Intergenerational transfers of entrepreneurial assets. The destiny of the company share between individualistic aspects and the need for the continuation of the economic initiative[*]

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Sommario: 1. Introductory remarks. – 2. The intergenerational transfer of wealth in the context of the *società di persone*. – 3. *Società di capitali* and transfer *mortis causa* of shares in the company. – 4. The death of the shareholder: readjustment of company ownership and impact on governance policies. – 5. Comments and conclusions.

1. Introductory remarks

Inheritance is one of the core areas of the Italian legal framework that is going to be reformed in the foreseeable future. In the field of inheritance, as in many other fields, the reform that is in progress is moving towards a more "liberal" approach, with the aim of reassessing and improving the transfer of assets between generations. This aim should be achieved through a long-awaited change in the current legal system (although there are different opinions on how effective the change will be), which is based on the generally agreed need for "flexibility injections" in order to rebalance the system of weights and counterweights that applies during the transfer of assets[1].

Indeed, the debate over the new structure of Book II of the Italian Civil Code (hereinafter ICC) cannot fail to take into consideration, in a broad and systematic perspective, the issue of transfers between generations.

(*) The present study reproduces, with the integration of some bibliographic notes, the speech given as part of the international conference on topics regarding «Intergenerational transfer of wealth between family and market» held at the Ca' Foscari University of Venice on 23-24 November 2012. Although the work is the result of common reflections, sections 1, 3 and 4 should be credited to Andrea Minto, and sections 2 and 5 to Bianca Longo.

(1) See the research projects formulated by the professional bodies that are involved, among which one should note, for its great efforts on the revision of the rules of inheritance, the *Consiglio Nazionale del Notariato*.

This perspective should be coordinated with the provisions of Book V of the ICC (albeit that in Book V there is indirect, rather than direct, reference to the this aspect), which contains the branch of law which can be defined as business law and is more specialised and segregated than the common private law. As a matter of fact, in the vast field of the transfer of assets, the entrepreneurial phenomenon has an independent value of its own. Evidence for this value lies in the existence of specific legislative tools that complement the more general legal institutions provided by inheritance law, and that may be used for the purposes we are considering here. Among the numerous examples given by the rules governing limited companies, we will consider the different restrictions which can be set on the transfer of the shares, the possibilities offered by Article 2346 of the ICC (concerning the issuing of different types of securities, and the economic and shareholder rights attached to them, but also concerning the suspension of the correlation between the asset and the type of shareholder rights granted), the adoption of alternative governance systems, the involvement of the shareholders (who can be given prior authority in the bylaws for certain management operations), the autonomous and peculiar issue of shareholders' agreements, the recognition of special rights for members of a *società a responsabilità limitata*, and so on.

Of paramount importance is that the particular relevance which the entrepreneurial phenomenon acquires in view of the possibility of it being handed down through generations, as explained above, does not derive from the fact that company law foresees a dedicated (i.e. preordained) instrument to manage the transfer of business assets, but rather from the presence, in the legal system, of instruments whose flexibility facilitates their application for this purpose. In other words, it is worth noting how company law is full of tools – those listed above represent only a small part – that are aimed at regulating corporate governance in a broad manner. These legislative tools were created to pursue such different aims that they lend themselves to being used for the diverse objectives and interests of the economic initiative, directing such initiative in a particular strategic perspective.

In this context, shareholders' freedom of contract is the element that can change legal instruments from their intact and (at least partially) adaptable configuration into a structure that reflects the special nature of the entrepreneurial phenomenon. The autonomy is required to deduce, from the general provisions of the Code, a specific solution which is applicable to the economic initiative that the same solution has to govern.

Indeed, it is a common characteristic of many company law tools that they can be used for several purposes: for example, the reasons for creating a specific category of shares arise or may arise from the general

needs of the organisation or from an entrepreneurial initiative which goes beyond the real purpose of creating the category. Among these reasons we can find those which involve in some ways the management of the life of a company in relation to the life of the shareholders and the involvement, or lack of involvement, of their heirs.

While the general inheritance rules are not appropriate to govern the transfer of entrepreneurial assets between generations, company law provides, *ratione materiae*, more suitable solutions for satisfying the various interests involved in this delicate phase. In particular, in addition to the attention paid to the individualistic aspects involved in each event of succession, company law generally shows the need to take into account the preservation of entrepreneurial wealth. In other words, a share must be considered as having a dual role, so that on the one hand it represents an inheritable item and, on the other hand, it is considered as a part of the company's assets, which may be functionally connected with the aim of keeping the business going and with the wider interests linked to this.

In fact, as soon as a person decides to go into business with other people, unless he just intends to invest his assets for speculative purposes, the part of the company of which he may be considered owner should not be deemed to be only a personal asset, freely transferable to his heirs after his death. It is also part of a shared business project, with respect to which the relevant person is only one among the members: a free disposal of this part, therefore, could meet some limits.

In the light of the two different views – the "self-centred" one and the "entrepreneurial" one – which may characterize the transfer of a company's assets, the legislator has designed a disciplinary regime that is suitable for satisfying the above-mentioned needs but that does not impose a solution that is closer to the individualistic interest or to the business one. The law has provided the basis on which shareholders' freedom of contract can regulate intergenerational transfer in accordance with actual situations, and the law can combine these two different dimensions in order to avoid the dispersion of wealth.

Such attention to contractual forms of management of the firm's succession phase comes both from the awareness of the traumatic consequences that could arise from the interruption of business due to the death of one of the members and from the aim to give the economic initiative a wider temporal horizon(2).

(2) The criticality of the transfer between generations in the field of business is perceived at the highest degree in the so-called family business, which traditionally plays a major role in the national economy (in Italy, 85% of companies – 50% of those with turnover of over 50 million – are family owned: Ganz, *Le imprese familiari in Italia antidoto contro*

In the light of the above, a study of the rules governing the destiny of corporate shares in the context of the transfer *mortis causa* must look at a balance between the various interests involved, and interpret the legislative text in order to encompass the opportunities offered in this respect. However, it is evident that business law is not a uniform set of rules, but is articulated into several disciplinary sectors, which can be divided – for our purposes – according to the different types of companies. The theme of intergenerational transfer must necessarily be developed according to the legal framework within which it is contextualised(3), since the regime for the individual enterprise differs from that for the *società per azioni* even in the rules for the transfer of assets between generations. Among the possible objects of the study, some considerations concerning entrepreneurship practised in the form of a company will be proposed. In particular, the attention will be focused on the *società di persone*, on the one hand, and on the *società di capitali*, on the other(4).

2. The intergenerational transfer of wealth in the context of the società di persone

In the area of the *società di persone*, it seems appropriate to look at the entrepreneurial transfer between generations by focusing on the rules governing what happens to the corporate participation of the member with unlimited liability. Indeed, if we consider the aims underpinning the rules of business law that deal with the transfer *mortis causa* of the corporate share, and at how those rules are integrated into general inheritance law, in the context of the *società di persone* particular attention should be paid primarily to the events concerning the participation of those members capable of influencing the governance and the management of the company(5).

la recessione, in *Il Sole 24 Ore*, 17 November 2012, p. 17). Expanding the study beyond the national borders, there is a similar distribution of such family ownership (in this regard, please refer to the data processed by Rossi, *L'impresa familiare tra piccola impresa, società chiuse, società quotate: la realtà italiana in un contesto globalizzato*, in *L'impresa familiare: modelli e prospettive*, edited by Beria of Argentine, Milan, 2012, p. 11 ff., particularly p. 17).

(3) Montalenti, *Impresa a base familiare e società per azioni*, in *Riv. soc.*, 2012, p. 381 ff.

(4) As for the *società di capitali*, this study only focuses on the *società per azioni* because of its more marked capitalistic structure compared to the *società a responsabilità limitata*.

(5) For an in-depth analysis of the matter, please refer to Menghi, *La morte del socio nelle società di persone*, Milan, 1984, passim, and to Patriarca, *Successione nella quota sociale, successione nell'impresa e autonomia statutaria*, Milan, 2002, p. 36 ff. Furthermore,

From these considerations there is a trend leading towards a certain "indifference" to situations involving the "investment shareholder" and, conversely, towards an enhanced focus on the issues relating to the "shareholder-entrepreneur", who holds the management power and whose *"intuitus personae"* assumes a paramount importance for the company.

In accordance with the individual nature of the obligations arising from being a shareholder in a company, and with the link between power and responsibility that characterizes this kind of company, the rules governing the death of one of the members are therefore guided by the principle of the non-transferability of corporate participation.

Going into more detail, Article 2284 of the ICC states that, except as otherwise provided in the company contract, if one member dies, the others must buy back his participation from his heirs, unless they decide to wind the company up or to continue the business with his heirs if the heirs agree.

First, it must be observed that the Civil Code of 1942, with a markedly different perspective, decided to abandon the previous system, under which the winding-up of a company was intended to be the natural result of the death of one of the members, preferring to protect the continuance of the entrepreneurial activity: nowadays, the death of a member just constitutes the basis for a partial dissolution of the company contract and not the basis for its complete dissolution.

In line with the methodology of taking into consideration the different interests involved in the entrepreneurial phenomenon, which has been explained in the introduction to this study, it is very important to note the non-binding (rather than mandatory) nature of the rules we are examining: they are to be applied only when nothing to the contrary is stated in the company's constitution. In other words, the legal scheme is designed to operate whenever the members did not intend to regulate this phase differently in relation to their specific needs.

To begin with, the legislator thus recognises the opportunity for members to use the company's articles, by inserting a clause that regulates what happens on the death of one of the members[(6)]. Secondly, even in the absence

please see the study by the Consiglio Nazionale del Notariato, *La disciplina legale della morte del socio nelle società di persone: riflessioni sulla fattispecie delineata dall'art. 2284 c.c.*, Studio di Impresa n. 261-2009/I, available at www.notariato.it/en/highlights/ news/ archive/pdf-news/261-09-i.pdf.

(6) For a discussion on the most important clauses that occur in practice, see Galgano, *Le società in genere. Le società di persone*, in *Trattato di diritto civile e commerciale*, directed by Cicu, Messineo, Mengoni, Milan, 2007, p. 322 f. Please refer also to Cottino,

of a specific contractual term, the law allows the surviving members, at the time of the death of one member, to decide to wind up the company or to continue with the heirs. In such a case, the option provided by the law, to buy back the shares, is left as the residual option, in the sense that it applies if the shareholders have not taken advantage of the second chance offered to them, i.e. the chance to regulate the matter themselves (with the first chance being the one granted by the company's articles).

Therefore, the support of the legislative framework for the role of shareholders' freedom of contract in managing the transfer between generations appears not only in the wide scope that is given to it (in the sense of its content), but with reference to the "timeframes" in which it operates. Indeed, members can choose the most suitable solution either in the company's bylaws, therefore acting in advance, or at the moment of the death of one of the members. In this regard, it is necessary to highlight the programmatic value of the choice of inserting a specific contractual clause: given that the establishment of a provision dealing with the death of the member takes place at a time before the occurrence of the event, the company bylaws seem to be the most suitable means to plan the future of the economic initiative and to manage, to a large extent, the risks that the business is wound up. In other words, the fact that the members are called to foresee the scenario in which one of them dies forces them to tackle in a shared and more lucid manner the potential discontinuity represented by the death, thereby enabling them to design more stable and enduring organisational and ownership structures and to settle the different interests involved with a long-term view. On the contrary, such a settlement is not likely to take place in the exercise of the contractual freedom granted by the law, if the articles of the company are silent, at the moment of the death of a member.

Finally, concerning the content of the so-called «business succession clauses», it should be noted that the parties are free to adopt the system which is the most appropriate to their specific needs and circumstances. The broad scope of the law towards freedom of contract has, indeed, some natural limits. These are, on the one hand, the principles belonging to the various branches of the law which interact with the matter under examination (i.e., the freedom of the members meets the constraints of

WEIGMANN, *Le società di persone*, in *Società di persone e consorzi*, *Trattato di diritto commerciale*, curated by Cottino, Padua, 2004, p. 256 ff. These authors conclude that we are mostly dealing with clauses which must be carefully formulated to avoid contravening (or violating) the mandatory principles of both inheritance and company law (p. 256). See also LUCCHINI GUASTALLA, *Gli strumenti negoziali di trasmissione della ricchezza familiare: dalla donazione* si praemoriar *al patto di famiglia*, in *Riv. dir. civ.*, 2007, p. 310 f.

the mandatory rules of both business law and inheritance law), and, on the other hand, the will of the heirs.

3. Società di capitali and transfer mortis causa of shares in the company

The *società di capitali* comes from a completely opposite perspective to the *società di persone*, being governed by the rule of the free movement of its shares. Indeed, in this context the legal system of the transfer *mortis causa* provides for an automatic transmission between generations of shares belonging to the deceased to his heirs, whereas for a *società di persone*, if the company's articles are silent, the immediate effect provided in the law is instead (as we have already seen) the dissolution of the contractual bond with the deceased member.

It is evident that such a different regulatory regime is the expression of the individualist or capitalist approach that distinguishes the two main categories of companies, *società di persone* and *società di capitali*. In fact, all the events concerning the transfer of the corporate participation, which include the transmission *mortis causa*, are subject to mechanisms consistent with the overall organisational structure of the particular type of company.

However, in a similar way to the *società di persone*, the rule mentioned above operates if the company bylaws are silent. The legislator has also recognised in the *società di capitali* a wide scope for self-determination with regards to the establishment of rules governing episodes of discontinuity, such as the death of one of the shareholders: indeed, the principle of the direct transfer of the deceased's shares to his heirs takes places in the absence of specific contractual provisions.

For this reason, the broad freedom of contract granted to the shareholders of a *società di capitali* by the company law reform of 2003 may lay down mechanisms similar to those which can be inserted into the company's articles of *società di persone*. Such legislative choice is in accordance with the aim of adopting the most suitable tools to meet specific needs that may arise in both categories of company (*di persone* or *di capitali*), regardless of the type adopted.

Looking at the *società per azioni* as the most representative type of the *società di capitali*, the relevant legislative reference is Article 2355-*bis* of the ICC which is exactly a product of the reform of company law mentioned above.

While under the previous legislation there were doubts concerning the legitimacy of "inheritance clauses", today the possibility of introducing

limits on the transfer of shares including transmission *mortis causa*, has been positively recognised.

In particular, the formalisation of such a possibility emerges in the context of the third paragraph of Article 2355-*bis* mentioned above, where the express reference to the legal phenomenon of clauses that impose special conditions on transfers of shares following death recognises their legitimacy.

Concerning the latter provision, given the acceptance of forms of contractual management for the intergenerational transfer of shareholdings, the legislator laid down, as a condition for the effectiveness of these clauses, some remedies in the second paragraph of the same Article 2355-*bis* of the ICC. The regime of "special conditions" applying to a transmission *mortis causa* therefore consists of the application of the same remedies that are provided in the event of a transfer *inter vivos* when a "mere approval clause" has been inserted in the company's by-laws(7): a right of renunciation must be given to the successors, or there must be an obligation upon the other shareholders or the company itself to purchase the shares, before any restriction on the transfer of shares in case of the death of the shareholder can be effective(8).

Beyond the many interpretation problems raised by this provision, it is necessary to highlight, for the specific purposes of the investigation into the intergenerational transfer of entrepreneurial wealth, the attention paid by Article 2355-*bis* to the various interests that are represented here. First, the need to protect the entrepreneurial initiative emerges with particular emphasis, since this regime has solved the long-standing and controversial question of the legitimacy of statutory provisions aimed at limiting transfers *mortis causa* [in the sense of their admissibility]: in fact, by these contractual means, it is possible to waive the general principle of the free movement of shares in view of the higher interests of the company.

Since these clauses arise from the will of the "company ownership", they express a shared view – or a majority view – with regard to cor-

(7) The reference is to the so-called "*clausola di mero gradimento*".

(8) In this regard, we should highlight that the remedy represented by the right of renunciation in the context of restrictions on the transfer *mortis causa* of the shares has to be considered as a right to the liquidation of the shareholding of the deceased, since renunciation by the heirs is not possible – the clause of non-transferability prevents them from becoming (and, therefore, from ceasing to be) members – and renunciation by the deceased shareholder is clearly not possible. In substance, the remedies of the second paragraph, designed primarily to regulate the effectiveness of statutory provisions which subordinate the transfer of shares inter vivos to the "mere approval" of corporate bodies or other members, must necessarily be interpreted in these terms in the case of a transmission *mortis causa*.

porate governance. In this regard, it is easy to understand that these restrictive provisions, insofar as they are the synthesis of the wills of the members, primarily consider the interests of the company: more precisely, it must be considered that such clauses are inserted in the section of the bylaws aimed at regulating the functioning of the company and, therefore, that they are also oriented towards a long-term vision of the continuity of the business activity.

In addition, the discipline provided for in the third paragraph of Article 2355-*bis* of the ICC, when interpreted together with the second paragraph of that Article, reveals the concern of the legislator for a different order of instances of a more "selfish" nature.

As a balance to the approach we have noted towards contractual autonomy, and as we have already mentioned, remedies are provided, consisting of the obligation upon the other shareholders or the company itself to purchase the shares of the deceased member, or the right of renunciation if the free transfer of the shares is in fact prevented.

In particular, the protection of the rights of the heirs (and also the rights of the deceased to maximize the wealth to be transferred) can be found not – or not only – in the application of specific remedies in itself, but rather in the ways in which these remedies operate: in other words, the legislative choice to ensure that the heirs do not remain "imprisoned" in the company is significant, but even more significant is the obligation to purchase the shareholding from them at its fair value. Over and above the objective of avoiding the risk of making the heir a "prisoner" in relation to the shares transferred by inheritance, the intention of the legislator to require that a sum equal to the current value of the shareholding is to be paid to the heir has to be underlined.

Indeed, in compliance with Article 2437-*ter* of the ICC, the quantification of the purchase price to be paid to the heirs must be calculated "taking into consideration the assets of the company and its earnings prospects, as well as the possible market value of the shares".

It is clear that the use of such criteria when calculating the value to be assigned to the shares balances the interests of the individuals and the continuity of the business, without giving precedence to one or the other.

Finally, the provisions of Article 2355-*bis* may be considered an illuminating example of the legislative awareness of the duality of interests involved in the intergenerational transfer of entrepreneurial wealth: on the one hand, the need to provide adequate means to preserve the continuity of the business, making it immune from potential risks of disintegration, and on the other hand, the expectations of the shareholders/heirs as regards the transfer of the part of the entrepreneurial wealth to which the deceased member has, in theory, contributed, and, therefore,

the interest in the repurchase of the shareholding at a current price and not at book value.

4. The death of the shareholder: readjustment of company ownership and impact on governance policies

The main problem arising when there is an adjustment of the shareholding structure caused by the death of one of the members is represented by the potential disruption to the strategic objectives of the company. Indeed, it is clear that a redistribution of share ownership is likely to have effects first on the "high-level and strategic administration" of the company, and second on its "executive management", since – at least in the traditional corporate governance system – ownership and control are tightly interrelated. In particular, the managers – even if they have a peculiar relationship that would make their role more autonomous [at least in the substantial profiles of their office(9)] – live in a sort of inevitable state of awe of the major shareholders from whom they take their powers (and, in fact, the shareholders are not only responsible for their appointments but can also decide that their appointments should be revoked *ad nutum*).

The objective of a regulation of the transfer between generations is, therefore, to provide the shareholders with instruments that can operate in advance in management policies. The concept of continuity in the exercise of the business does not express – in this logic – the mere wish to avoid the collapse of the entrepreneurial assets, for example by means of the preservation of the integrity of the share capital without diminishing it by the considerable sums of that would be spent on buying back the shares of the heirs when calculated according to their fair value. The safeguarding of the entrepreneurial phenomenon also moves towards the perpetuation, in the interests of the company and of the surviving members, of the entrepreneurial strategy as it was decided at a given time and as a result of choices that were intended to be consolidated. In order to satisfy this specific need there are several legal instruments, mentioned in the introduction, that have been designed with a certain flexibility, and are suitable for transcending the objectives for which the legislator conceived them in the first instance and gave them their names. Indeed, such instruments will assume a configuration that is

(9) The company law reform of 2003 has the indisputable merit of having improved the discipline of corporate management in many aspects: among these, the profile of the relationship between the directors and the company deserves to be highlighted.

consistent with the purpose to be achieved, according to a legal system characterized by a wide scope for shareholders' freedom of contract. The shareholders are free to design – within the limits of the mandatory rules and binding principles – the organisational structure which is most appropriate to their specific concrete needs, as well as being most suitable to the nature and the size of the company, as required by Article 2381 of the ICC[10].

5. Comments and conclusions

In the light of the discussion above, it can be concluded that company law deals with the phenomenon of intergenerational transfer of the entrepreneurial wealth within the company as a matter to be regulated mainly by the shareholders' freedom of contract, in the awareness of the different instances that may occur in practice of which the extent can be fully appreciated only by the parties involved.

With particular reference to the *società di persone*, it can be concluded that this category of companies, while it certainly does not represent the ideal case for the transfer of entrepreneurial assets, still allows members to pursue the objective of the conservation of the company's production function without compromising their own needs.

As a matter of fact, considering the core principle of the non-automatic transfer *mortis causa* of the *status socii* for those members with unlimited liability, and the more general rule according to which any contractual mechanism could be frustrated by the non-acceptance of the inheritance by the relevant heir, some organisational solutions available for company members seem appropriate to facilitate the succession phenomenon and avoid the discontinuity of the business. These solutions, for example, could prevent either people who were potentially harmful from becoming members of the company or an excessive fragmentation of ownership, or could help the transmission, albeit in a non-automatic way, of the entrepreneurial powers to the most appropriate persons.

With regard to the *società di capitali*, and the *società per azioni* in particular, the support of the law for the introduction of restrictions on the transfer *mortis causa* of shares shows a clear response to corporate needs, and is therefore given in the perspective of the protection of

(10) In this regard, please refer to the contribution of Buonocore, *Adeguatezza, precauzione, gestione, responsabilità: chiose sull'art. 2381, commi terzo e quinto, del codice civile*, in *Giur. comm.*, 2006, I, p. 16 ff.; on the same issue, see also Irrera, *Assetti organizzativi adeguati e governo della società di capitali*, Milan, 2005, *passim*.

the continuity of the economic initiative. At the same time, however, one should take into consideration the attention paid to more properly personal instances, such as the legislative choice concerning the sum to be devolved to the heirs for the purchase or buying back of the shares. Moreover, the management of the intergenerational transfers of wealth within the *società di capitali* can further develop following guidelines provided by some general legislative provisions governing the company, which we have not analysed in this context for reasons of synthesis. Among them, we might mention, with reference to the *società per azioni*, the opportunities offered by the adoption of the dual board system of governance in place of the traditional one, or of drafting shareholders' agreements which, although having only obligatory effects and limited temporal validity, can pursue "distributive" aims concerning the governance or management of the company.

Ultimately, the means that company law legislation provides to govern the delicate phase of the intergenerational transfer of entrepreneurial assets seem to be suitable mechanisms – if used properly – for complementing the traditional measures of the inheritance law, in order to arrive at a satisfactory compromise between different and specific needs. Beyond everything, of course, the law is not omnipotent(11).

(11) Montalenti, *Impresa a base familiare*, cit., p. 402.