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ANALYSIS



Corporate & Commercial

To which kind of co-ownership of company shares does Article 126 of the Spanish Companies Act apply?

This paper posits that the scope of application of Article 126 LSC is quite narrow. This is because it only makes sense in an entirely marginal case.

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1. Two shareholders co-owners of a single share

This is the basic factual scenario of Article 126, which, however, never arises in practice. The provision is not necessarily justified by the indivisible nature of the company share, *but rather by the indivisible nature of the vote per share at a meeting*. Thus, nothing would prevent the exercise of the right solely by either one or the exercise by both shareholders in an indivisible joint manner. This is even better for the company because external conflicts become "apparent" within the corporate sphere; and in this case, whether the right is exercised on a sole basis or on a joint basis, the best solution is that, in the face of objection from one or the other, the share does not vote — that is, the chair of the meeting denies the right to vote. A representative acting solely under Article 126 LSC casts a valid vote when the other (present) representative does not object, and the silent representative's vote is not counted as an abstention; if there is mutual objection, the vote shall be deemed not to have been cast. Two joint representatives cast a valid vote when they vote jointly, and no one may require one of them to leave the meeting, because every shareholder has the right to participate in corporate matters and to be informed before and during the meeting (Articles 196 and 197 LSC). Whether one of the joint representatives votes or both vote does not increase corporate transaction costs and avoids suspicion when a shareholder is "outside the meeting but dissenting", and the chair of the meeting is aware of this because they have been notified. In summary: what is required is that only one vote be cast, not that only one person has the right to attend the meeting.

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2. Two shareholders with joint ownership of a single share

If "one" share is concurrently held by two co-owners, Article 126 applies (within the scope already explained), even if the co-owners are co-heirs to the share or hold an interest in post-marital community property (with the surviving spouse) of that share. However, it cannot strictly be said that they are co-owners of that share or co-shareholders in the company, because a "co-owner in an estate" is never considered as such.

3. Two shareholders with undivided co-ownership of two (or more) shares

The principle of feasibility and dynamic efficiency that Pantaleón sought to find in the underlying rationale of Article 126 — rather than in the indivisibility of the share — proves insufficient as an explanation here. This is because the two shareholders may agree, regardless of the corporation's position, that each of them will act as a representative for one share. Article 126 does not prevent the duplication of votes, unless the shareholders *choose to act through a shared representative*. To argue that the corporation does not have to tolerate the exercise of voting rights on a

pro rata basis but must tolerate the exercise of joint voting by the two shareholders — as a separate exercise for each share — has very little practical basis. Note that, in pragmatic terms, if it is possible (notwithstanding the corporate bodies) to have two votes, one for each share, and as both are co-owned, then it should also be possible to structure the voting so that each shareholder adds their share in A to their share in B and votes indivisibly for the sum of the shares, "as if voting for the share" with the other co-owner doing the same. What has been stated here can be extended *mutatis mutandis* to more shareholders and more co-owned shares — that is, in the case of multiple shareholders holding a "block of shares". Of course, the shareholders may also appoint, in accordance with Article 398 of the Civil Code (not Article 126 LSC), a single shared representative in these situations involving multiple shares. But only if the co-owners so desire.

4. Multiple shareholders co-owning a combined stake totalling >50% but <100% of the share capital

The co-owners hold a majority stake in the company, but not all shares are co--owned. Without delving yet into hereditary or post-marital property co-ownership, we assume the rare scenario in which the shareholders in question remain co-owners of each share, comprising a set of shares that exceed half but do not reach 100% of the share capital. Well, to get closer to a more likely real-life model, let us assume that these shareholders became such through a partition of prior hereditary or post-marital community property, by means of an agreement assigning undivided co-ownership of all the shares. It is still somewhat artificial (why weren't blocks of shares assigned in sole ownership?), but not entirely improbable (for example, as a way of pooling voting rights in a syndicate). The decisive factor in this case is that there is a "majority" of shareholders who are co-owners, but diversity remains in the composition of the shareholder base. At least one shareholder is not a co-owner.

In practical terms, the question boils down to the following: Do they appoint a shared representative who, through his or her vote, "resolves" that the relations between the company and the co-owners will not be subject to Article 126 LSC, or is it simply sufficient that there be majority (co-)ownership for the "majority" to no longer be required to communicate with the minority through a shared representative? Since it is clear that a majority of the shareholders can vote to exempt this majority from having to communicate with the company or with minority shareholders under the aforementioned Article 126, it is also clear that they can do so by all attending the meeting — or by a group of co-owners who have been elected by the others as "representatives" attending the meeting — and directly imposing a rule of conduct on the minority shareholders. But there is also this: the majority of co-heirs directly informs the outsider shareholder "from outside the company" that things will proceed in one way or another. This conclusion becomes all the more robust as the majority of co-heirs approaches the 100% threshold of the share capital. Thus, someone (anyone) informs the sole outsider shareholder that matters will proceed in one way or another, without the corporate body or the minority shareholders being able to object.

5. We must now turn to "joint owners" (of post-marital or pure hereditary community property).

6. **If there is more than one co-owned share, Article 126 LSC does not apply to hereditary or post-marital community property**

   I have already stated that, given its scope and limitations, Article 126 applies to joint owners of a single share. But this has little or no practical relevance. The overwhelming majority of legal and judicial sources unequivocally hold that Article 126 LSC applies equally to the coheirship with respect to a block of shares, although it appears that no source overlooks the fact that in these "co-ownerships in an estate" the co-owners do not hold any specific share in each individual share or in a block of shares, but rather in the estate as a whole. Each shareholder's abstract share in the estate falls under an intangible metageneric category, known in Roman sources as *hereditas*, and this share — by virtue of its abstract nature — includes company shares, pet dogs, vehicles, houses, and lease receivables, but only *in fieri*, because only partition will put things in their proper place. The holder of this share cannot be the owner of company shares or of a share in company shares that the *hereditas* holds in a company limited by shares. Right. But what also cannot be said — as nearly all sources do — is that "the coheirship is the shareholder", the sole owner of the block of inherited shares. Not only because such coheirship is not a legal person, but also because it would not be appropriate to consider it a "functional" legal person either. It makes no sense to attribute legal personality — whether it's own or extended — when there are no corporate bodies or assets, no debts or liabilities of its own, and when not even a "minimal" separation of assets can be posited (as in a business partnership). Well, the matter is of little consequence because it is very likely that these sources express themselves in this manner as a *modus vulgaris loquendi* that prefers to speak in (more concise) metaphors rather than use a somewhat convoluted circumlocution that would amount to saying that the shareholders of such companies are the individuals who are concurrently joint owners.

7. It is true, however, that the joint ownership must appoint a shared representative. But not under Article 126 LSC, because those with an interest in the joint property are neither shareholders nor co-owners of shares. Since there are no "shareholders" the joint ownership can only act as a single entity vis-à-vis third parties through a representative of the joint property — a sort of quasi-body of the coheirship. However, it is not necessary for there to be a single representative; several representatives may be appointed; it may even inform the "company" that the four co-heirs will have a place in the meeting of shareholders and that each of them will hold voting rights corresponding to x% of the shares held jointly. This is all the more true if the co-owners hold the majority of the shares.

   The representative appointed by the majority of the heirs may not make corporate decisions that create a conflict of interest with the co-heirs who did not vote for him or her. The sole shareholder holding 1% of the capital "cannot require the co-owners" to deal with him or her under the terms of Article 126 LSC. This is because, if the "sole representative" could decide by his or her

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vote alone at a shareholders' meeting that Article 126 would not apply, the co-owners could similarly decide — in a non-corporate (but legally valid) manner — that Article 126 would not apply: that matters would be handled in such-and-such a way in the future. This is an obvious application of the "piercing the corporate veil" rule. A minority shareholder who insists on not piercing the corporate veil is engaging in an abuse of rights.

8. The co-owners of post-marital community property holds 100% of the share capital

We now turn to a very common form of joint ownership involving 100% of the share capital. The widower, who holds 50% of the abstract post-marital estate, shares ownership with the heirs (whether co-heirs or not) of the predeceased spouse; together, they jointly hold an estate that forms part of another joint ownership. Leaving aside the widow's usufructs and socinian clauses for now, the entire share capital "belongs" to the post-marital estate and there is no separation of ownership.

Suppose the widower is the company chairperson, or that the surviving spouse has been elected company chair based on his or her half of the share capital plus the one-third usufruct that the decedent assigned to the usufructuary with voting rights in company matters. Or, alternatively, the company appoints one of the co-owners as chair. It is clear that the chair of this company cannot demand that the co-owners act as a single representative under Article 126 LSC. Of course, "all" will act corporately in whatever manner they agree upon (*e.g.*, the co-owners holding shares in proportion to their abstract shares in the post-marital estate), but, if by chance they have already appointed a company chair from among themselves, that chair could not impose on the co-owners any other way of participating and voting at a "meeting" than the manner decided by the majority of the abstract shares in the joint property, "outside the corporate framework."

9. The co- heirs own 100% of the share capital

The solution is the same when co-heirs holding 100% of the share capital do not hold an interest in post-marital community property with the surviving spouse. Or when the surviving spouse participates with his or her 50% share of the post-marital community property plus the "usufruct with voting rights" over the entire co-heirship. In both this case and the previous one, unless the resolutions are subject to registration in the Registry of Companies, it is not even necessary to follow corporate procedures. The agreement is reached within the co-heirship: it is binding on the "company", even if it was not reached through corporate procedures.

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