

Research Article

THE IMPACT OF THE MATRIMONIAL PROPERTY REGIME ON COMMERCIAL COMPANIES ACCORDING TO ALBANIAN LEGISLATION

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ABSTRACT

Background: *The purpose of this study is to examine the interaction between the legal discipline of matrimonial property regimes and the commercial activities of spouses that are established before or during marriage. It aims to investigate how the legal community impacts commercial companies, specifically in the hypothesis where the shareholder of the company is married. There is ongoing debate within legal circles about whether shares of a commercial company established by one spouse during marriage or acquired through a legal transaction are part of the legal community. Regarding this matter, several issues arise: whether the participation in the company's initial capital is governed by community administration rules, which is the legal nature of shares acquired by one spouse, and how the marital community regime interplays with commercial legislation. Another issue that has engaged legal doctrine is whether the spouse of a shareholder is recognised as a shareholder and can participate in the company administration. Albanian Family Code lacks specificity on shares, mainly addressing small family businesses. The study of the interaction of these two disciplines aims to assist jurisprudence because, despite some cases of the Supreme Court and the Constitutional Court in recent years, this is still a relatively new field for Albanian doctrine and jurisprudence.*

Methods: *The research methodology adopted for this paper employs a multi-faceted approach, integrating desk research, legal analysis, case law review, and a comparative study. It encompasses an examination of relevant national legislation, as well as foreign legislation from civil law tradition countries such as France and Italy. Furthermore, European soft law, notably the principles of the European Commission of Family Law (CEFL) focusing on matrimonial property issues, has been reviewed.*

Our research methodology includes gathering and analysing existing studies and academic literature on matrimonial property regimes. To better understand the norms of the Family Code regarding matrimonial property regimes, we will analyse Italian and French doctrine and jurisprudence, as well as the legal systems based on which the Albanian Family Code has been drafted.

It should be emphasised that while this paper's primary aim is not solely comparative analysis, it strives to assist in better understanding and implementation of the legal community regime as the most used regime by spouses in practice. Also, a comprehensive comparative analysis has been conducted, comparing Albanian legislation and the CEFL Principles, to identify key similarities, differences, and potential areas for enhancement within legal frameworks. Moreover, the jurisprudence of both Albanian and foreign High courts has been extensively utilised to enrich the analysis and provide insights into practical applications of legal principles.

Results and Conclusions: *The solution to the abovementioned issues depends on the company's legal structure and articles of participation rules and requires a combined interpretation of matrimonial property regimes and commercial law. In this combined interpretation of the rules, protecting the rights and interests of all involved subjects, the interests of the spouses and those of the commercial company as a legal entity is crucial.*

1 INTRODUCTION

The interaction between commercial legislation and matrimonial property legislation naturally raises the discussion of the influence that legal community norms have on commercial companies when one of the company's shareholders is married.

Since the 1990s, following changes in Albania's political-economic system, especially in recent years, economic-commercial relations between spouses have increasingly become the subject of legal disputes. The Family Code 2003¹ marks the first explicit regulation of the legal regime governing commercial activities in relation to the legal community. The Family Code does not explicitly regulate the shares acquired by one of the spouses during marriage. Therefore, the analysis will be based on the norms of the Family Code regulating the legal community and the provisions of the law "On Entrepreneurs and Commercial Companies".² The interpretation of these two legal disciplines must be based on the legislator's intent and the principles that have inspired their legal regulation.

It appears the interpretative process seeks to achieve a fair balance between competing interests, including the property interests of the family (interests of the legal community) and the interests surrounding the existence and survival of the commercial company, the

1 Law of the Republic of Albania no 9062 of 8 May 2003 'Family Code' [2003] Official Journal 49/1907 <<http://qbz.gov.al/eli/ligj/2003/05/08/9062>> accessed 23 March 2024.

2 Law of the Republic of Albania no 9901 of 14 April 2008 'On Entrepreneurs and Commercial Companies' [2008] Official Journal 60/2631 <<http://qbz.gov.al/eli/ligj/2008/04/14/9901>> accessed 23 March 2024.

freedom of economic activity of each spouse (a constitutional right), the interests of the creditors of the entrepreneur spouse, and, to a macro level, the development and economic stability of the country. The coordinated interpretation of these two legal disciplines presents difficulties due to the drafting of commercial and family legislation based on legal models of different states and their drafting at different times.

Based on Art. 66 of the Family Code,³ spouses have the right to choose, through the marital contract, the matrimonial property regime they desire. The legal regime will only apply in the absence of contractual regulation of the matrimonial property regime.

The legal community regime is based on the French and Italian models and considers the Family Code of the People's Socialist Republic of Albania of 1965 (entered into force on 1 January 1966).⁴

Based on the socio-economic conditions of Albanian society, a community of acquisitions regime, known as the "legal community regime", has been chosen as the legal regime. This regime recognises the equal participation (contribution) of both spouses in the acquisition and increase of wealth during marriage. At its core lies the principle of marital solidarity, which equally values the monetary contribution with the in-kind contribution of each spouse.⁵ The legal community regime makes both spouses joint owners in equal shares of the property acquired during marriage and gives them equal rights in the administration of common property.⁶

The property of the spouses under the legal community regime consists of the property for which the spouses are joint owners and the personal property of each of them. The spouses are joint owners of:⁷

- a) property acquired by both spouses, together or separately, during marriage;
- b) income and gains from the separate activity of each spouse during marriage, if not consumed until the end of joint ownership;
- c) the fruits of each spouse's personal property, which are received and not consumed until the end of joint ownership;
- d) commercial activities created during marriage.⁸

3 Law of the Republic of Albania no 9062 (n 1) art 66.

4 Tefta Zaka, 'Kodi i ri i Familjes - Një hap në zhvillimin e marrëdhënieve familjare' (2004) 2 Jeta Juridike 11.

5 Cesare Massimo Bianca, 'Il regime della comunione legale' in CM Bianca (ed), *La Comunione Legale* (Giuffrè 1990) 2.

6 *ibid* 5.

7 Law of the Republic of Albania no 9062 (n 1) art 74.

8 The Family Code also contains other provisions regarding commercial activities that are personal property of one of the spouses. According to the second paragraph of Art. 74, if the commercial activity belonged solely to one of the spouses before marriage but is managed by both spouses during marriage, the community only includes the profits and the increase in production. Meanwhile, Art. 75 provides that the property created during marriage, designated for the management of the commercial activity of one of the spouses and its production additions, are subject to joint ownership only if they exist as such at the time of marriage dissolution.

According to Albanian doctrine, based on the moment of entry of the property into the legal community, the common property (mentioned above) is divided into two categories: (i) actual community, property provided for in Art. 74 (a) and (ç); and (ii) eventual community, property provided for in Art. 74 (b) and (c).⁹ Upon the actual community property, spouses become joint owners immediately upon the acquisition of property by each of them. On the other hand, for eventual community property, spouses become joint owners only if this property is unconsumed at the end of the legal community.

On the other hand, under the legal community regime, each spouse has personal property, which they enjoy the right of possession, enjoyment, and disposal independently of the other spouse. The personal property of each spouse consists of:¹⁰

- a. assets, which before marriage was in the joint ownership of the spouse with other persons or against which he/she held a real right of use;
- b. assets acquired during marriage through donation, inheritance, or bequest when the act of donation or testament does not specify that they are given in favour of the community;
- c. strictly personal belongings of each spouse and properties acquired as accessories to personal assets;
- d. necessary tools for the exercise of the profession of one of the spouses, except those designated for the administration of a commercial activity;
- e. assets acquired from compensation for personal damages, except for income derived from a pension obtained due to partial or total loss of work capacity;
- f. assets acquired from the alienation of the above-mentioned personal assets;
- g. their exchange, when expressly declared in the act of acquisition.

The category of personal assets provided for in Art. 77 of the Family Code is an exhaustive list. There are no other personal assets than those listed in Art. 77. If the property is acquired during marriage and does not belong to the category of personal assets, then it is presumed to belong to the community.¹¹

The legal community does not represent a separate legal entity independent of the spouses; it has no legal personality. Spouses cannot alienate their ideal share, not because this right belongs to the community, but because in the hypothesis of alienating the ideal share by one spouse to a third party, this would result in the termination of the community for the alienated property and the creation of a joint ownership between the third party and the other spouse. In the legal community regime, the rights and obligations belong to the spouses, not the community.¹²

9 Sonila Omari, *E Drejtë Familjare* (Morava 2015) 95.

10 Law of the Republic of Albania no 9901 (n 1) art 77.

11 For this opinion see: Omari (n 9) 105.

12 Bianca (n 5) 8-9.

Community of acquisitions is the default regime in countries of the Romanic legal tradition such as France, Italy, Belgium, Spain, Portugal, and in most of the Central and Eastern European countries.¹³ The Italian legal model, which is followed *mot a mot* from Albanian legislator, is presented slightly differently. According to this model, the property of spouses in the community regime is divided into community property, personal property, and eventual property (*comunità di residuo*).¹⁴ This is the reason why handling one of the most controversial issues in the practice of the community of acquisitions regime, such as the legal nature of the participation of one of the spouses in commercial partnerships during marriage, is of interest to Albania and to the countries of Central and Eastern Europe too. Given that this regime has been implemented in Italy and France since the mid-1970s and 1980s, these countries' doctrinal debates and jurisprudence can also assist legal practitioners in Albania and Central and Eastern Europe when facing the same issues.

2 A COMPARATIVE ANALYSIS BETWEEN ALBANIAN LEGISLATION AND PRINCIPLES OF EUROPEAN COMMISSION ON FAMILY LAW REGARDING MATRIMONIAL PROPERTY REGIMES

Due to numerous divergences in the field of marriage, inheritance, and specifically in the field of matrimonial property regimes,¹⁵ there are no unified or harmonised substantive norms for these issues at the European level. These divergences are rooted in the cultural, economic, social, religious, and political values of European countries.¹⁶ As a result, it is a challenge to create uniform mandatory rules in the field of family law for Europe.¹⁷ The European Union has unified the rules of private international law in the field of matrimonial property regimes with the adoption of Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.¹⁸ This Regulation is applicable to cross-border marriages only.

13 Jens M Scherpe, 'Financial Consequences of Divorce in a European Perspective', in JM Scherpe (ed), *European Family Law*, vol 3: *Family law in a European Perspective* (Edward Elgar 2016) 151; Frédérique Ferrand, 'The Community of Acquisitions Regime' in K Boele-Woelki, N Dethloff and W Gephart (eds), *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (European Family Law Series, Intersentia 2014) 38.

14 Scherpe (n 13) 151.

15 For more about these divergencies see: *ibid* 148.

16 Katharina Bolele-Woelki, 'The Impact of the Commission on European Family Law (CEFL) on European Family Law' in JM Scherpe, *European Family Law*, vol 1: *The Impact of Institutions and Organisations on European Family Law* (Edward Elgar 2016) 221.

17 *ibid* 230.

18 Council Regulation (EU) 2016/1103 of 24 June 2016 'Implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes' [2016] OJ L 183/1 <<http://data.europa.eu/eli/reg/2016/1103/oj>> accessed 23 March 2024.

In recent years, the Commission on European Family Law (CEFL)¹⁹ has undertaken significant initiatives to create unified substantive norms in the field of family law. Established on 1 September 2001, CEFL comprises a group of 26 renowned experts in family and comparative law from all European Union countries and some other European countries. Its primary goal is the harmonisation of family law in Europe through comparative analyses aimed at identifying commonalities and better legal solutions provided by the national family law of different European countries. For this purpose, CEFL has published four sets of *Principles*: 1) Principles on Divorce and Maintenance Between Former Spouses (2004); 2) Principles on Parental Responsibilities (2007); 3) Principles on Property Relations between Spouses (2013); 4) Principles of European Family Law Regarding Property, Maintenance and Succession Rights of Couples in *de facto* Unions (2023).²⁰ The purpose of these principles is their use in the process of harmonisation of family law in Europe.²¹ Although the CEFL rules, known as *Principles*, are non-binding instruments, they constitute important acts that aim to assist European countries in reforming and modernising family law.²² These principles represent model legal rules.²³

The 2013 publication by CEFL, titled “Principles of European Family Law Regarding Property Relations Between Spouses,”²⁴ consists of three chapters covering all aspects of matrimonial property relations and contains 58 principles. Each principle consists of four elements: the text in English, French, and German, a description of international and European instruments in the field of matrimonial property regimes, a comparative overview of 26 European jurisdictions, and explanations for each principle.²⁵

The first chapter, known as the general part of the *Principles*, governs “general rights and duties” of spouses, such as the equality of spouses, legal capacity of spouses, their duty to contribute to the needs of the family, the protection of the family home and household

19 Hereinafter we will refer to the Commission on European Family Law with the acronym CEFL. All information about the CEFL on the official website (ceflonline.net).

20 For a brief analyse of this group of four Principles see: ‘Principles of European Family Law’ (CEFL Commission on European Family Law, nd) <<https://ceflonline.net/principles/>> accessed 23 March 2024.

21 Katharina Bolele-Woelki, ‘General Rights and Duties in the CEFL Principles on Property Relations between Spouses’ in K Boele-Woelki, N Dethloff and W Gephart (eds), *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (European Family Law Series, Intersentia 2014) 6; Bolele-Woelki (n 16) 218.

22 Bolele-Woelki (n 16) 209-10.

23 *ibid* 216.

24 Katharina Boele-Woelki and other, *Principles of European Family Law Regarding Property Relations Between Spouses* (European Family Law Series, Intersentia 2013); CEFL, ‘Principles of European Family Law Regarding Property Relations Between Spouses’ in K Boele-Woelki and other, *Principles of European Family Law Regarding Property Relations Between Spouses* (European Family Law Series, Intersentia 2013) 345-56.

Hereinafter we will refer to the CEFL Principles on Property Relations Between Spouses as the *Principles*.

25 Bolele-Woelki (n 21) 4.

goods, the protection of the leased family home, the duty of spouses to inform each other about their assets and obligations, the right of spouses to represent each other, and the spouses right to enter into matrimonial property agreements.²⁶ These rights and duties, known in legal doctrine as primary regime, are mandatory and apply irrespective of the matrimonial property regime that governs the property relations between spouses, whether contractual or default.²⁷

Similarly, the Albanian legislation, like the 26 legislations studied by CEFL,²⁸ foresees several rights and obligations for spouses that apply *ex lege* upon marriage, regardless of the matrimonial property regime, such as equality of spouses, the obligation of spouses to contribute to the needs of the family, protection of the family home and household goods, joint responsibility for obligations related to family maintenance and the upbringing and education of children, etc. The Albanian Family Code aligns with the principles provided in the First Chapter of the CEFL *Principles*. However, unlike CEFL Principles, the Albanian Family Code regulates only the protection of the family home, which is the private property of the spouses but does not provide for the protection of the leased family home.

The second chapter governs the matrimonial property agreements. Future spouses can choose their matrimonial property regime before marriage or modify it during marriage.²⁹ These *Principles* aim to find a fair balance between spouses' party autonomy to make property agreements and the need to protect each spouse and third parties.³⁰ The *Principles* provide some legal conditions for the validity of the agreements such as the notarial deed; they foresee obligation for notaries; regulate the effects of the agreements against third parties; and prescribe the duty of spouses to disclosure to each other their assets before entering into a matrimonial property agreement. In cases of exceptional hardship, the *Principles* give authority to the competent authority (ex. court) to set aside or adjust a matrimonial property agreement³¹ (Principle 4:15).

Unlike the legislation of the socialist state,³² the Albanian Family Code provides for the right of spouses to choose the matrimonial property regime (Art. 66 of the Family Code). Similarly to the CEFL *Principles*, the Family Code of Albania stipulates several conditions for concluding the matrimonial property agreement, such as the notarial form.

26 CEFL (n 24) principles 4:1-4:9, 345-7.

27 Bolele-Woelki (n 21) 12.

28 *ibid* 12.

29 CEFL (n 24) principles 4:10-4:15, 347-6.

30 Nigel Lowe, 'Matrimonial Property Agreements', in K Boele-Woelki, N Dethloff and W Gephart (eds), *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (European Family Law Series, Intersentia 2014) 14.

31 *ibid* 20-1.

32 The Albanian Family Code of the People's Republic of Albania of 1965 and the Albanian Family Code of the People's Socialist Republic of Albania of 1982, together with the Albanian Civil Code of the People's Socialist Republic of Albania of 1981, did not allow spouses the possibility of choosing a matrimonial property regime by agreement.

Differently from the *Principles* of CEFL, the Albanian Family Code does not provide for the duty of spouses to disclosure and does not permit the judicial authority to intervene in cases of exceptional hardship. Another distinction between CEFL *Principles* and Albanian Family Code is that the latter foresees that a minor spouse who has entered marriage has no right to enter into a matrimonial property agreement (Art. 70 of the Albanian Family Code). It also foresees that spouses during marriage can change their matrimonial property regime only after two years have passed from the application of the first regime (Art. 72 para. 1 of the Albanian Family Code). To summarise, the spouses' party autonomy to enter matrimonial property regimes is wider in the CEFL *Principles* compared to the Albanian Family Code.

The third chapter governs the default matrimonial property regime applicable if spouses have not agreed otherwise. Considering that European states have divergences among them regarding the type of legal regime, the CEFL *Principles* have drafted two models of property regimes:

- a) participation in acquisition regime,³³ similar to German, Swiss and Greek legal regimes;³⁴ and
- b) community of acquisition regime,³⁵ similar to the legal regime in France, Italy, Belgium, Spain, etc.³⁶

CEFL decided to draft two default regimes because of the lack of uniformity in European countries regarding the default regime. European countries have two different default regime models: the community of property model and the participation in gains (acquisition) model.³⁷

In the community of acquisitions regime, governed by the CEFL *Principles*, the property of spouses is divided into three groups: the community property, the personal property of the husband, and the personal property of the wife.³⁸ The CEFL *Principles* foresee rules regarding the composition of community property and personal property of each spouse, rules for the community debts and separate debts of each spouse and their recovery, rules of administration of community property and rules regarding the dissolution and liquidation of community property.

The default regime governed by the Albanian Family Code, the community of acquisitions regime, known by legal doctrine as legal community,³⁹ is similar to the CEFL *Principles'*

33 CEFL (n 24) principles 4:16-4:32, 348-51.

34 Dieter Martiny, 'The Participation in Acquisition Regime' in K Boele-Woelki, N Dethloff and W Gephart (eds), *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (European Family Law Series, Intersentia 2014) 26.

35 CEFL (n 24) principles 4:33-4:58, 351-56.

36 Ferrand (n 13) 38.

37 *ibid* 39.

38 *ibid* 42.

39 Omari (n 9) 92.

community of acquisitions regime. Arts. 74 and 77 of the Family Code, which regulate the community assets and spouses' personal property, are almost identical to Principles 4:35 and 4:36 of the CEFL *Principles*. However, there exists a slight difference. Unlike the Albanian Family Code, the CEFL *Principles* do not expressly govern the participation of spouses in commercial companies during marriage.

3 PARTICIPATION OF ONE OF THE SPOUSES IN A COMMERCIAL COMPANY

There are several discussions in legal doctrine regarding whether shares of a commercial company established by one of the spouses during marriage or shares acquired through an onerous legal transaction by one of the spouses are included *ex lege* in the legal community.⁴⁰ It should be noted that a commercial company obtains legal personality acquired at the time of its registration with the National Business Centre.⁴¹ In contrast, the legal community is not endowed with legal personality; it is a *sui generis* co-ownership. Consequently, according to the criteria we will analyse in this study, the shareholder is not the community but one or both spouses.⁴²

The shareholder has a set of rights and obligations derived from the ownership of the share, such as the right to participate and vote in the General Meeting, the right to benefit from dividends, the right to information, the right to dispose of the shares, the right to profit in case of share liquidation, etc.⁴³

Several issues arise from the interaction between the matrimonial property regime and the legislation that governs commercial companies. First, it involves determining whether investment into a company's initial capital or the purchase of shares from one spouse comply according to the rules of administration of the legal community provided by the Family Code. Second, questions arise regarding the legal nature of shares acquired by one spouse in relation to the legal community regime and whether they automatically become part of the community. Additionally, understanding how the legal community functions alongside commercial companies raises concerns about the non-shareholding spouse's recognition as a shareholder and their rights to participate in management activities, i.e. exercise the rights

40 If the shares are acquired during marriage by one of the spouses, through a gratuitous legal transaction, such as donation or inheritance, then according to Art. 77(b) of the Albanian Family Code, they are not included in the legal community but are personal assets of the owner spouse.

41 Law of the Republic of Albania no 131/2015 of 26 November 2015 'On the National Business Centre' [2015] Official Journal 215/14332. The Law amended respectively act no. 9723/2007 'On the National Registration Centre', and act no. 10081/2009 'On licenses, authorizations and permits in the Republic of Albania'. This law governs the registration and licensing of businesses.

42 Andre Colomer, *Les Régimes Matrimoniaux et le Droit Commercial*, vol 2: *Les sociétés commerciales et les régimes matrimoniaux* (Defrénois 1984) 11.

43 *ibid* 13.

derived from the ownership of the share⁴⁴, such as the right to vote in the General Meeting. The administration of shares also poses challenges in determining whether family law or commercial legislation governs their management and transfer.⁴⁵ Moreover, questions arise concerning the applicable rules in case the shareholder spouse decides to transfer the shares to a third person through a sale contract or donation – is it regulated by legal community administration or commercial laws? Lastly, the dissolution of the legal community prompts inquiries into its impact on share ownership.

There are no specific provisions for shares in the Family Code. The Code governs, in general, the commercial activities⁴⁶ founded by one or both spouses, independently of their form of organisation. In our opinion, while drafting the Code, it appears that the legislator's focus was on small family businesses, aligning with traditional family models where the wife is the caretaker at home, while the husband is the breadwinner. Generally, the regulation of the object of the legal community, the category of personal assets of each spouse and the rules of administration of the legal community are more suited to a community consisting only of real rights, not considering credit rights. There is a “lack” of regulation of those forms of wealth that are characteristic of a capitalist economy, such as credit titles, treasury bonds, quotas, shares, etc.⁴⁷ It seems that the legal regime of the community does not adapt to the developments of the capitalist society nowadays in Albania.

The solution to the abovementioned problems will be realised by applying the provisions of the Family Code of the legal community (Arts. 74, 75 and 77 of the Family Code) in coordination with commercial legislation.

4 THE ACQUISITION OF SHARES DURING MARRIAGE

An important issue to address is whether the acquisition of shares, through the contribution to the initial capital or through an onerous contract, represents an act of ordinary or non-ordinary administration of the shareholder spouse in accordance with the regime of the legal community.

44 Regarding the presentation of this problem see: Enrico Sacca e Teresa Mollura, *Impresa Collettiva Societaria e Comunione Legale tra Coniugi (Società fra coniugi - partecipazione di uno dei coniugi a società)* (Giuffrè 1981) 115.

45 *ibid* 145.

46 Law of the Republic of Albania no 9901 (n 2). The Law “On Entrepreneurs and Commercial Companies” does not provide a definition of the notion of “commercial activity” but provides a list of those activities that are considered commercial, a list which is not exhaustive. Thus, based on Art. 2 of the Law “On Entrepreneurs and Commercial Companies”, the term commercial activity will include not only those commercial activities created in the form of a commercial company (limited partnership, general partnership, limited liability company and joint stock company), but will also include any natural person who exercises an independent economic activity that requires an ordinary commercial organization, designated as an entrepreneur by the law on commercial companies.

47 Ennio Russo, *L'oggetto della comunione legale e i beni personali*, *Artt 177-179* (Il Codice Civile Commentario, Giuffrè 1999) 277-8.

The acquisition of shares by one spouse during marriage represents a legal transaction, generally a contract. From the point of view of family law, it is important to determine whether this legal transaction, performed by one spouse without the consent of the other spouse, is valid in relation to the legal community regime.⁴⁸

If the shares are acquired using personal property (Art. 77 of the Family Code) or by using the property of the eventual community (Art. 74 para. 1(b), (c) of the Family Code), there is no need for the consent of the other spouse, because the owner spouse enjoys the freedom of administration and possession of his property. If the shares are acquired by using the personal property of one spouse, then the shares are the personal property of the owner's spouse, as it represents a substitution of personal assets. If the incomes used to acquire the shares are part of the eventual community, then in principle, both spouses are co-owners, as provided by Art. 74 para. 1(a) of the Family Code.⁴⁹ However, a distinction must be made between the quotas of general partnership and limited partnership companies (partnerships)⁵⁰ in relation to the shares of limited liability and joint stock companies (corporations).⁵¹

Whereas, suppose the participation in the commercial company or the acquisition of shares is realised by using community property, then the issue is whether this is an action of ordinary or non-ordinary administration. According to French doctrine, participation in a commercial company using community property represents an act of non-ordinary community administration. It represents an investment made by the community property, an investment which not only benefits the community but also burdens it with obligations. It represents an onerous legal transaction. Therefore, the other spouse's consent is also required as a condition for the validity of the legal action of participation in the company.⁵²

5 THE LEGAL NATURE OF SHARES ACQUIRED BY ONE SPOUSE IN RELATION TO THE LEGAL COMMUNITY REGIME

In parenthesis, it should be noted that, according to Art. 77 (a), (b), (dh), (e) of the Family Code, are personal assets of one of the spouses the shares that: a) are acquired before marriage, regardless of the title of their acquisition; b) are acquired during marriage by inheritance, donation or bequest, except the donation which is made in favour of the community; c) are acquired as a result of the alienation of personal property of the spouses. In these cases, the profits from the shares, as part of the eventual community, will be included in the community only if they are unconsumed at the end of it, according to the

48 Colomer (n 42) 23.

49 Law of the Republic of Albania no 9062 (n 1).

50 Hereafter, the term "partnerships" encompasses both general partnership and limited partnership companies.

51 Hereafter, the term "corporations" encompasses both limited liability and joint stock companies.

52 Colomer (n 42) 46.

provisions of Art. 74 para. 1(c) of the Family Code, such as the dividends.⁵³ The assets acquired from the liquidation of shares are personal property, representing the counter value of personal property.⁵⁴

The most delicate issue is determining whether the shares acquired by one of the spouses during marriage, except for those included in Art. 77 (a), (b), (dh), (e) of the Family Code are included in the current community or the eventual one.⁵⁵ The legal doctrine has divergent positions regarding this issue. Italian and French legal doctrine, in relation to the legal regime to which the shares acquired by one of the spouses during marriage are subject, do not make any distinction whether the shares are acquired by contribution to the initial capital of the company, or whether one spouse enters an existing company through acquisitions of shares from the shareholders of the company, or subscribing quotas, in case of an increase of the initial capital of the company, etc.⁵⁶

Another issue that arises where a distinction can be made between quotas of general partnership and limited partnership companies and shares of limited liability and joint stock companies. Both Italian and French doctrine have generally followed two lines of thought:

- a) the monist theory, according to which there is a single solution, regardless of the nature of the commercial company: if the shares are acquired during marriage they are included in the legal community since the date of their acquisition; and
- b) the dualist theory, according to which to determine the legal nature of the shares, a distinction should be made between the quotas of partnerships and the shares of corporations. In partnerships, the personal qualities of the partners are essential, while in corporations, these qualities are, in principle, irrelevant.

The Albanian doctrine aligns with the Italian doctrine and distinguishes between the quotas of general partnership and limited partnership companies and the shares of limited liability and joint stock companies. The shares of limited liability and joint stock companies are included in the community at the moment of their acquisition by one of the spouses. While the quotas of general partnership and limited partnership companies are the personal property of the shareholder spouse.⁵⁷ The same position has been held by the First Instance Court of Tirana.⁵⁸ The court, while deciding the validity of two sale contracts concluded between the shareholder's spouse and two other persons for the transfer of the property of

53 M Tanzi, 'Comunione legale e partecipazioni a società lucrative' in CM Bianca (ed), *La comunione legale*, vol 1 (Giuffrè 1989) 311.

54 Saccà and Mollura (n 44) 202.

55 Patrizia Di Martino, 'La comunione legale tra coniugi: l'oggetto', in G Bonilini e G Cattaneo (eds), *Il diritto di famiglia*, vol 2: *Regime patrimoniale della famiglia* (UTET 1997) 78-9.

56 N Tabanelli, 'La comunione legale: l'azienda coniugale' in A Arceri e M Bernardini (eds), *Il regime delle partecipazioni sociali' in Il regime patrimoniale della famiglia* (Maggioli 2009) 530.

57 Omari (n 9) 96-7.

58 Decision no 3873 (Court of the Judicial District of Tirana, 9 May 2016).

60% of the shares of the company, has mentioned that the quotas of partnerships are not included in the community.

In the last years, there have been several court decisions regarding the shares of corporations acquired by one of the spouses during marriage, but there have been no decisions about partnerships. The Albanian High Court has stated that the shares of a limited liability company⁵⁹ and the shares of a joint stock company,⁶⁰ which are acquired by one of the spouses during marriage, are included *ex lege* in the current community, pursuant Art. 74 para. 1(a) of the Albanian Family Code.

Given that Albanian legal doctrine and jurisprudence frequently align with the reasoning of Italian and French doctrines, it is crucial to consider the stance of these doctrinal perspectives.

5.1. The position of Italian legal doctrine

Part of Italian legal doctrine contends that any form of participation in a commercial company acquired by one spouse during a marriage is deemed part of the legal community because it represents an investment of the gains and incomes of each spouse.⁶¹ This group of authors uses two basic arguments in support of their position: a) the term “property” of Art. 74 para. 1(a)⁶² of the Family Code should not be interpreted narrowly, including only tangible (material) items and b) if the assets are gained during marriage by each spouse and are not personal property as provided by Art. 77 of the Family Code, then they are community property as provided by Art. 74 para. 1(a). Art. 74 para. 1(a) is drafted in a general way, including in it any “asset” that can be an object of a subjective right.⁶³

Contrary to the abovementioned position, few authors, based on the argument that non-tangible (non-corporeal) assets are not included in the community, exclude from the legal community all types of shares, regardless of whether they belong to partnerships or corporations.⁶⁴ However, many legal scholars have criticised this stance, contending that

59 Decision no 340 (High Court of the Republic of Albania, Civil Chamber, 26 June 2012).

60 Decision no 13 (High Court of the Republic of Albania, Civil Chamber, 18 January 2023); Decision no 00-2009-391 (High Court of the Republic of Albania, Civil Chamber, 8 May 2009).

61 In favour of this position are: L Gatti e G Scardaccione, ‘Titolarita’ Delle Partecipazioni Sociali in Regime di Comunione Legale’ (1978) *Vita Notarile* 270-1. According to these authors, any share acquired by one spouse during marriage is included in the current community, based on Art. 177 para. 1(a) of the Italian Civil Code (equivalent to Art. 74 para.1(a) of the Albanian Family Code), regardless of the type of commercial company (with limited or unlimited liability of the partners), because each share represents an “asset”. These authors criticize that part of the doctrine that gives a different solution based on the type of responsibility that the share entails for the partner.

62 Because Art. 74 of the Albanian Family Code is drafted according to Art. 177 of the Italian Civil Code, the Italian legal doctrine is used to interpret the Albanian law, see: Italian Codice Civile (1942) <https://www.trans-lex.org/601300/_/italian-codice-civile/> accessed 23 March 2024.

63 Regarding the position of this group of authors, see: Tanzi (n 53) 307.

64 For more about the position of these authors see: *ibid* 306.

such an exclusion contradicts the legislative intent and the fundamental essence of the legal community regime. Contrary to Art. 77 of the Family Code (categories of personal properties), which is regulated by the legislator in detail, Art. 74 para.1(a) is regulated in a general way, including in it any property acquired jointly or separately by each spouse. The principle sanctioned by Art. 74 and Art. 76 of the Family Code is the *favor communionis* principle.⁶⁵

Other authors do not include all forms of participation in a commercial company in the same legal discipline but use the criteria of the shareholder's responsibility in the company to determine if the shares acquired by one spouse during marriage are community or personal property.⁶⁶ According to this opinion, shares of limited liability and joint stock companies are included *ex lege* in the community from the moment of their acquisition by one of the spouses because in these companies, the shareholders have limited property liability.⁶⁷ On the other hand, the quotas of general and limited partnerships are included in the "eventual" community. If we accept these quotas' inclusion in the current community, we would expose all the community property to the company's creditors.⁶⁸ Also, an additional argument is that another partner would be added to the company - the spouse of the new partner - who is unknown to the company's existing partners and "is not reliable" both to the partners and their creditors.⁶⁹ We recall that, in general partnership and limited partnership companies, the personal qualities of the partners are of great importance in the company's reliability, especially in its relations with third parties. Furthermore, other authors argue that the Articles of Association,⁷⁰ when they do not allow new shareholders into the company, should also be considered.⁷¹ In companies with unlimited liability partners, it is implied that the acceptance of new shareholders, such as the spouse of one of the shareholders, necessarily requires the amendment of the Articles of Association of the company itself.⁷²

Furthermore, another approach disregards the differences between partnerships and corporations, focusing instead on the purpose behind acquiring shares – whether for investment purposes or active participation of the shareholder in the company's activity.⁷³ Under this perspective, shares of partnerships and corporations are included in the community since the moment of their acquisition, except for those shares representing an

65 For more on this position see: *ibid* 311-2.

66 For more on this position see: Raffaele Caravaglios, *La Comunione Legale*, vol 1 (Giuffrè 1995) 527-8; Russo (n 47) 286-7; Tanzi (n 53) 307.

67 Russo (n 47) 291.

68 *ibid* 290.

69 *ibid* 290.

70 Caravaglios (n 66) 529-30.

71 *ibid* 528.

72 *ibid* 528-9.

73 For this opinion see: Francesco Corsi, *Il regime patrimoniale della famiglia*, vol 2: *Le convenzioni matrimoniale, famiglia e impresa* (Giuffrè 1984) 139.

instrument of economic initiative. These shares are included in the eventual community.⁷⁴ Based on these arguments, the quotas of partnerships can also be part of the current community; likewise, on the other hand, the shares of a corporation can be part of the eventual community. If the quotas of partnerships are included in the community from the moment of their acquisition, due to their acquisition with investment purpose, then their inclusion in the company has only an *inter partes* effect (between the spouses) and has no effects in relation to the company⁷⁵. If the other shareholders of the company have not approved the recognition of the other spouse as a shareholder of the company, then he/she cannot exercise any rights deriving from the ownership of the share, but the exercise of these rights belongs only to the shareholder spouse.

In decision no. 7409, dated 12 December 1986, the Italian Court of Cassation ruled that the partner's participation in partnerships represents a "strictly personal" participation. The alteration in the company's partners necessitates a corresponding modification in the contractual relationships among them, which cannot be executed without the unanimous consent of all partners or unless explicitly stipulated in the Articles of Association. Whereas the Court continues its reasoning, in corporations, the solution is different. In joint stock companies, the transfer of shares is governed by securities legislation. The quotas of limited liability companies are also freely transferable through *inter vivos* and *mortis causae* legal transactions.⁷⁶ Following this reasoning, the Italian Court of Cassation has decided that the shares of joint stock companies are tangible movable items (Cass, 6 April 1982, no. 2103), while the shares of limited liability companies are non-tangible movable items (Cass 11 September 1991, no. 9513), and as such are subject to the right of ownership, therefore freely transferable from one subject to another.⁷⁷ For this opinion, see other decisions of the Italian Court of Cassation: Cass. Civ. No. 7437/ 1994; Cass. Civ. No. 9355/ 1997; Cass. Civ. No. 5172/ 1999; Cass. Civ. No. 1363/ 1999.⁷⁸

5.2. The position of French legal doctrine

In French legal doctrine, a distinction has traditionally been made between the shares of partnerships and corporations. According to the doctrine, shares of corporations, in which the personal qualities of the partners are irrelevant to the company, are included in the community from the moment of their acquisition. In this case, there is no conflict between the law of matrimonial property regimes and the law of commercial companies.⁷⁹ There are three different opinions reflected in French doctrine regarding the quotas of personal

74 Russo (n 47) 286; Tanzi (n 53) 308.

75 For more on this discussion see: Corsi (n 73) 148-9.

76 Caravaglios (n 66) 554-5.

77 *ibid* 556.

78 Note of: Tabanelli (n 56) 534.

79 For more information see: Colomer (n 42) 105.

partnerships: a) according to the first opinion the quotas are personal property of the partner spouse;⁸⁰ b) based on the second opinion, the quotas are included in the community, from the moment of their acquisition;⁸¹ and c) the last is the dualistic position.

The dualistic theory tries to find an intermediate solution between two monistic theories, recognising the dualistic character of the quotas of partnerships.⁸² There are two dualistic theories, the traditional and the contemporary one. The traditional dualistic theory distinguishes between the monetary value of the quota and the title (*titre et finance*). According to this position, the quotas are the personal property of the partner spouse, but their monetary value is included in the community.⁸³ The modern dualist theory distinguishes between “quota” and “partnership quality”. On the one hand, while the “quota” itself as a property right is included in the community, on the other hand, the “quality of partner”, as a personal non-property right, is a personal right of the partner spouse. Only the partner spouse has the right to vote.⁸⁴ If the company’s Articles of Association allow it, the partner’s spouse has the right to request to be recognised as a partner of the company. He/she gains the right to vote only after being recognised as a partner and registering in the Partners’ Register.⁸⁵ In case of alienation of the quota, the consent of the other spouse is necessary according to the regime of non-ordinary administration of the legal community.

The modern dualistic theory seems to be the most preferred in French doctrine due to its ability to harmonise the interests of the commercial company with the property interests of the family and the interests of each spouse.⁸⁶ This solution is portrayed as the best option in accordance with the laws governing matrimonial property regimes and commercial companies.⁸⁷

80 *ibid* 106. These authors base their position on the *intuitu personae* character of the quotas of partnerships. Since they are *intuitu personae*, closely related to the personal qualities of partner, they cannot be included in the community, but are personal property of the partner spouse.

81 *ibid* 106. These authors base their position entirely on the legal provisions that govern the community property. Given that quotas are assets and according to the French Civil Code assets acquired during marriage are part of the community (Art. 77 para. 1(a) of the Albanian Family Code), then the shares, regardless of their type, are included in the legal community from the moment of acquisition. See, Code civil des Français (1804) <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070721> accessed 23 March 2024.

82 Colomer (n 42)105.

83 For more about this doctrinal position see: Jacques Flour e Gérard Champenois, *Les régimes matrimoniaux* (Armand Colin 1995) 278-9; Colomer (n 42) 106.

84 For more about this doctrinal position see: Francis Caporale, ‘Société et communauté entre époux’ in A Couret e altro, *Le droit des affaires a la confluebce de la theorie et de la pratique: Melanges en l’honneur du Professeur Paul Le Cannu* (Dalloz; LGDJ; IRJS 2014) 675-6; Flour and Champenois (n 83) 279.

85 Caporale (n 84) 676.

86 *ibid* 676.

87 Colomer (n 42) 118.

6 THE ADMINISTRATION OF THE SHARES DURING MARRIAGE BY THE SHAREHOLDER SPOUSE: THE PARALLEL FUNCTIONING OF COMMERCIAL COMPANIES WITH THE LEGAL COMMUNITY

When considering shares as community property, it is crucial to address the legal framework regulating the administration of shares owned by the shareholder's spouse. We advocate for the administration of these shares to be accomplished through a complementary integration of commercial laws and matrimonial property legislation.⁸⁸ The administrative rights of the shareholder spouse can be divided into two groups: first, the administrative rights exercised in the relations between the spouses and second, the administrative rights exercised in their relation to the commercial company and third parties.

Generally, the inclusion of shares in the legal community has only *inter partes* effects, and, therefore, the rights deriving from the possession of the shares can be exercised only by the shareholder spouse.⁸⁹ However, within the limits determined by the commercial legislation and the Articles of Association, the spouse of the shareholder has the right to be formally recognised as a shareholder of the company through approval by the General Meeting or a court decision. At this point, which legal regime is applicable to the shares in the relations between the spouses themselves? There are two alternative solutions: a) the division of the shares between the spouses, or 2) the recognition of both spouses as co-owners of the shares, according to commercial legislation, keeping the share/s undivided. In the last alternative, the spouses must appoint a common representative to exercise the rights derived from the shares.⁹⁰ Based on Art. 72 of the Law on Entrepreneurs and Commercial Companies (co-ownership of shares in limited liability companies) and Art. 121 of the Law on Entrepreneurs and Commercial Companies (co-ownership of shares in a joint stock companies),⁹¹ the common representative can be one of the spouses or a third person. We believe this is the most appropriate solution.

For the appointment of the common representative, it is disputable if the rules of joint ownership of the Civil Code are applicable or the rules of the administration of the community property of the Family Code. This solution, although practical, may affect the future of the company, potentially influencing its decision-making process because of eventual conflicts in spouses' marital relationships.⁹²

According to French doctrine, a proposed solution is to include clauses in the company's Articles of Association that prevent the spouses of shareholders or future shareholders from

88 For this doctrinal position see also: *ibid* 132.

89 Di Martino (n 55) 82.

90 Tommaso Auletta, 'La comunione legale: oggetto' in T Auletta (ed), *Il diritto di famiglia*, vol 3, *I rapporti patrimoniali fra coniugi* (Trattato di diritto di famiglia, diretto da Mario, Giappichelli 2011) 370.

91 Law of the Republic of Albania no 9901 (n 2).

92 F or this opinion see: Caporale (n 84) 672.

participating in the company's decision-making process.⁹³ Similarly, Italian doctrine suggests that if the Articles of Association do not allow the shareholder's spouse to be recognised as a partner of the company, then only the economic value of the shares is included in the community,⁹⁴ with voting rights retained solely by the shareholder spouse.

When only one spouse is registered as a shareholder of the company, the alienation of shares is governed by the administration rules of the matrimonial property regime. According to Art. 90 of the Family Code, each spouse can carry out actions of ordinary administration separately from the other spouse, but for actions of non-ordinary administration, the joint consensus of the spouses is necessary. If one spouse carries out actions of non-ordinary administration without the consent of the other, the act may be annulled by the court upon the request of the non-consenting spouse (Art. 94, para. 1 of the Family Code). According to the Albanian High Court,⁹⁵ if one spouse sells shares that are part of the community property, the consent of the other spouse is necessary. The court decision has effects not only on the shareholder spouse but also on the company and the third person to whom the shares have been alienated, even if the latter is not aware and does not have the obligation to be informed about the civil status of the shareholders of the company. The Albanian⁹⁶ and Italian⁹⁷ legal doctrines have the same stance.

However, there are exceptions for acts of joint administration where one spouse can act without the consent of the other, but upon court authorisation (e.g. the sale of shares) when the other spouse is in the situation of the impossibility of expressing their consent or refuses to give their consent and the action is necessary for the interests of the family (Arts. 91, 92, 93 of the Family Code).⁹⁸

7 ISSUE AND LIQUIDATION OF SHARES

The legal nature of shares becomes a complex issue when one spouse's main professional activity involves "buying and selling shares," prompting questions about whether these shares constitute part of the legal community (current/eventual) or personal property.⁹⁹ Part of the Italian legal doctrine distinguishes between professional stock market speculation and sporadic trading.¹⁰⁰ According to this group of authors, shares used in the exercise of a spouse's profession are considered personal property to avoid discrimination against this

93 *ibid* 670.

94 Tabanelli (n 56) 540.

95 Decision no 13 (High Court of the Republic of Albania, Civil Chamber, 18 January 2023)

96 Omari (n 9) 125.

97 Auletta (n 90) 368-9.

98 For this doctrinal position see: Corsi (n 73) 150-1.

99 For more about this problem see: Tanzi (n 53) 329.

100 For this doctrinal position see: Auletta (n 90) 360.

form of economic activity compared to other professions.¹⁰¹ It is important that the activity of speculation in the stock market has the nature of the exercise of the profession; it should not be a casual activity.¹⁰² Whereas, according to the same line of thought, when the purchase for the purpose of resale of shares is carried out sporadically, then the shares and the profit realised from their resale are part of the current community.

In line with the abovementioned doctrinal opinion, if shares are deemed personal property under Art. 77 (ç) of the Family Code, profits realised from the purchase and resale of the shares are part of the eventual community, as incomes from the separate activity of spouses (Art. 74 para. 1(b) of the Family Code). These profits are subject to division only if they remain unconsumed at the end of the community. The articles of the Family Code should be interpreted in accordance with the right of “freedom of economic activity” enjoyed by every individual, a freedom guaranteed by the Albanian Constitution. If the purchase and resale of shares is not a professional activity but is conducted casually, then according to Art. 74 para.1(a) of the Family Code, the shares and their profits are current community property.

If the company rewards its employees with shares issued *ad hoc*, then the shares are included in the eventual community, according to Art. 74 para. 1(c) of the Family Code,¹⁰³ as they represent income from the beneficiary spouse’s own activity.

Another issue regards the effects that the increase of the initial capital of the company will have on the community property when the initial shares are considered the personal property of one spouse. The question arises: will the newly issued shares be included in the community?¹⁰⁴

According to Italian doctrine, it is essential to distinguish whether the issuance of shares is made onerously or gratuitously. If the new shares are acquired through gratuitous issuance, they are deemed personal property of the shareholder spouse because they do not represent a new value but merely a materialisation of a previous stock value.¹⁰⁵ Conversely, if the new shares are acquired through onerous issuance, they are included in the current community property as property acquired during marriage.¹⁰⁶

Regarding the liquidation of shares, the doctrine suggests that the proceeds obtained from the liquidation will adhere to the same legal regime applicable to the shares themselves. If the shares are included in the community property, the proceeds obtained from their liquidation are also included in the community property. If the shares are personal property, then the liquidation’s proceeds are personal property, too.¹⁰⁷

101 For further information on these arguments, see: Russo (n 47) 296-7.

102 Giovanni Gabrielli, *Comunione coniugale ed investimento in titoli* (Giuffrè 1979) 28-9.

103 Tanzi (n 53) 327.

104 *ibid* 337-8.

105 Gabrielli (n 102) 33-4; Saccà and Mollura (n 44) 205.

106 Gabrielli (n 102) 364.

107 Auletta (n 90) 363.

Furthermore, according to the same doctrine, the shares of corporations formed by the conversion from a partnership, in which one of the spouses was a partner,¹⁰⁸ are deemed part of the existing community property unless the shares were considered personal property of the shareholder spouse.

8 CONCLUSIONS

To protect the rights and interests of all involved subjects, the interests of spouses and those of the commercial company as a legal entity, it is crucial to coordinate the commercial legislation with the legislation of matrimonial property relations.

Based on Albanian, French, and Italian doctrine, it is necessary to distinguish between partnerships and corporations. While the solution lies in the Family Code for corporations, the same solution cannot be used for quotas of partnerships. Shares of corporations acquired during marriage by one spouse are included *ex lege* in the community property. In partnerships, a distinction must be made between the quota and its value. While the quota remains the separate property of the partner spouse, its value is included in the community. This solution favours the protection of the interests of partnerships on the one hand and protects the community from the company's creditors, on the other hand.

When shares are included *ex lege* in the current community, this inclusion has effects only *inter partes*, i.e. only between the spouses, while exercising the rights in the company belongs only to the shareholder spouse. The other spouse cannot exercise these rights until he/she is recognised as a shareholder. If there are clauses in the company's Articles of Association that prevent the entry of new shareholders in the company, then the other spouse cannot be recognised as a shareholder. In such a hypothesis, the "economic value" of the shares in the community, and only the spouse who appears as a shareholder in the shareholder register can exercise the rights in relation to the company.

However, when the other spouse is recognised as a shareholder, the spouses are co-owners of the shares. The exercise of the rights in the company will be subject to the Law on Entrepreneurs and Commercial Companies, which regulates the co-ownership of shares. According to Arts. 72 and 121 of this Act, the co-owners of shares (the spouses) administer the shares in an agreement between them or with the court's intervention in the absence of an agreement.

In any case, the alienation of shares from the shareholder spouse, as an action of non-ordinary administration of the legal community, needs the other spouse's consent.

Through a careful and combined analysis of the CEFL *Principles*, specifically within the community of acquisitions default regime, we assert that shares acquired by one of the spouses during marriage are community property, based on two arguments: first, shares are

108 *ibid* 361.

not mentioned in the category of personal property; second, assets acquired by each spouse during marriage by means of spouses' income and gains and do not fall in the category of personal property (Principle 4:35 (b)), are presumed community property. Assets acquired by each spouse during marriage are presumed to be community property unless they are proven to be personal property. Since shares of commercial companies are assets, if acquired during marriage using one spouse's income and gains, they are presumed to be community property according to Principle 4:53 (b).

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Competing interests: No competing interests were disclosed.

Disclaimer: The authors declare that their opinions and views expressed in this manuscript are free of any impact of any organizations.

ABOUT THIS ARTICLE

Cite this article

Qarri E and Kadi X, 'The Impact of The Matrimonial Property Regime On Commercial Companies According to Albanian Legislation' (2024) 7(3) Access to Justice in Eastern Europe 1-25 <<https://doi.org/10.33327/AJEE-18-7.3-a000305>> Published Online 23 May 2024

Submitted on 20 Mar 2024 / Revised 02 Apr 2024 / Approved 26 Apr 2024

Published ONLINE: 23 May 2024

DOI <https://doi.org/10.33327/AJEE-18-7.3-a000305>

Managing editor – Mag. Yuliia Hartman. **English Editor** – Julie Bold.

Summary: 1. Introduction. – 2. A Comparative Analysis Between Albanian Legislation and Principles of European Commission on Family Law Regarding Matrimonial Property Regimes. – 3. Participation of One of the Spouses In A Commercial Company. – 4. The Acquisition of Shares During Marriage. – 5. The Legal Nature of Shares Acquired by One Spouse in Relation to The Legal Community Regime. – 5.1. *The Position of Italian Legal Doctrine*. – 5.2. *The Position of French Legal Doctrine*. – 6. The Administration of the Shares During Marriage by the Shareholder Spouse: The Parallel Functioning of Commercial Companies with the Legal Community. – 7. Issue and Liquidation of Shares. – 8. Conclusions.

Keywords: *marriage, spouses, matrimonial property regimes, legal community, commercial companies, shares, shareholder.*

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ВПЛИВ СПІЛЬНОЇ ВЛАСНОСТІ ПОДРУЖЖА НА КОМЕРЦІЙНІ КОМПАНІЇ ЗГІДНО ІЗ ЗАКОНОДАВСТВОМ АЛБАНІЇ

Еніана Тяррі* та Дженсіла Каді

АНОТАЦІЯ

Вступ. Мета цього дослідження полягає в тому, щоб вивчити взаємодію правового врегулювання спільної власності подружжя та комерційної діяльності, яка ведеться до або під час шлюбу. У статті зазначено, як право спільної власності впливає на комерційні компанії, зокрема, коли акціонером компанії є один із подружжя. У юридичних колах тривають дебати щодо того, чи є акції комерційної компанії, створеної одним із подружжя під час шлюбу або придбані у результаті юридичної операції, частиною права спільної власності. З огляду на це виникає кілька питань: чи регулюється участь у початковому капіталі компанії правилами спільного управління, якою є правова природа акцій, придбаних одним із подружжя, і як взаємодіє правове врегулювання спільної власності подружжя з комерційним законодавством. Ще одне питання, яким займається правова доктрина, полягає в тому, чи визнається чоловік/дружина акціонера акціонером і чи може брати участь в управлінні компанією. У Сімейному кодексі Албанії, який, зокрема, головним чином регулює малі сімейні підприємства, немає конкретики щодо акцій. Дослідження взаємодії цих двох дисциплін має на меті допомогти юриспруденції, оскільки, незважаючи на деякі справи Верховного Суду та Конституційного Суду за останні роки, це все ще відносно нова сфера для албанської доктрини та юриспруденції.

Методи. Багатогранний методологічний підхід цієї статті охоплює дослідження літератури, правовий аналіз, перегляд судової практики та порівняльний аналіз. Було вивчено відповідне національне законодавство, а також законодавство країн, що належать до цивільно-правової традиції, таких як Франція та Італія. Крім того,

було переглянуто європейське «м'яке право», зокрема принципи Комісії з європейського сімейного права (Commission on European Family Law — CEFL), які зосереджуються на питаннях спільної власності подружжя.

Наша методологія дослідження містить збір та аналіз існуючих досліджень і наукової літератури щодо питання спільної власності подружжя. Щоб краще зрозуміти норми Сімейного кодексу щодо спільної власності подружжя, ми проаналізували італійську та французьку доктрину, судову практику, а також правові системи, на основі яких був розроблений Сімейний кодекс Албанії.

Слід підкреслити, що основною метою цієї статті є не лише порівняльний аналіз, вона прагне допомогти в кращому розумінні та застосуванні правового врегулювання спільної власності подружжя, що найчастіше використовується на практиці. Крім того, було проведено комплексний порівняльний аналіз албанського законодавства та принципів CEFL, щоб визначити основні подібності, відмінності та потенційні сфери для покращення в його правових межах. Крім того, судова практика як албанських, так і іноземних вищих судів була широко використана для збагачення аналізу та надання розуміння практичного застосування правових принципів.

Результати та висновки. Вирішення вищезазначених питань залежить від юридичної структури компанії та правил участі, вимагає комбінованого тлумачення спільної власності подружжя та комерційного права. У такому комбінованому тлумаченні правил вирішальне значення має захист прав та інтересів усіх залучених суб'єктів, подружжя та комерційного товариства як юридичної особи.

Ключові слова: шлюб, подружжя, спільна власність подружжя, право спільної власності, комерційні компанії, акції, акціонер.