

# Spanish Matrimonial Property Regimes and CEFL Principles Regarding Property Relations between Spouses

## Common Core and Better Law

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### Abstract

*This article compares the CEFL principles to Spanish civil law regarding the general rights and duties of spouses, matrimonial property agreements and matrimonial property rights, i.e., property relations between spouses, by detecting where the latter follows the common core or better law approach solution selected by the former.*

**Keywords:** matrimonial property regimes, Commission on European family law, Spanish civil law, common core, better law.

### A Introduction

At the end of August 2013, the Commission on European family law (CEFL) presented the fourth set of Principles of European Family Law in the field of property relations between spouses.<sup>1</sup> On the basis of the 26 national reports, the CEFL formulated 58 principles.<sup>2</sup>

The CEFL goal of harmonizing European substantive family law has led to a new set of principles that are detailed and complete enough to be state law and, thus, are able to regulate, almost completely, a dispute between the parties. Although nowadays non-state law cannot be designated as the applicable law in the area of family law, it is also true that what the CEFL has developed is valuable

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1 K. Boele-Woelki *et al.*, *Principles of European Family Law Regarding Property Relations between Spouses*, Cambridge-Antwerp-Portland, Intersentia 2013.

2 K. Boele-Woelki, B. Braat & I. Curry-Summer (Eds.), *European Family Law in Action: Property Relations between Spouses*, Vol. IV, Antwerp-Oxford-Portland, Intersentia 2009.

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not only for harmonization purposes but also for when the European legislator decides to create an optional European matrimonial property regime.<sup>3</sup>

Within the drafting process of these principles – as those drafted before – the CEFL disclose five different approaches. When a common core was found, the principle usually follows this approach, although it is also possible that a better solution was selected or that the solution was left to national law. In those cases where no common core was detected, either the best solution was selected or the solution was left to national law.<sup>4</sup>

The wide-ranging and comprehensive character of the principles – and thus their potential suitability to regulate most property relations between given spouses – can become apparent through the comparison of the principles themselves and the solutions offered by a national legislator in the area of matrimonial property regimes.

The purpose of this article is to compare the principles of European Family Law regarding property relations between spouses with the regulation of matrimonial property regimes in Spanish civil law. In other words, the aim of the article is to juxtapose the Spanish legal system against the principles – or vice versa<sup>5</sup> – by detecting if the former follows the common core or better law approach taken by the latter.

It is important to note that this article does not provide an exhaustive and extensive analysis neither of the Principles nor of the Spanish matrimonial property regimes. There is also another important delimitation: the research is based on the so-called *derecho común* (Spanish general law) and not on the *derechos forales o especiales* (territorial laws), still prevalent in several Autonomous Communities.<sup>6</sup>

This analysis will follow the structure and content of the CEFL principles and, thus, will first examine the general rights and duties of spouses. Next, it will con-

- 3 See the following literature on this subject: A. Agell, 'The Division of Property upon Divorce Form a European Perspective', in *Liber amicorum Marie-Thérèse Meulders-Klien: droit compare des personnes et de la famille*, Brussels, Bruylant 1998, p. 20; D. Martiny, 'Is Unification of Family Law Feasible or Even Desirable?', in A. Hartkamp et al. (Eds.), *Towards a European Civil Code*, 4th edn, Alphen aan den Rijn, Wolters Kluwer 2011, p. 444; N. Dethloff, 'Arguments for the Unification and Harmonization of Family in Europe', in K. Boele-Woelki (Ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, Antwerp, Intersentia 2003, p. 54 and K. Boele-Woelki, 'Why and How to Accommodate an Optional European Family Law', in N. Witzleb, R. Ellger & P. Mankowski (Eds.), *Festschrift für Dieter Martiny zum 70. Geburtstag*, Tübingen, Mohr Siebeck 2014.
- 4 K. Boele-Woelki, 'Building on Convergence and Coping with Divergence', in M.V. Antokolskaia (Ed.), *Convergence and Divergence of Family Law in Europe*, Antwerpen, Intersentia 2007, p. 44.
- 5 A similar approach to this article, but in the field of the principles of divorce and maintenance and parental responsibilities, can be found in E. Örucü & J. Mair (Eds.), *Juxtaposing Legal Systems and the Principles of European Family Law: Divorce and Maintenance*, Antwerp-Oxford-Portland, Intersentia 2007 and J. Mair & E. Örucü (Eds.), *Juxtaposing Legal Systems and the Principles of European Family Law on Parental Responsibilities*, Antwerp-Oxford-Portland, Intersentia 2010.
- 6 For an extensive analysis of the different matrimonial property regimes not only in the *derecho común*, but also in the different *derechos forales o especiales*, see J.L. Gimeno y Gómez-Lafuente & E. Rajoy Brey (Coords.), *Regimenes económico-matrimoniales y sucesiones. Derecho común, foral y especial*, Vol. I, Cizur Menor, Thomson Civitas 2008.

sider how party autonomy is regulated both in the principles of the CEFL and in Spanish civil law. Thirdly, the two matrimonial property regimes drafted by the CEFL – participation of acquisitions and community of acquisitions – will be compared with those of the same category in the Spanish civil code. Finally, it presents a general conclusion of the comparison.

## B General Rights and Duties of the Spouses

First and foremost, both the CEFL principles and the Spanish civil code contain provisions regarding general rights and duties of spouses, relating to a series of primarily financial provisions which are applicable due to the existence of the marriage *per se*, which the parties are unable to waive or change them. In Spain, as in other continental legal systems (*i.e.* France or Belgium), this group of legal relationships is known as *régimen primario*.<sup>7</sup> In the CEFL principles these dispositions are regulated in Chapter I (principles 4:1 to principle 4:9), in Spanish law they are contained in Articles 1318 to 1324 of the Spanish civil code (SCC).

When drafting these principles, the CEFL mainly followed the common core approach, but in some specific aspects, although a common core was found, a better law solution was selected. For example, in the case of not needing to include in the principles the spouses joint and several liabilities for debts related to cover the needs of the family. Besides, under certain situations, no common core was discovered and the solution was left to national law, for example, with regards to the formal requirements of the spousal consent to represent the other spouse.

An examination of the different dispositions regarding the general rights and duties of the spouses reflects, to a greater or lesser extent, a high degree of similarities between the solutions offered by the CEFL and Spanish civil law, since both include the equality of the spouses (principle 4:2 and Articles 66 and 1328 SCC), their legal capacity (principle 4:3 and Article 1323 SCC), their contribution to the needs of the family (principle 4:4 and Article 1318 SCC), the protection of the family home and household goods (principle 4:5 and Article 1320 SCC), the option regarding mutual representation in legal transactions (principle 4:7 and Articles 71 and 1439 SCC) and the freedom to enter into marital agreements (principle 4:9 and Article 1315 SCC).

As stated before, these CEFL principles were mainly drafted by using a common core approach, and thus, the main consequence of the similarities between the CEFL principles and the Spanish civil law is that the latter was accomplished with the common core approach taken by the former.

7 Boele-Woelki *et al.* 2013, p. 37 and W. Pintens, 'Matrimonial Property Law in Europe', in K. Boele-Woelki, J. Miles & J. Scherpe (Eds.), *The Future of Family Property in Europe*, Cambridge-Antwerp-Portland, Intersentia 2011, p. 20.

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However, the set of rules provided by the CEFL is more specific and detailed than Spanish civil law regarding certain issues.<sup>8</sup> For example, whereas the CEFL principles explicitly define ‘needs of the family’ (principle 4:4(2)), Article 1318.I SCC does not. This absence is covered by Article 1362 SCC, which refers to the expenses that must be covered by community property.<sup>9</sup> The Spanish *régimen primario* provisions also do not regulate the duty of one spouse to inform the other about his or her assets, although some authors have interpreted that the spouses’ duty to respect and assist each other and to act in the interest of the family (Article 67 SCC) in effect means that both spouses have to inform each other.<sup>10</sup> The CEFL principles do (principle 4:8), since the CEFL detected there is no common core in regards to the extent to which spouses are under an obligation to inform each other.

### C Matrimonial Property Agreements

Matrimonial property agreements drafted by the CEFL make up the second chapter of the principles (4:10 to 4:15), whereas in Spanish law they are regulated in Articles 1325 to 1335 SCC. Taking into account that the principles mainly – but not exclusively – follow the civil law approach (*i.e.* they allow the choice a matrimonial property regime<sup>11</sup>) one can foresee that there would be a clear kinship between both options. The CEFL, however, offers a different solution as to the obligation of spouses to disclose assets and debts when making an agreement and regarding the possibility of intervention of the competent authority setting aside or adjusting the content of the agreement in cases of unfair results by providing two principles which, precisely, do not reflect the common core among civil law jurisdictions.

The general freedom of the spouses to make agreements is contained in principle 4:10. According to this principle and the comments of its drafters, it is possible to make pre- and post-marital property agreements choosing a matrimonial property regime for all or part of the property and for the duration of the marriage or restricted to a limited period. The matrimonial property agreements that may be chosen under this principle are the participation in acquisitions or community of acquisitions. Yet if national law allows it, spouses can exercise party autonomy in different ways, for example, choosing a different matrimonial property regime or designing a tailored one. This is also true in regards to the modification of the matrimonial property regime, as expressly stated in the principle.<sup>12</sup>

8 K. Boele-Woelki, ‘General Rights and Duties in the CEFL Principles on Property Relations between Spouses’, in K. Boele-Woelki, N. Dethloff & W. Gephart (Eds.), *Family Law and Culture in Europe: Developments, Challenges and Opportunities*, Cambridge, Intersentia 2014, pp. 11-12, referred to the prominent role than rights and duties of the CEFL principles have in comparison with many European jurisdictions.

9 L. Díez-Picazo & A. Gullón, *Sistema de derecho civil. Derecho de familia*, 11th, Vol. IV, Madrid, Tecnos 2013.

10 C. González Beilfuss, ‘Question 144’, in Boele-Woelki, Braat & Curry-Summer 2009, p. 961.

11 N. Lowe, ‘Marital Property Agreements’, in Boele-Woelki, Dethloff & Gephart 2014, pp. 14-16.

12 Boele-Woelki *et al.* 2013, pp. 99-118.

Similarly, in Spanish law, spouses are able to make matrimonial property agreements to stipulate, amend or replace the matrimonial property regime as well as to stipulate other provisions (Article 1325 SCC). Party autonomy can be exercised before (pre-marital agreements) or during (post-marital agreements) the marriage (Article 1326 SCC). Spouses may also change their matrimonial property regime at any time (Article 1331 SCC). Together with these main features that are expressly contained in the Spanish civil code, some authors have underlined other characteristics of the agreements, such as the option to choose an *ex novo* matrimonial property regime or the possibility of establishing a subsequent or precedent condition for its application.<sup>13</sup>

As a result of the comparison of the basic features of the matrimonial property agreements contained in the CEFL principles and those regulated in Spanish law, one can conclude that the basic goal and possibilities offered are almost equal not only regarding the concept of matrimonial property agreements but also in respect to formal requirements (principle 4:11 and Articles 1280.3º, 1327 and 1332 SCC), to the legal professionals drafting the agreement (principle 4:13 and Article 147 Reglamento notarial), and to their effects against third parties (principle 4:14 and Article 1333 SCC). Nevertheless, there are important differences, such as those regarding the obligation of disclosure and exceptional hardship. These principles do not follow a core approach among civil law jurisdictions and are thus unlike Spanish legal provisions.

According to principle 4:12 spouses are mutually obliged to inform each other about their assets and debts when making a matrimonial property agreement. This is not expressly provided in Spanish law nor in the majority of civil law jurisdictions that permit said agreements.<sup>14</sup>

But without any doubt one of the main differences has to do with the possibility of intervention by the competent authority to set aside or adjust a marital property agreement in cases of exceptional hardship, pursuant to principle 4:15. In Spanish law, as in the majority of Civil law jurisdictions, matrimonial property agreements have the status of binding contractual provisions and cannot be set aside on grounds of unfairness.<sup>15</sup> This is mainly because most Civil law systems try – even if not completely – to seek fairness by creating maintenance obligations (in Spain, *pensión compensatoria*, Article 97 SCC) in order to correct unjust consequences that may result from the dissolution and liquidation of the matrimonial property regime.<sup>16</sup>

13 Díez-Picazo & Gullón 2013, pp. 152-153 and L. Zarraluqui Sánchez-Eznarriaga, *Derecho de familia y de la persona. Regímenes económicos matrimoniales*, Vol. V, Madrid, Bosch 2007, pp. 33-34.

14 Boele-Woelki et al. 2013, pp. 123-125.

15 *Ibid.*, pp. 135-136.

16 J. Ferrer-Riba, 'Spain', in J. Scherpe (Ed.), *Marital Agreements and Private Autonomy in Comparative Perspective*, Oxford, Hart publishing 2012, pp. 356-357.

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## D Matrimonial Property Regimes

During the drafting process, the CEFL revealed that the elements of all national matrimonial property regimes cannot be merged into one.<sup>17</sup> Thus, the CEFL has drafted two matrimonial property regimes – participation in acquisitions (Chapter III.A) and community of acquisitions (Chapter III.B) – and put them on an equal footing. In the Spanish legal system, there is one default matrimonial property regime, the community of acquisitions (*sociedad de gananciales*, Articles 1344 to 1410 SCC), applicable in cases where spouses have not entered into a contract concerning the matrimonial regime or if this contract is ineffective (Article 1316 SCC). In addition, the Spanish civil code contains two other legal regimes that can be chosen by the parties through a matrimonial property agreement: the participation in acquisition (*régimen de participación*, Articles 1411 to 1434 SCC) and the separation of property (*régimen de separación*, Articles 1435 to 1444 SCC).

Thus the coincidence between the principles of the CEFL and Spanish law is the possibility of choosing a community system, on the one side, and a participation system, on the other. The key question is to what extent and how similar both regimes are.

### I Participation in Acquisitions

Participation of acquisitions is one of the two matrimonial property regimes created by the CEFL (Chapter III. Section A); it is also one of the optional regimes in the Spanish legal system (Articles 1411 to 1434 SCC). This regime aims to promote self-sufficiency and autonomy of the spouses and also inter-spousal solidarity and fairness.<sup>18</sup> While the regime is in effect, there is separation of property between spouses but at the time of its dissolution, if one spouse's net acquisitions – in the CEFL regime – or accrued gains – in the Spanish regime – exceed the value of the other's, the latter participates in the surplus to the amount of one half.

Even though both regimes can be classified as participation regimes, the different categorization of assets results in a different structure. Participation of acquisitions provided by the CEFL distinguishes between each spouse's acquisitions and his or her reserved property, but not between initial assets and final assets of each, as is the case of the participation regime offered by the Spanish law. This is also the case if one compares the CEFL participation in acquisitions with the German one or with the deferred community property regime of Denmark, Finland and Sweden, where a different categorization of assets is also provided.

Consequently, each spouse's participation at the time of dissolution and liquidation of the matrimonial property regime is different: under CEFL, only acquisitions are compared in determining which spouse participate in the surplus of the other, while in Spain the surplus is calculated by comparing the accrued gains of each spouses, *i.e.* the difference between final and initial assets. Thus, the Spanish

<sup>17</sup> Boele-Woelki *et al.* 2013, p. 25.

<sup>18</sup> *Ibid.*, p. 25.

regime offers a far-reaching matrimonial solidarity, while in the regime provided by the CEFL the existence of reserved property of each spouse results in a lack of total participation.<sup>19</sup> In spite of this, it is possible to find resemblances between certain aspects of both regimes.

Firstly, the composition of the different categories of assets – initial assets and final assets vs. acquisitions and reserved property – is very similar, despite the different naming and their implications. On the one hand, the initial assets of the Spanish participation regime (Article 1418 SCC) consist of the property and rights belonging to each spouse at the onset of the regime as well as those subsequently acquired by inheritance, gift or legacy; these are, in effect, similar to the first two categories of the reserved property included in principle 4:19. On the other hand, according to the Spanish participation regime (Article 1422 SCC), final assets of each spouse are his or her assets at the time of dissolution of the marriage; these are the same as the acquisitions contained in principle 4:18.

Secondly, in regards to the administration of property, both regimes establish that each spouse should be able to independently administer his or her property. It is clear, however, that this freedom has a limit. Per CEFL, principles 4:5 and 4:6 are fully applicable, since any act of disposal of the family home and household goods requires the consent of both spouses. Similarly, in Spanish law the consent of both spouses is required to dispose of rights over the family home and household goods even if such rights should belong to only one of the spouses (Article 1320 SCC).

Regarding grounds for dissolution of the matrimonial property regime, there are also important parallels. CEFL principle 4:24 establishes the same grounds for the dissolution of the participation regime as those referred to in Articles 1315 and 1416 SCC but specified in arts.1392 and 1393 SCC. But Spanish law, in contrast to CEFL, gives a detailed list of grounds that justify the intervention of the competent authority for the dissolution of the community (Article 1393 SCC), such as incapacitation of one of the spouses, acts of administration of one of the spouses which defraud the community property or the *de facto* separation of spouses for more than one year.

Further, there are differences concerning the date of dissolution of the matrimonial property regime. For example, whereas principle 4:25(b) considers the date of application as decisive in cases of dissolution by divorce – this solution is based on a better law approach – Spanish law takes a different approach because the relevant date is that on which the judicial decision on the divorce becomes final (Article 95.1° SCC). When the dissolution stems from the death of one of the spouses, principle 4:25(a) explicitly opts for the date of death as decisive – there is a common core in this question – while under Spanish law this is not as clear. Some authors claim that the date should be that of the declaration of death, while others argue for the date when the death presumably occurred.<sup>20</sup>

19 D. Martiny, 'The Participation in Acquisitions Regime', in Boele-Woelki, Dethloff & Gephart 2014, p. 35.

20 C. González Beilfuss 2009, p. 518.

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After the dissolution of the regime liquidation follows. Even though both regimes coincide in establishing the relevant date for the determination of acquisitions or final assets – according to the different categorization of assets – a different solution is offered to establish the relevant date of valuation. Whereas the Spanish participation regime opts for the date of its dissolution,<sup>21</sup> the CEFL participation of acquisitions prefers the regime's liquidation date (principle 4:26(b) for which no common core was found regarding this issue and the best solution was selected), whereby both spouses share the risks of changes in the value of assets.

At the time of the liquidation both matrimonial property regimes include dispositions regarding detrimental transactions (principle 4:27 and Articles 1423 and 1424 SCC).

Another issue in the liquidation process is the right to compensation. In the Spanish participation regime, contrary to the participation system of the CEFL (principle 4:28), there are no dispositions regarding compensation, since the regime does not make a distinction between reserved property and acquisitions but rather between the initial and final property of each spouse.<sup>22</sup>

The main difference between both regimes is apparent at the moment of determining the right of participation. Whereas the participation of acquisitions drafted by the CEFL provides for an equal participation in net acquisitions (principle 4:31), the right of participation in the Spanish regime is calculated by comparing the accrued gains (final assets minus initial assets) of each spouse (Article 1427 SCC).

Both regimes establish as a general rule the participation of one half of the surplus – and, thus, Spanish law follows the common core approach of this principle – unless spouses agree otherwise, but the party autonomy contained in CEFL (principle 4:29) is greater than that in Spanish law, where an agreement on a different participation must apply equally and in the same proportion to both sets of net assets in favour of both spouses (Article 1429 SCC) and cannot be made if there are descendants who are not common to both spouses (Article 1430 SCC).<sup>23</sup>

Finally, another difference between the participation of acquisitions of the CEFL and the Spanish participation regime refers to the possibility the former provides regarding the intervention of the competent authority in adjusting the participation or setting aside or modifying the participation agreement under exceptional cases (principle 4:32). This principle is not based on a common core approach, since the competence of the court to intervene under these situations is not provided in all legal systems. As stated before, most Civil law systems, Spanish law included, correct inequity between former spouses by means of other

21 Díez-Picazo & Gullón 2013, p. 226 and M.J. Reyes López, 'El regimen de participación', in J.R. De Verda y Beamonte (Ed.), *Derecho civil IV. Derecho de familia*, Valencia, Tirant lo blanch 2013, p. 203.

22 As in the case of German or Greek participation systems. See Boele-Woelki *et al.* 2013, p. 196.

23 Regarding this limitation, see E. Algarra Prats, 'Del regimen de participación', in J. Rams Albesa & J.A. Moreno Martínez (coords.), *El regimen económico del matrimonio: Comentarios al Código civil: especial consideración de la doctrina jurisprudencial*, Madrid, Dykinson 2005, pp. 789-797.

solutions, for example, by the allowance of maintenance orders, in Spain *pensión compensatoria* (Article 97 SCC).<sup>24</sup>

## II Community of Acquisitions

A second matrimonial property regime offered both by the CEFL (Chapter III. Section B) and Spanish law (Articles 1344 to 1410 SCC) is the community of acquisitions, under which any property acquired during the regime that it is not personal property of one of the spouses is divided at the time of the dissolution of the matrimonial property regime. This matrimonial property regime promotes solidarity and equity of both spouses while the regime is in effect and at the time of its dissolution. In addition, one of its main strengths is that it protects the spouse who does not own any assets or is not integrated into the labour market.<sup>25</sup>

The community of acquisitions drawn up by the CEFL and that contained in the Spanish civil code are very similar and evidence a high degree of uniformity. Notwithstanding, solutions offered by each may differ.

Regarding the composition of the assets, both regimes distinguish clearly between community property and personal property and, thus, one can conclude that Spanish civil law, in a greater or lesser extent, follows the common core approach that CEFL has chosen for this question.

There are, however, some unessential differences as to how these regimes deal with the classification of the assets. Even though community property in the CEFL regime includes both movable and immovable property acquired during the regime which is not the personal property of the spouses (principle 4:35(1)), the list of specific assets included in this group (principle 4:35(2)) is shorter compared to the ones included in Spanish civil law (Articles 1347 to 1360), as the latter explicitly includes, for example, companies and establishments founded by one spouse with community property and improvements made to common assets.

In respect to personal property, principle 4:36 is almost equal to Article 1346 SCC. It is true, however, that this principle leaves the determination of the nature of intellectual rights or personal damages to national law.<sup>26</sup> In Spanish law, whereas the latter is expressly considered personal property (Article 1346.6° SCC), the former is not included in the list, but some authors consider the right itself, but not the income derived from this right, a personal asset.<sup>27</sup> This 'more detailed' character of Spanish civil law is compensated by the CEFL with better and more complete rules regarding substitution (principle 4:37) and investment or reinvestment (principle 4:38).

Not only is the composition of the groups of property similar but also that of the debts. Consequently, Spanish law again follows the common core approach

24 See Boele-Woelki *et al.* 2013, pp. 123-125.

25 Boele-Woelki *et al.* 2013, p. 26 and F. Ferrand 'The Community of Acquisitions Regime', in Boele-Woelki, Dethloff & Gephart 2014, pp. 38-41.

26 Boele-Woelki *et al.* 2013, p. 236.

27 Díez-Picazo & Gullón 2013, p. 164 and C. Rogel Vide, 'Bienes gananciales, bienes privativos y propiedad intelectual', in *Centenario del Código civil. Tomo II de la Asociación de profesores de derecho civil*, Madrid, Editorial Centro de Estudios Ramón Areces 1990, p. 1853.

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that the CEFL selected as the best solution for this question in the majority of the cases.

The community of acquisitions offered in both cases coincides that community debts can be recovered from community property as well as from personal property of the spouse/s who incurred the debt (principle 4:42 and Articles 1367 and 1369 SCC). However, the principles drafted by the CEFL do not establish the order of ranking to be followed by the creditor, since this question is left to national law.<sup>28</sup> If Spanish law is applied, it distinguishes between cases where spouses acted together (or one spouse acted with the consent of the other) and those where one spouse acted alone. Whereas in the latter case it expressly determines a joint and several liability between community property and the property of the spouse who incurred the debt (Article 1369 SCC, the non-contracting spouse can only be accountable when the debt was related to household expenses), in the former, doctrine interprets that there is also a joint and several liability.<sup>29</sup>

Personal debts are not expressly listed in the Spanish civil code, but contrary to principle 4:41, are defined in a negative way. In respect to the recovery of personal assets, 4:43 establishes that these debts can be recovered from the debtor spouse's personal property, his or her income and gains as well as from community assets to the extent of their merger with the debtor spouse's personal property. The CEFL, like Spanish law (Article 1373 SCC), establishes that a personal debt of one spouse should primarily be recovered from the personal assets of that spouse.<sup>30</sup>

One of the main differences between the two regimes, at least from a theoretical point of view, is the way in which they organize the administration of community assets. Whereas in Spanish law the general rule is that spouses administer community assets jointly (Article 1375 SCC), there are some instances that do not require the consent of both spouses, such as the possibility of one spouse to freely borrow community money if it is necessary for activities related to the exercise of his or her profession (Article 1382 SCC), the possibility to act unilaterally in defense of community assets (Article 1385.2° SCC) or the option of each spouse to act unilaterally in cases of urgent necessary expenses (Article 1836 SCC). The approach taken by the CEFL – there is no common core in the surveyed jurisdictions in this question – is the opposite (principle 4:44): the general rule is that both spouses are entitled to unilaterally administer community property but important legal transactions (principle 4:45) require joint administration.

Another difference between these regimes is that whereas in the CEFL there is only one legal consequence for acts requiring joint administration in cases when one spouse acts alone, the annulment of the transaction upon application of the non-contracting spouse (principle 4:46), in Spanish law it is necessary to distinguish between gratuitous and onerous title transactions. While in the for-

28 Boele-Woelki *et al* 2013, p. 264 and Ferrand 2014, p. 49.

29 Díez-Picazo & Gullón 2013, p. 177 and J.R. de Verda y Beamonte, 'La sociedad de gananciales', *in* de Verda y Beamonte 2013, p. 166.

30 Boele-Woelki *et al.* 2013, p. 272. Ferrand 2014, p. 50.

mer the legal consequence is the nullity of the transaction (Article 1378 SCC), the latter leads to voidability (Article 1322 SCC).

However not all matters related to the administration of the community are different, as there is a similitude regarding the divestment of the right to administer community property (principle 4:48 and Articles 1387-1388 SCC).

The community of acquisitions drafted by the CEFL and the ones established in the Spanish civil law come to an end on very similar grounds for the dissolution (principle 4:49 and Articles 1392 and 1393 SCC). Nevertheless, in regards to the CEFL, there is a distinction between the date that the dissolution takes effect between spouses and as against third parties (principle 4:50).

After the dissolution of the regime, comes its liquidation. Both regimes (principle 4:52 and Article 1497) distinguish between the date that community assets are to be considered (the date of dissolution of the community of acquisitions) and the date of their valuation (the date of their distribution), and, thus, Spanish civil law is in accordance with the common core solution selected by the CEFL. Then, both follow similar rules regarding the compensation when community/personal properties have been used for community/personal profit, as stated in principle 4:53 – a common core rule – and Article 1358 SCC. Nevertheless, in the process of liquidation, the approach to the ranking of debts differs, since the CEFL establishes that community debts and compensation rights rank equally (principle 4:54) and in Spanish law community debts have priority over compensation rights (Article 1399 SCC). In this case, Spanish civil law does not follow the better law approach taken by CEFL.

Finally, both regimes allow spouses to reach an agreement on the distribution of community assets. If an agreement cannot be reached or if it is deemed invalid, the general rule in both cases (principle 4:57(1) and Article 1444 SCC) is the equal distribution of the community assets between spouses. Spanish law, consequently, is in accordance with the common core solution selected by CEFL in this regard. However, there is a huge difference in regards to the adjustment or modification of the equal distribution by the competent authority in cases of exceptional hardship, since the CEFL allows for this possibility (principle 4:57(2)) – in this case, a better law solution was chosen by CEFL – and Spanish law, as stated before, follows a different approach: inequitable results are mitigated by the *pensión compensatoria* (Article 97 SCC) when the marriage is dissolved by divorce.<sup>31</sup>

## E Conclusions

Spanish civil law is, to a large extent, in accordance with the CEFL principles, as in the majority of the cases it follows the approach taken by them.

In regards to the general rights and duties established by CEFL, their similarity with the Spanish *régimen primario*, allows one to conclude that Spanish civil law follows the, most used, common core approach taken by the former.

31 See Ferrer-Riba 2012.

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As to the matrimonial property agreements, Spanish civil law is also mainly in accordance with the common core approach taken by the CEFL. However, there is an important difference between CEFL principles and Spanish law, which may seem to be similar in their end result, but which are arrived at by different means. Whereas the principles allow the competent authority to modify or set the agreement aside in cases of exceptional hardship – which is precisely not a common core solution among civil law jurisdictions – in Spanish law these agreements have the status of binding contractual provisions. However, the Spanish law recognizes a right to financial compensation of the spouse who endures an economic imbalance in relation to the other spouse's position (*pensión compensatoria*).

Finally, CEFL offers two matrimonial regimes, which can be compared with two Spanish matrimonial property regimes: participation in acquisitions and community of acquisitions. In the former, which is an optional regime in Spain, both CEFL and Spanish law categorize assets differently and, thus, the participation in surplus is different. The latter, which is the default regime in Spain, reflects a high degree of similarity. Thus, one can conclude that the dominant common core approach taken by the CEFL when drafting this regime is also followed by Spanish civil law.