

whether the ownership right itself or another right is contributed[14]. By reference to Article 347 of the Romanian Civil Code, the legislator intended, given its gravity, to assimilate the contribution to an act of disposal of the jointly owned asset, regardless of the legal operation through which it is effectuated, which is why the written consent of both spouses is required for the contribution of the asset[15].

The Necessity of the Non-associate Spouse's Consent depending on the Subject Matter of the Contribution

A contribution represents the obligation assumed by each associate to bring a certain asset or patrimonial value into the company. A contribution means the transfer of a right from the contributor's patrimony to the patrimony of the company, or even the provision of a service[16].

A contribution may concern jointly owned immovable or movable assets, tangible or intangible. The ownership right[17] or another real right (for example, the right of usufruct[18]), the right of use, another claim right, or an intellectual property right may be transferred as a contribution. The right transferred by contribution may also be the right over a patent, a trademark for goods or services, or the business goodwill, either in its entirety or only over certain elements thereof. The contribution may also consist of shares, membership interests, or equity interests[19].

Within Article 349 of the Romanian Civil Code, the legislator's wording is general, without any distinction: the written consent of the non-associate spouse must exist regardless of the nature of the jointly owned asset subject to contribution—immovable or movable, tangible or intangible. Article 346 paragraph (2) of the Romanian Civil Code provides that one of the spouses may, for consideration and alone, dispose of a jointly owned movable asset whose transfer is not subject to a publicity formalities, without the consent of the other spouse. However, according to Article 349 of the Romanian Civil Code, in cases where the transfer takes the form of a contribution, the consent of both spouses to the transfer is always required, regardless of the movable asset contributed, including when it concerns a tangible movable asset whose transfer is not subject to publicity formalities.

[14]Frențiu (2012) at 226.
[15]Avram & Nicolescu (2010) at 278–284.
[16]Angheni, Volonciu & Stoica (2004) at 102.
[17]If the contribution concerns an immovable asset or a tangible movable asset and the ownership right is transferred, the relations between the company and the contributing associate are governed by rules similar to those applicable to sale and purchase.
[18]In this situation, the company acquires a real right over the asset, which grants it the possibility to use it and collect its fruits, while the associate retains the right to dispose of the asset.
[19]These contributions are considered contributions in receivables but must be made in compliance with the rules governing the transfer of each of them.

The Moment at which the Consent of the Non-associate Spouse must exist

Under the current regulation, the assumption and execution of the obligation to contribute are carried out solely by the potential associate spouse. However, the valid assumption of this obligation requires the written consent of the non-associate spouse.

The written consent of the non-associate spouse must be given in a document separate from the constitutive act[20], either prior to or concurrently with the assumption of the obligation to contribute. This requirement must be fulfilled no later than the date of conclusion of the constitutive act, as a prerequisite for the valid assumption of the obligation to contribute.

The manifestation of consent may take the form of a written statement, either under private signature or in authentic form, as is the case with declarations made by founders, administrators, auditors, or sole associates regarding the fulfilment of the legal conditions necessary to acquire such status.

Starting in 2022, with the entry into force of Law No. 265/2022 regarding the Trade Register and for the amendment and completion of other normative acts having an impact on the registration in the Trade Register[21], the application addressed to the Trade Register Office for the registration of the acquisition of company titles by spouses must specify the matrimonial regime applicable to their patrimonial relations.

Sanction for the Lack of Consent of the Non-associate Spouse to the Contribution of jointly owned Assets

According to Article 347 paragraph (1) of the Romanian Civil Code, read in conjunction with Article 349 of the Romanian Civil Code, if jointly owned assets are contributed or used to acquire membership interests or shares without the written consent of one of the spouses, the sanction that applies is the relative nullity of the legal act. In the same sense, Article 1882 of the Romanian Civil Code provides that the existence of the other spouse's agreement is a condition of validity of the company contract, with the provisions of Article 349 of the Civil Code applying accordingly.

As a result of fulfilling the obligation to contribute, the asset will leave the community property patrimony and enter the company's patrimony.

The Romanian legislator has established a special legal regime of nullity concerning the company contract by which the obligation to contribute is assumed and which forms the basis of the company's incorporation, a regime that we will outline in the following.

The company contract is a multilateral contract. The relative nullity caused by the lack of consent of the non-associate spouse to the subscription made by the associate spouse will affect only the relationship with the subscribing spouse. In relations with the other associates, the company contract remains valid and will

[20]Tec (2013) at 35-47.
[21]Law No. 265/2022 regarding the Trade Register and for the amendment and completion of other normative acts having an impact on the registration in the Trade Register, published in the Official Gazette of Romania, Part I, No. 750 of 26 July 2022.

produce all its effects, pursuant to Article 1256 of the Romanian Civil Code, which, under the marginal title ”Nullity of the multilateral contract”, provides that: “In the case of contracts with multiple parties in which each party’s performance is made in consideration of a common purpose, the nullity of the contract with regard to one party does not entail the annulment of the entire contract, except where that party’s participation is essential for the existence of the contract”.

The lack of the written consent of the non-associate spouse entails only the partial relative nullity of the company contract and only with regard to the associate who failed to comply with the conditions of validity, namely, the associate-spouse. This is not a case of partial nullity of the company, which has a special regime[22] due to its status as a legal entity, a subject of law. The partial relative nullity of the company contract does not constitute grounds for the nullity of a company, the causes of which are expressly and exhaustively provided by Article 56 of Law No. 31/1990 on Companies.

As a consequence of nullity, the subscription act will be annulled with retroactive effect, and the parties will be restored to their prior situation. Consequently, the jointly owned asset contributed by one of the spouses to the incorporation of the company without the express consent of the other spouse shall return to the spouses’ communal patrimony. We consider that the court, in the case of partial annulment of the company contract, must also rule on the fate of the membership interests or shares corresponding to the invalidly made contribution, regarding the value of the share capital, its structure, and the participation of the associates in the share capital, as occurs in the case of exclusion or withdrawal of an associate.

Regarding the effects of nullity in relation to third parties, as a general rule, Article 347 paragraph (2) of the Romanian Civil Code states that a third party who has undertaken the necessary diligence to inform themselves about the nature of the asset is protected from the effects of nullity. The diligence undertaken by the acquiring third party in fulfilling the duty to inform will vary depending on whether they are a professional or a non-professional. Article 1480 of the Romanian Civil Code requires the non-professional to act with the diligence that a prudent owner exercises in managing their property. On the other hand, in the case of obligations inherent to a professional activity, diligence is assessed taking into account the nature of the activity carried out. Information regarding the status of an asset as community or separate property can be obtained from public registers: the national notarial register of matrimonial regimes, the trade register, the land registry, civil status registers, or from any notarial declarations of the transferor concerning their marital status, the applicable matrimonial regime, or the status of the transferred asset as separate or community property. The non-associate spouse whose interests related to the community property have been harmed by a legal act to which they were not a party has the right to claim damages from the associate spouse if the acquiring third party acted in good faith. The obligation to pay damages is governed by the general rules of tort liability.

[22]The nullity of the company must be distinguished from the nullity of the company contract that forms the basis of the incorporation of the company in question. The nullity of the company occurs exceptionally and has an absolutely particular configuration outlined by the provisions of Articles 57–59 of Law No. 31/1990 on Companies. For these aspects, see Dumitru (2012) at 114–127.

The right to an action for annulment prescribes within a period of three years, which runs from the date on which the spouse who did not give consent (and who is a third party to the concluded act) became aware of the concluded act, this being the moment when the non-associate spouse became aware of the cause of nullity (the fact that the disposal act was concluded without their consent).

The lack of the written consent of the non-associate spouse, being a cause of relative nullity, gives rise to the application of related legal mechanisms that may lead to the validation of the subscription act and, consequently, of the company contract. In other words, the company contract may be validated pursuant to Article 1261 of the Romanian Civil Code. The nullity may be remedied by confirmation if the non-associate spouse expressly or tacitly, but certainly and unequivocally, waives the right to invoke nullity.

To Whom the Status of Associate in the Company is recognised. The Rule and the Exception. The Legal Nature of the Company Titles

If one of the spouses disposes of a jointly owned asset as a contribution to the incorporation of a company or for the acquisition of membership interests or shares, the status of associate is recognised only to the spouse who contributed the jointly owned asset, pursuant to Article 349 paragraph (2) of the Romanian Civil Code, which provides that: "In the case provided for in paragraph (1), the status of associate is recognised to the spouse who contributed the jointly owned asset, but the membership interests or shares are jointly owned property. The associate spouse exercises alone the rights arising from this status and may independently effect the transfer of the membership interests or, as the case may be, of the shares held".

The legislator's option, which we consider appropriate, was based on the need to facilitate the functioning of the company by enabling the easy exercise of the prerogatives recognised to a company associate.

According to Article 349 paragraph (2) of the Romanian Civil Code, the status of associate is recognised only to the spouse who contributed, who is the sole individual mentioned in the company's constitutive act, but the company titles are community property.

The associate spouse has personal non-patrimonial rights that are exclusively based on the status of associate: the right to participate in the deliberations and decisions of the general assembly of associates, the right to approve the company's financial statements and to determine the dividends, the right to contest the decisions of the general assembly of associates, the right to withdraw from the company, the right to be informed about the functioning of the company etc.[23].

The associate spouse also has patrimonial rights, such as the right to dividends, as well as to a share of the net assets in the event of the company's liquidation.

The associate spouse exercises alone both the non-patrimonial rights and the patrimonial rights arising from the status of associate[24].

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[23]Dumitru (2012) at 114–127.

[24]Tec (2013) at 35-47. The author describes these rights as "a heterogeneous set of rights and obligations towards the company (financial and political)".

The obtaining of associate status goes beyond the scope of a mere act of disposal of a jointly owned asset. It generates for the associate spouse both personal non-patrimonial rights and patrimonial rights, the exercise of which is performed solely by the associate spouse, as expressly provided by Article 349 paragraph (2) of the Romanian Civil Code. Although the law refers only to rights, the associate spouse also bears the obligations incumbent upon an associate in a company.

The Situation in which the Associate Status is acquired after the Incorporation of the Company

Spouses may also use jointly owned assets to acquire membership interests or shares in an already constituted company. The company's share capital was formed by the founders' contributions. The spouses acquire the membership interests or shares from the founders (or their subsequent assignees) similarly to the acquisition of any other asset, in compliance with the provisions of Law No. 31/1990 on Companies. The spouses' jointly owned assets used to acquire company titles will not be transferred to the company (they will not be reflected in its share capital or in the company's estate) but will be transferred to the third party former associate. However, even in this situation, the law requires the written consent of the other spouse[25]. The acquired titles are jointly owned property, but the status of associate is recognised only to the spouse assignee of the membership interests.

The Legal Nature of Company Titles

Although only one of the spouses acquires the status of associate, the company titles acquired in exchange for the contribution of jointly owned assets are considered jointly owned property, pursuant to Article 349 paragraph (2) of the Romanian Civil Code. The legislator's chosen solution is justified by the desire to protect the community of property against diminution. By conferring the status of jointly owned property to the company titles, the matrimonial common estate remains balanced: one patrimonial value leaves the community of property—the contributed right—and another takes its place—the membership interests, shares, or equity interests.

[25]As a rule, acts of acquisition of community property may be concluded individually by each spouse, pursuant to Article 345 paragraph (2) of the Civil Code.

Transfer of Membership Interests that are Community Property

According to Article 349 paragraph (2) of the Romanian Civil Code, ”the associate spouse [...] may independently effect the transfer of the membership interests or, as the case may be, of the shares held”, which are community property.

Apparently, this prerogative is granted only to the associate spouse, with the wording chosen by the Romanian legislator being susceptible to interpretations regarding the powers recognised to the associate spouse.

The legal text does not state that the associate spouse “may transfer” or “may dispose of” or “may alienate” (as is the case with Article 346 of the Romanian Civil Code and Article 349 paragraph (1) of the Romanian Civil Code), but rather that they “may independently effect the transfer.” We question whether the legislator indeed intended to confer the prerogative of legal disposition over the community property titles exclusively to the associate spouse, or merely to recognise their ability to perform the formalities necessary for their transfer.

If we interpret the text in question to mean that the associate spouse could always independently transfer the company titles, it would imply that they could unilaterally diminish the community property when the transfer takes the form of a gratuitous act. This is precisely what the Romanian legislator sought to prevent through the entire regulation.

As for us[26], we consider that the intention was not to grant the associate spouse the discretionary power to unilaterally alienate the membership interests or shares, which are community property. Unfortunately, the practical implementation has not been carried out in a desirable manner. In this context, we believe that the Romanian legislator should intervene and clarify the text to the effect that the associate spouse may unilaterally alienate or encumber with real rights the membership interests or shares, which are community property, except in cases where the alienation is gratuitous, in which case the express consent of the non-associate spouse is also required.

Recognition of Associate Status for the Non-Contributing/Non-Associate Spouse. Division of Membership Interests that are Community Property[27]

Associate status may be recognized for both spouses when the other spouse has expressed their will to have associate status, pursuant to Article 349 paragraph (3) of the Romanian Civil Code, which provides: “Associate status may also be recognized to the other spouse if they have expressed their will to that effect. In this case, each spouse has the status of associate for the membership interests or shares allocated in exchange for half of the value of the asset, unless the spouses have stipulated different quotas by agreement. The membership interests or shares attributed to each spouse are separate property”.

[26]Regarding this issue, see Nica-Dumitru (2023).
[27]Regarding the issues arising from the exercise of this right, see: Nica-Dumitru (2024a) at 475–489; Nica-Dumitru (2024b) at 105-125.

Regarding the participation quotas in this situation, Article 349 paragraph (3) of the Romanian Civil Code establishes the presumption that each spouse contributed half of the value of the asset to the share capital. The article incorporates the provisions of Article 357 of the Romanian Civil Code[28], which establishes the presumption that spouses have contributed equally to the acquisition of community property.

Of course, the spouses may agree to different contribution shares to the share capital by contract. The membership interests or shares acquired by the spouses are the separate property of each associate spouse, and the dividends generated thereby shall also be separate property. Each associate spouse shall individually exercise the personal non-patrimonial rights as well as the patrimonial rights arising from the status of associate corresponding to their participation quota in the share capital.

The right granted to the non-associate spouse under the provisions of Article 349 paragraph (3) of the Civil Code can be classified as a potestative right.

A potestative right designates an autonomous category of rights[29], distinct from classical rights, either real rights or claims, characterized by granting its holder the power to unilaterally and discretionarily influence a pre-existing legal situation involving the interests of another person, through unilateral actions, thereby modifying, extinguishing, or creating a new situation in its place. Its specificity is essentially given by the relationship of submission that unites the active subject with the passive subject and explains why the latter is obliged to endure the interference of the former in the sphere of their legal interests.

The holder of this prerogative, subject to discretionary exercise, is exclusively the non-associate spouse who is a co-owner by joint ownership of the membership interests in the limited liability company, from the date of acquiring the membership interests. In other words, the premise for exercising the legal right provided by Article 349 paragraph (3) of the Romanian Civil Code is the status of the spouse as a co-owner of the membership interests in a limited liability company at the time of acquiring the membership interests.

As a result of the manifestation of will by the non-associate spouse, they become, by operation of law (Article 349 paragraph (3) of the Civil Code), an associate from the date of communication of the unilateral legal act, pursuant to Article 1326 paragraph (3) of the Romanian Civil Code[30], thus effecting the legally

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[28]Article 357 of the Romanian Civil Code provides: "(1) Within the liquidation of the community, each spouse takes over their own property, after which the common property shall be divided and debts settled. (2) For this purpose, the quota due to each spouse is first determined based on their contribution both to the acquisition of the common property and to the fulfilment of common obligations. Until proven otherwise, it is presumed that the spouses contributed equally. (3) The provisions of Article 364 paragraph (2) shall apply accordingly".

[29]In the same sense, see Reghini (2003) at 236. It is stated that "potestative rights are neither real rights nor claims, nor are they an intermediate category between real rights and claims" — see also Stoica (2003) at 58.

[30]In the same sense, see Tec (2013) at 35-47. The author argues that: "the amendment of the constitutive act occurs by operation of law in the case of the manifestation of will by the non-associate spouse to acquire associate status: the modification of the associative structure shall be made by operation of law, meaning that each spouse shall have the status of associate for the membership interests or shares allocated in exchange for half of the value of the asset, unless the spouses have stipulated different quotas by agreement. Practically, half of the number of

anticipated division of a category of community property of the spouses—the membership interests—in a 50% share, unless the spouses have agreed otherwise. The exercise of this right takes place independently of any approval procedure requiring the adoption of a decision by the general assembly of associates and outside of any judicial procedure, solely through a non-contentious procedure.

The legal situation modified by the exercise of the right conferred to the non-associate spouse is the company's constitutive act itself, insofar as it concerns the status of associate, the holding of membership interests and the participation in profits and losses, following the modification of the share capital structure. This is modified by operation of law, through the power of the non-associate spouse, a power granted by law under the provisions of Article 349 paragraph (3) of the Romanian Civil Code, without any intervention by the court or other authority and without requiring any further acceptance from the passive subjects. The company and the other associates knew or should have known of this faculty from the moment the membership interests were acquired and, as a consequence, are obliged to comply with its manifestation of will.

The submission of the updated constitutive act is the obligation of the company's administrators, pursuant to Article 204 paragraph (4) of Law No. 31/1990 on Companies[31], and not of the spouse who becomes an associate. This obligation may be fulfilled voluntarily or compulsorily, based on a court decision.

The percentage of share capital held by the requesting spouse is determined by a simple mathematical calculation, by relating half of the membership interests held as joint property—which have become the exclusive property of the requesting spouse—to the total number of membership interests into which the share capital is divided[32]. For the other associates, the number of membership interests and their participation in the share capital remain unchanged. These elements are established through the notification communicated to the company and through the entries recorded in the Trade Register.

The opposability against third parties of the exercise of the potestative right by the requesting spouse (non-associate), namely the assertion of associate status, is achieved solely through the registration of the corresponding entry in the Trade Register by means of a non-contentious procedure, with the spouse being entitled to carry out the public registration independently[33], pursuant to Article 43 paragraph (2) of Law No. 265/2022 on the Trade Register[34]. Once the non-associate spouse

membership interests or shares initially held by the associate spouse shall be distributed to the other spouse, excluding the mechanism of assignment".

31 According to Article 204 paragraph (4) of Law No. 31/1990: "After each amendment of the constitutive act, the administrators […] shall file with the Trade Register the amendment act and the complete text of the constitutive act, updated with all amendments, which shall be registered in the Trade Register based on the decision of the Trade Register Registrar […]".

32 In this regard, see Nica-Dumitru (2024a) at 475–489.

33 *Idem*.

34 According to Article 43 paragraph (2) of Law No. 265/2022: "The registration of entries may also be carried out at the request of interested persons, in cases provided by law, within a maximum of 30 days from the date they became aware of the act or fact subject to registration". In this case, the term "law" is understood to mean Article 349 paragraph (3) of the Civil Code, and the requesting spouse is considered an "interested person".

exercises their discretionary right to request registration as an associate in the associative records, the request cannot be refused by the company, nor by the Trade Register, which maintains the associative records alongside the company. The registration in the Trade Register merely informs third parties that the non-associate spouse has exercised their potestative right and that from the date of notification to the company, they have become an associate and exclusive owner of 50% of the joint ownership interest and will exercise the corporate rights corresponding to this share.

Conclusions

At the intersection of corporate law and family law, specifically concerning the matrimonial regime of the legal community of property, persistent theoretical and practical uncertainties and issues can be identified. The intertwining of businesses and marriage brings to the forefront multiple challenges both for the spouses, who may find themselves in antagonistic positions, and for the company in which they have invested.

The legislator's intention, through the inclusion of certain provisions in the new Romanian Civil Code, in Book II dedicated to the family, to resolve controversies identified by doctrine and jurisprudence prior to 2011, has remained merely a desideratum. Part of the new regulation has been applied very little, whether due to lack of awareness, resistance to novelty, or complacency of the involved parties, although the practical situations in which it would apply are numerous and frequent. Without neglecting the positive aspects of the regulation, we have sought to present also the existing ambiguities in the new provisions. Taking all these into account, this study aims to constitute a compelling invitation to constructive debate for all actors on the legal stage.

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