

## CONTRIBUTION BY SPOUSES TO ESTABLISH A COMPANY

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### Abstract

*The possibility of a husband to participate with common goods in a company and especially the legal status of the parties of interest, the shares acquired as consideration for this contribution have been the subject of doctrinal controversy and a source of non-unitary judicial practice.*

*The difficult state in which the theoreticians and practitioners of law were is in because of the fact that before the 1<sup>st</sup> of October 2011 the Romanian Law lacked a statement that related to this problem. Receptive to the difficulties observed, the lawmaker proposed that through some articles from the new civil Code to cover the lack of legislation.*

*The present study proposes to analyze if one of the husbands can use common goods to constitute a company and what are the conditions in which the obligation of offer can be assumed in a viable way.*

*The whole judicial endeavor tries to state in which measure the present regulations achieved their goal and what are the propositions susceptible to bring more clarity on the judicial regime of the contribution in goods.*

**Keywords:** company formation, share, common goods, spouses

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Before the entry into force of the current Civil Code, the law was characterized by total silence as to whether a spouse can participate in the formation of a company with common property. The family Code – revoked at present – established the relations and property regime of the goods of spouses and any agreement as null and void. Matrimonial regime of community of goods was based on the concept that most goods are common property of spouses and they can only manage them together for the common good.

At present the Civil Code establishes three regimes applicable to matrimonial property relations between spouses; spouses may opt for any of these discretionary: legal community regime, the regime of separation of property and conventional community regime. Choosing a different regime than the legal community is the conclusion of an agreement in authenticated form. Whenever prospective spouses entered into a matrimonial agreement<sup>2</sup> the matrimonial regime of community of goods will apply.

With a matrimonial agreement, the future husbands will clarify the aspects referring to the participation in a company with common goods<sup>3</sup>. Therefore in what follows we will consider only the proposed topic within the legal community regime, which is currently the most commonly used.

*1. Possibility of the spouses to be together as partners in the same company. Possibility of setting up of companies by one spouse with others.*

The positive answer at this question given in the past by the doctrine and jurisprudence was used by the lawmaker at for the present law. Article 1882 Civ.Code

The affirmative response to this question was given by the doctrine and the jurisprudence<sup>4</sup> and was also adopted by the legislator. Art 1882 C.civ. outlining the conditions of validity of the contract of society, proclaims in alin. 1 that any person physical or judicial can have the quality of associate, principle stated also by art.1 of Law nr.31/1990 regarding companies. The second thesis is for the special situation when the associate is also a spouse/husband: "*A husband can not be associated using some common property except with the consent of the other spouse ...*" which conditions the lawmaker to the consent of the other spouse is not the associate state but the possibility of using common goods by the spouse to become an associate.

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<sup>2</sup> If at least a year passed from the date of the marriage the spouses can modify or change the matrimonial regime.

<sup>3</sup> The matrimonial convention closed before marriage produces effects only after the marriage takes effect. The convention closed during marriage produces effects at the date stated by parts or if missing at the date of closure as stated in art 330 alin.2 and alin.3 C.civ.

<sup>4</sup> Regarding this problem see, M.N. Costin, M.C. Costin, *Probleme teoretice și practice privind constituirea și funcționarea societăților comerciale*, in *Revista de Drept Comercial* nr. 2/1999, p.31-43; C. Popa, *Contraprestația aportului la constituirea capitalului social și regimul matrimonial al comunității de bunuri*, in *Revista de Drept Comercial* nr. 3/2003; Ghe. Piperea, M. Tomescu, *Dreptul societăților comerciale și regimul matrimonial actual*, in *Revista de Drept Comercial* nr. 10/1999, p.91-98; C. Turianu, *Validitatea societăților comerciale constituite între soți*, in *Dreptul* nr. 1/2008, p. 110-115; M. Dumitru, *Dreptul societăților comerciale*, European Institute Editure, Iași, 2010

Therefore when a spouse wants to acquire the associate status using own goods he can opt on not taking the consent of the other spouse. A similar statement is found in art. 348 C.civ.: *"Common goods are subject to contribution to a company, association or foundation only in law"*.

### *2. Goods of spouses that can contribute to the establishment of a company.*

If on own property of one of the spouses it is considered unanimously that he may contribute to the formation of a society on common goods there have been different opinions. It is stated that common property of the spouses should be shared and split first, because the contribution of each partner to the constitution of a company must be fully individualized at the value from the subscription date, which would have been a good reason to require splitting property during marriage (Căpățână, 1999, p31). The majority opinion was in the old framework that spouses can contribute to the formation of a company not only with personal property but also with their common property (Filipescu, (2010), p185; Piperea, Tomescu, (1999), p.92). If the good was real estate propriety then there was a necessity for the consent of the other spouse; if the good was mobile, in the term of art. 35 from the family Code – the presumption of silent mandate for representation is used.

In the current civil Code based on the reality that in most cases an associate is accompanied by the husband, the matrimonial regime applicable to most marriages, at least it is now, is the legal community and as a result most of the goods used in initiating or subsequently contributing to running a business are common goods stated in legislature at art. 348. C civ. with the marginal naming "Supply of common goods" the lawmaker proclaims: *"common goods can make the object of a contribution to the capital of a company, association or foundation in the conditions of the law"*. Undoubtedly, we can conclude, that one of the spouses or both can contribute to the constitution of a company with common or individual goods.

### *3. Conditions for the contribution with common goods.*

The current Civil Code retains the property relations between spouses as a legal community matrimonial regime, under which property acquired by either spouse during marriage are common goods excluding goods prescribed by law and which are each spouse's own assets. This system had a number of improvements, such as those relating to common property by spouses used to form companies.

One of the principles underlying the legal community regime is the principle of equality between spouses, enshrined by art. 308 C.civ. and including, inter alia, that the administration, enjoyment and disposition of common goods are regulated so that each spouse to confer practically the same powers over common them.(Aniței, 2012a, p 39) .

In realization of this principle every man may enter only acts of conservation, management and acquisition of common goods. Also, each spouse may use one common property without the express consent of the other spouse.

Instead, acts of alienation and encumbrance of real rights covering common goods, both old and currently settled can not be concluded without the consent of both spouses. To this rule there is an exception: documents of disposition with

beneficial related to movable goods whose disposal is not subject to publicity formalities can be completed by one spouse.

Given the controversies existent in the past the lawmaker found it necessary to regulate the assumption of transmission for joint property by a husband in order to acquire shares at the formation of a company or later as amendments. To avoid any potential husband abuses detrimental to common property, the legislature determines the ability to use common goods as contribution to companies. A spouse may dispose of common property as contribution to a company or to acquire shares only with the written consent of the other spouse. The requirement established by alin.1 al art 349 C.civ. is resumed by art.1882 C.civ. governing the conditions of validity of the contract of society: *"A husband can not be associated using the common property except with the consent of the other spouse, the provisions of art. 349 being applied properly."*

Art. 349 alin. 1 C.civ. sets the common control rule, regardless of the movable or immovable nature of the common good, whether ownership is given or another right. By sending at art. 347 C.civ. means that from the point of view of their seriousness, the legislature has treated an act of alienation of the common good, which is why the contribution imposes expressly the consent of both spouses (Avram, Nicolescu, (2010) p. 278-284).

Undoubtedly, one of the spouses can contribute with propriety to the creation of a company. This action requires the written consent of the other spouse. Art. 349 C.civ. states the requirements of the written consent for the unrelated husband, a requirement not found in the content of art. 1882 C.civ. targeting the very conditions of validity of the company constitution contract. However, by the express reference that art.1882 C.civ. alin.1 makes to art. 349 C.civ: -" *the statements of art. 349 apply accordingly*", we consider that the other husband must express its consent in written form.

#### *4. Situations where the consent of the unassociated husband is necessary*

The marginal name of art.349 C.civ.- *Contributions regime* – suggests that the text expresses legislative solutions designed only the contribution in common property in a corporate setting, i.e. the transfer of common property to form a company. In fact, as shown by its contents it also governs any other situations where common assets are used to acquire shares by any other legal transactions, after the company is incorporated. The text sets the common control rule, also in the act by which a spouse brings a common good as contribution to a company (society formation phase) and for acts of acquisition of shares using common property (subsequent to the formation of a company). This solution is different from the previous one, which allowed one spouse to do all such acts under mutual tacit mandate, excluding contribution of real estate, where express consent is required by both spouses.

Although art 1882 alin. 1 C.civ. mentions the existence of consent from the unassociated spouse only for the contribution in common goods – the phase of company formation, as stated above, by the link that it makes to the application of art. 349 C.civ., the analyzed requirement is a validity condition and must be achieved whenever one spouse uses a common good to acquire shares.

*5. The need of the unassociated spouse consent depending on the type of contribution.*

The contribution represents the obligation that each partner brings to the company, a patrimonial value. By contribution we understand the transmission of a patrimonial right from the ownership of the initial owner to the company (Angheni, Volonciu, Stoica, (2004), 102). In counterpart, the associate will get shares, social parts or interest parts. The judicial operation of contribution is presented in the form of a translation contract of rights in onerous form.

The moment of obligation assumption is called subscription and is the moment of the signing of the company contract (constitution act)<sup>5</sup>, and the moment of execution is called payment of capital (carrying the amount of the payment).

The written consent of the unassociated spouse required by art. 349 C.civ. must not be confused with the consent stated at the payment of capital by the other spouse. The obligation of payment is assumed only by the future associate spouse and is realized by the signing of the company contract. Also, we must not confuse the consent that the potential associate spouse states at the conclusion of the company contract and that states the agreement at the constitution, functioning, dissolution and liquidation of the company, and for whose availability the consent of the other spouse is not necessary.

Contribution can carry on real estate or movable joint, tangible or intangible. It is possible to transmit as contribution the right to own<sup>6</sup> or any other right (for example the right to use<sup>7</sup>), an ownership on intellectual propriety, factory mark, invention, etc. in whole or in part. The contribution can consist also in shares, social parts or stake holds<sup>8</sup>. These contributions are similar with the contribution in claims but must be made by the law governing each type.

The formulation of the lawmaker is general, without any distinction, the written consent of the other spouse being required in any type of good if it is common: mobile, immobile, corporeal or incorporeal.

Although art. 349 C.civ. talks only about the contribution in goods and not the contribution in money as it is stated in art. 1899 and art.16 from Law nr. 31/1990 regarding companies, because money belong to the mobile goods category, the written consent of the other spouse is necessary. This situation is found in most common cases because a contribution in money is necessary at any company creation.

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<sup>5</sup> By exception, in the case of joint stock companies or limited liability share companies the commitment to be achieved and by subscribing to a copy of the prospectus of the founders, according to art. 18 from Law nr.31/1990 regarding companies.

<sup>6</sup> If the contribution is in an immovable or movable tangible property and property rights are transferred, relations between the company and partner – Transmitter - are governed by rules similar to those of sale.

<sup>7</sup> In this situation a company acquires a right of property which gives it the possibility to use and reap the fruits retain, the associate keeping the right to dispose of the object.

<sup>8</sup> The associate that contributes in shares or social parts from another company is liable for the transaction as a seller to a buyer.

As stated in art. 535 C.civ. “*goods are real things that can be tangible or intangible that have property rights*”, art.536 C.civ. stating that “*goods are mobile and immobile*”. From the entire statement used for defining the goods in art. 535-art.546 C.civ. there is no conclusion that money is a distinct type of goods.

According to art. 339 C.civ. common goods are those goods acquired by spouses while they are under the legal community regime, art 340 C.civ. stating the exceptions from this rule by enumerating the categories of that own to each spouse. We see that in the two texts of law there is no mention of “money” and “goods” but only “goods”. In another way and by judicial reports from family law, money is included in the goods category, having no special regime.

Despite the contribution breakdown by purpose in cash contributions and in-kind contribution, we believe that the legislature foresaw the need of each other's written consent in the case the spouse contributes in kind and a cash in a company. The difference made in the matter of the company contract in the civil Code and in Law nr. 31/1990 regarding companies was generated by necessities that are related to the matter of companies. As art. 1881 C. civ. states, the associates commit to contribute to the development of an activity with money, in kind or in special know how and work. The law of companies conditions the constitution of a company to the existence of some types of contributions by type of company: contributions in cash are necessary for any kind of company; contribution in claims is not permitted at limited liability companies, joint stock companies and ordering stock companies that are constituted by public subscription. Also, not executing the contribution is sanctioned different, depending on the way the contribution is made, in cash, claims or other goods. So from the perspective of company law the separation presents importance. Instead, as we showed in terms of family law, the legal community of goods, this nuance is irrelevant. How spouses' agreements aims at an area of considerable interest that is unrelated, the written consent of the spouse is necessary whether a contribution is made in money or goods.

The consent of both spouses is asked only when the judicial form of the act gets a disposition act form, art 349 C.civ. stating that none of the spouses can dispose alone of the goods that are common and use them as a contribution to a company to get shares. In another way, when the common object leaves the community of common goods, the consent of the non associated spouse is necessary. If the spouse, future associate, assumes with the title of contribution the obligation to constitute and transfer in the favor of the company that is to be constituted, for example, the right to use a building<sup>9</sup>, this being an act of disposition, the consent of the other spouse is not necessary. In the case that the object brought as contribution is brought into use the relations between the company and associate are governed by the rules of lease. The solution of common right is embraced for the conservation, administration and disposition(sale/split) acts that have as a subject the common goods of spouses stated in art. 345-346 C.civ.

## *6. Situation of corporate contribution.*

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<sup>9</sup> We do not consider the lease is for a period of more than 5 years that is assimilated to a disposition act ( art. 1419 from the old civil Code)

Besides cash or in kind contributions - which is a contribution to social capital - associates can contribute to formation of the company - but as a corporate contribution - with benefits and specific knowledge (work) as stated in art.1899 C.civ. In the same way art.16 from Law nr. 31/1990 regarding companies states that the contributions can be in cash, in kind, in claims and in work.

Contributions in work and know how are made by activities held by the associate that stated them and by offering information for the company. This is permitted only in the common name company and to the general partners of the limited partnership and is owned continuously, as far as the associate that took responsibility is a member of the company.

Although art . 349 C.civ. refers to contribution in general, without distinguishing between the contribution to capital and corporate contributions, we consider that the written consent of the other spouse is needed only concerning contribution in capital not corporate(work, know how), so only contribution in money or goods not in labor input. Work is not a patrimonial value to be part of the community of goods and, as a result of contribution the value of this community does not decrease. Provision of specific professional activities can not be restricted or conditioned in consent of another person, even a spouse. Employment benefits (corporate contribution) is not contributed to the formation of a capital increase, in exchange for his party partner acquires no interest or shares<sup>10</sup>. Corporate contribution is as long as the person has the capacity associated with the company and is extinguished as the associate loses this quality.

#### *7. When the unassociated spouse's consent is necessary.*

We must distinguish between the commitment contribution and the expressed written consent of the other spouse at retrieving and contributing with common goods. The contract (Articles of Incorporation) through which the future associate undertakes the contribution is signed by associates only under art. 5 from Law nr. 31/1990 regarding companies. Or, even when common goods are brought as contribution only one spouse becomes associate, as clearly states alin.2 al art.349 C.civ. More even, in the text of the above mentioned law is clearly stated about "*the spouse that offers the good*" from this deducing the fact that only one of the spouses assumes the obligation of contribution. By signing the constitution act, the associates do not assume the obligation of contribution but the obligation of cooperation for the good development of an activity from which to share a profit that can result. In any company type this shareholder intention of cooperating in developing social activity is completed by the right to take part at deliberations and decision making and the right to control the activity of the company. The text alin. 1 art 349 C. civ. States the existence of the approval of the other husband only for the retrieving of common goods not for assuming other obligations, like the obligation of cooperation. This powers are recognized only by the associated husband, as showed at art. 349 alin 2 thesis II will exercise alone the rights that arise from the

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<sup>10</sup> The working associate participates, according to the constitution act, at the sharing of benefits and support of losses and has the right to share the social assets.

associated quality. The disassociated husband must express the approval only with the retrieving of common goods and not with the company contract.

As follows, the written consent of the disassociated husband will be given in advanced or concomitant bind intake by a register different of the constitution act, the latter one being signed only by the shareholders. It is a requirement that should be fulfilled prior to the completion of the constitutive act, as a premise for assuming the validity of the contribution obligation. It is similar to the fulfillment of legal conditions for developing the quality of founder, administrator, auditor or single shareholder.

Need of prior consent of the disassociated husband is also emphasized by the situation in which could lead to enforcement of contribution obligation. If the required contribution was not made voluntarily, if the company is interested also in execution is possible in such contribution obligation can be enforced by foreclosure. If the disassociated husband didn't express his consent at retrieving common goods the obligation can't be ended on forced terms because it is not an obligation assumed valid. If the contribution it be the transfer of ownership of a fixed asset and the disassociated husband expressed his approval the company may call a special legal means to obtain performance of the obligation in kind contribution. The company can call the court to deliver a judgment that takes place act of alienation and have registration rights in the land transfer. The court may issue such a decision unless prior consent of the two spouses: disassociated husband expressed prior to the signing of the company contract, in a separate document on the transfer of the company being set up and the one of the associated husband expressed in the company contract. Of course, it is necessary and consent of the company that is being set up to develop good contribution, expressed by the completion of the company contract, as also the other conditions provided by law.<sup>11</sup>

On the other hand, according to art 65 Law no.31/1990 concerning companies and art.1896 C.civ. alin.1 performance requirement is achieved by transmitting contribution of the right over the good and the delivery of the goods in running social as intended by the company. As follows we consider that the nullity of the juridical act of the intake due to lack of disassociated husband's consent is covered also and when husband in the execution disassociated contribution obligation - the transmission of the right of a spouse to society associated. For example, the subject matter intake requirement is to transfer ownership of a property joint ownership. Intake execution is realized by concluding an act translating property between spouses and an original company being set up and the latter providing the building<sup>12</sup>. We consider that in this manner the disassociated husband expressed his approval for the retrieving of common goods and ground for invalidity consists in the absence of agreement disassociated husband when bind intake (completion the articles of association) was removed. We must not forget that the company society partnerships, limited partnerships and limited liability company must pay the full amount of share capital at the setting up, according to art

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<sup>11</sup> As stated in art. 906 C.civ and art. 1669 C.civ.

<sup>12</sup> The good becomes propriety of the company from the date of achieving judicial personality, moment that coincides with the date of registration in the Commercial Registry.



9 index 1 of Law no.31/1991 concerning companies. The law establishes the relationship between input imperative subscribed and paid in the moment of the company for the joint stock company and limited partnership by shares: share capital of each shareholder shall not be less than 30% of the share capital, the remainder to be paid within 12 months of the date of registration of society and for contributions in kind such payment is required within 2 years from the date of registration of the company, according to art. 9 of the Law no.31/1990 concerning companies. Following these steps should be performed and required the contribution made to the fulfillment of the terms listed above.

In conclusion, we believe that the provisions of the Civil Code are a breakthrough in solving problems caused by the matrimonial regime of community of property law in relation to companies.

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