EU Regulation no. 650/2012 and access to new forms of intergenerational transfer of wealth

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1. Introduction

The European Parliament and the Council of the European Union recently issued the Regulation no. 650/2012 of July 4, 2012 on jurisdiction, applicable law and enforcement of the decisions on successions, and the creation of a European Certificate of Succession (the «Regulation»).

The Regulation shall provide uniform rules on conflict of laws, aiming at harmonizing the rules of the European countries on determination and choice of jurisdiction, applicable law as well as on the transnational enforcement of the decisions.

With reference to the Italian sources of Law, the uniform rules on conflict of laws provided by the Regulation shall replace Sec. 46 of Law no. 218/1985, which states the current regulation of the conflict of laws in matters of succession *mortis causa*.

However, the Regulation shall also provide substantive rules on the European Certificate of Succession[1].

(1) As the Regulation will be actually applicable in the European Countries, we should consider the implications of the introduction of Article 69 of the Regulation, on the «Effect of the Certificate», vis-à-vis Art. 1189 of the Italian Civil Code on the «Payment to the apparent creditor». Actually, Article 69, § 3, of the Regulation states that «any person, who acting on the basis of the information certified in the Certificate, makes payments […] to a person mentioned in the Certificate […] shall be considered to have transacted with a person with authority to accept payment […] unless he knows that the contents of the Certificate are not

The issue of the Regulation provides the opportunity to reconsider certain material principles of Italian Law on successions in the light of the international context, as granting reserved shares to certain relatives and the invalidity of agreements on succession rights (see §§ 8-10).

Preliminarily, it is appropriate to briefly outline the main contents of the Regulation (see §§ 2-7).

2. Application of the Regulation

The Regulation will become effective on August 17, 2015 (except for certain minor Sections, some of which have come into force on July 5, 2012 and some others that will come into forceon January 16, 2014) and will be applicable to the succession of individuals dying from the effective date onward.

Denmark, United Kingdom and Ireland did not take part in the adoption of this Regulation and are not bound by it or subject to its application. United Kingdom and Ireland reserves the right to notify the intention of accepting this Regulation after its adoption in accordance with Article 4 of the Protocol no. 21 on the position of said countries in respect of the European Union (Whereas no. 82 and 83).

Specific rules on the organization of the sources of Law are provided by the Regulation itself.

In particular, Article 75 concerns the relationship with existing international conventions, stating that the Regulation shall not affect the application of international conventions to which one or more Member States are party at the time of adoption of the Regulation and which concern matters covered by the Regulation.

Furthermore, Article 76 fixes the specific rule that the Regulation shall not affect the application of the EU Regulation on insolvency proceedings (Council Regulation (EC) no. 1346/2000).

3. Scope of the Regulation

The Regulation shall apply to succession to the estates of deceased persons (Article 1.1 of the Regulation).

According to Whereas no. (9), «*the scope of this Regulation includes all civil-law aspects of succession to the estate of a deceased person,*

accurate or is unaware of such inaccuracy due to gross negligence». Meanwhile, different rules is provided by Sec. 1189 of the Italian Civil Code. As a matter of fact, Sec. 1189 maintains that the debtor, paying to a person, who appears to be entitled to receive the payment, shall be discharged from the obligation to pay, if he/she gives evidence of the good faith.

namely all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer intestate succession».

The following Whereas clarifies the scope of the Regulation by excluding certain matters as matrimonial property regime and set up, administration and dissolution of trusts as well as taxes and administrative matters of a public-law nature (Article 1.1 of the Regulation).

However, in certain cases – such as exclusion of trusts from the scope of the Regulation – Whereas no. (13) specifies that this exclusion does not entail a general exclusion of trusts from the scope of the Regulation. Actually, «*where a trust is created under a will or under a statute in connection with intestate succession the law applicable to the succession under this Regulation should apply with respect to the devolution of the assets and the determination of the beneficiaries*».

Other exclusions, which are important to analyze for the purposes of this paper, are the following:

- the formal validity of wills on property upon death orally given (Article 1.2.(f));
- questions governed by companies law and other bodies, such as clauses in the memoranda of association and articles of association of companies and other bodies, which determine what will happen to the shares upon the death of the members (Article 1.2.(h));
- any recording in a register of rights in immovable or movable properties, including legal requirements for such recording, and effects of recording or failing to record (Article 1.2.(l)).

Many other Whereas dwell on each specific rule, fixing the aims of the Regulation.

4. Purpose of the Regulation

The purpose of the Regulation is «[to] *remov*[e] *the obstacles to the free movement of persons who currently face difficulties in asserting their rights in the context of a succession having cross-border implications*» (Whereas no. (7)).

In particular, the Regulation highlights that «*in the European area of justice, citizens must be able to organize their succession in advance*» and «*the rights of heirs and legatees, of other persons close to the deceased and of creditors of the succession must be effectively guaranteed*» (Whereas no. (7)).

In order to achieve that objective, the Regulation wants to create a (logical and physical) area in which persons are able to arrange in

advance their succession and to get a predictable structure of their interests (*i.e.*, a predictable arrangement of their assets for the period of time after the death).

On one hand, the Regulation should grant people the right (with some limits) to choose the Law applicable to their succession, allowing them the possibility to arrange and assign their assets for the period of time following their death by choosing the Law, which is better known by them.

On the other hand, heirs and legatees should be able to assert their rights in all the European area.

The Regulation is mainly based on the fact that knowing in advance the applicable law (by effect of a voluntary choice or by effect of the rules of the Regulation) supports people in their choice to move to another country and makes them more confident in doing it.

The Regulation is also based on the fact that same people will be confident to assert their rights in a same manner (or in a predictable manner) across Europe.

European Commission considered that the main obstacle for the succession having a cross-borders implication is the uncertainty of the rules governing the matter across Europe. Actually, in Europe different principles apply: the one of the unity of the succession opposite the other of the split of the applicable laws. As to the relevant laws different criteria apply: the one of the law of the domicile opposite the other of the law of the nationality of the deceased.

Under local legislation currently in force, Italy follows the principle of the unity of the succession (*i.e.*, the succession as a whole) and the criterion of the law of the nationality of the deceased, as a general rule.

That being outlined, the main rules provided for by the Regulation are the following.

5. Relevant laws

Laws taken into account in the Regulation are:

- the law on the habitual residence of deceased people, as a general rule;
- the law of the State with which deceased was more closely connected; and
- the national law of the deceased person.

According to the Regulation, the "habitual residence" of the deceased at the time of death is the general connecting factor for determining jurisdiction and applicable law. Actually, the Regulation deems appropriate this criterion in consideration of the increasing mobility of the citizens

and in order to ensure the proper administration of justice within the Union and also to ensure that a genuine connecting factor exists between the succession and the Member State, in which jurisdiction is exercised (Whereas no. 23).

Differently, Italian conflict of laws currently in force provides that the main rule applicable to succession is the law of the nationality of the deceased. The latter is entitled to choose the law of the State in which he resides at the time of death, by means of a formal declaration (Sec. 46 of Law no. 218/1995).

In order to determine the habitual residence, the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific aims of the Regulation (Whereas no. 23).

Whereas no. 24 seems to consider the problem of the expatriates who are workers who perform their professional activity and who live abroad. As a matter of fact, in some cases determining the deceased's habitual residence may prove complex.

Such a case may arise, in particular, where the deceased for professional or economic reasons had gone to live abroad to work there, sometimes for a long time, but had maintained a close and stable connection with his State of origin. In such a case, the deceased could, depending on the circumstances of the case, be considered still having his habitual residence in his State of origin in which the centre of interests of his family and his social life was located. Other complex cases may arise where the deceased alternately lived in several States or travelled from one State to another without settling permanently in any of them.

If the deceased was a national of one of those States or had all his main assets in one of those States, his nationality or the location of those assets could be a special factor in the overall assessment of all the factual circumstances.

6. Jurisdiction

As a general rule, the courts of the Member State in which the deceased person had his habitual residence(2) at the time of death shall have jurisdiction to rule on the succession as a whole (Article 4).

It is possible for stakeholders to enter into a choice-of-court agreement if the deceased chooses the applicable law to his/her succession according to Article 22 (Article 5).

The court of a Member State, which law had been chosen by the deceased pursuant to Article 22, shall have jurisdiction to rule on the succession on certain conditions (Article 7).

In the end, please note that the Regulation clarifies that the term «courts» means not only any judicial authority but also all other authorities and legal professionals dealing with succession matters, such as (*e.g.*, in Italy) the notary public (Article 3.2).

Said rules shall meet the following principles:

Firstly, the principle of the succession as a whole (*i.e.*, the principle of the unity of the succession: Article 4 and 21.1);

Moreover, the need to jointly consider the jurisdiction and the applicable law rules;

Finally, the need to consider a joint main criterion for the jurisdiction and the applicable law that is the law of the habitual residence of the deceased (Article 4 and 21.1).

7. Applicable Law

As a general rule, the applicable law to the succession as a whole shall be that of the State in which the deceased person had his habitual residence by the time of death (Article 21.1).

However, by way of exception, where it is clear based on all circumstances that, by the time of death, the deceased person was manifestly more closely with a State other than the State whose law would be applicable as law of the habitual residence, the law applicable to the succession shall be the law of the other State (Article 21.2).

A person may choose the law governing his/her succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death (Article 22).

(2) Italian Law does not have the concept of «habitual residence». Italian law consider the «residence» (see Sec. 43, § 2, of the Italian Civil Code), which means «habitual place of house» («dimora abituale»). Please note that OECD Model Tax Convention on Income and Capital (especially Art. 4) should suggest further criteria of «residence» for tax purpose.

The choice shall be made expressly in a declaration in the form of a disposition of property upon death.

Any law specified by the Regulation shall be applied whether or not it is the law of a Member State (Article 20).

The Regulation states that the Law determined according to the Regulation itself shall govern *inter alia* (Article 23):

«*the determination of the beneficiaries, of their respective shares and of the obligations which may be imposed on them by the deceased* [...]»;

«*disinheritance* [...]»;

«*the disposable part of the estate, the reserved shares and other restrictions on the disposal of property upon death as well as claims which persons close to the deceased may have against the estate or the heirs*»;

«*the sharing-out of the estate*».

The Regulation is without prejudice to Public policy rules applicable in the Member States.

Indeed, «*the application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum*» (Article 35).

Certain Italian rules on successions may be regarded as public policy rules and, as a consequence, they could prevent the application of foreign rules before the Italian Judges.

The issue could refer, for example, to a foreign man, in love with Venezia, who decides (i) to enter into an agreement as to succession for his Venetian mansion or (ii) to disinherit his son or (iii) to leave his Venetian palace to his beloved new partner and pennies to his unpleasant wife.

Otherwise, the issue could refer to an entrepreneur man or woman, who would leave in will his assets to the person, who he/she thinks is the best choice for his/her business.

However, please note that the Regulation shall not apply to questions governed by the law of companies and other bodies, such as, for example, the clauses on the transfer of the shares.

Public policy could block the application of foreign law in specific matters as the reserved shares and the agreements as to succession.

8. Public policy

The characteristics of the present paper allow only mentioning the issue of the public policy.

It is worth to clarify that some authors normally distinguish between "domestic public policy" ("*ordine pubblico interno*") and "international public policy" ("*ordine pubblico internazionale*").

International public policy consists of the essential principles of the *lex fori*.

As a matter of fact, international public policy would represent a sort of inner circle within a wider context corresponding to the principles of domestic public policy. However, some authors point out that the difference should be of a functional nature(3).

These principles can be derived from constitutional provisions, or from other provisions and finally from an examination of the overall discipline of certain sectors of the legal system.

Public policy is, in essence, the ultimate defense, which can be used only in cases where it is at stake the internal coherence of the internal legal system(4).

9. Reserved shares and public policy

As in other jurisdiction, Italian Law reserves shares of the estate to certain relatives of the deceased (Sec. 536 and ff. of the Italian Civil Code).

In other words, Italian Law limits the possibility to dispose the entire assets by will for the time after the death.

Italian case law is divided on the question if the rules on reserved shares have public policy nature or not.

Court of Cassation and some minor courts stated that reserved share rules are not of public policy nature(5). As a consequence, the application of a foreign law, which does not grant certain relatives the reserved shares, should be considered enforceable(6).

Other part of the case law maintains the opposite opinion that reserved shares rules make part of the public policy and their application

(3) G. Contaldi, *Ordine pubblico*, in R. Baratta (ed.), *Diritto internazionale privato*, in N. Irti (org.), *Dizionari del diritto privato*, Milano, 2010, p. 273 ff. Sometimes, case-law states a different meaning of "international public policy", namely the "really international public policy", consisting in the principles commont to many countries of akin civilization, aimed at protecting certain fundamental human rights (see G. Contaldi, p. 276).

(4) G. Contaldi, *Ordine pubblico*, in R. Baratta (ed.), *Diritto internazionale privato*, in N. Irti (org.), *Dizionari del diritto privato*, Milano, 2010, p. 273-274.

(5) Cass., 24 June 1996, no. 5832, in *Riv. dir. internaz. priv. proc.*, 2000, p. 784; Trib. Chiavari, in Riv. dir. internaz. priv. proc., 1977, p. 379.

(6) F. Mosconi, C. Campiglio, *Diritto internazionale privato e processuale*, II, *Statuto personale e diritti reali*3, Torino, 2011, p. 284; T. Ballarino, *Diritto internazionale privato*3, Padova, 1999, p. 520.

by the Italian Judge should not be prevented notwithstanding the application of a foreign law(7). A famous Italian author confirms this opinion: granting the reserved shares to the closest relatives meets the mandatory need for solidarity of the nuclear family(8).

However, Italian Law no. 218/1995 on conflict of laws offers a strong argument against the public policy nature of the reserved shares rules. Actually, Sec. 46 of Law no. 218/1995 grants Italian residents only the right to claim their reserved shares. Sec. 46 does not give protection for those people, who would like to claim the reserved shares, but they are not resident in Italy, notwithstanding they would have been protected if they had been resident in Italy. According to Sec. 46, it seems that reserved share rules are not in conflict with public policy and thus Italian Judges should accept a foreign law, excluding reserved shares. Many authors contested that Sec. 46 is contrary to the Italian Constitution, because it creates an unreasonable unequal treatment between resident and non-resident people(9).

As to the reserved shares problem, we could have different cases: for example, not only the one in which the deceased was a foreign citizen and had his/her habitual residence in Italy, but also the other in which the deceased was an Italian citizen, having his/her habitual residence in another Country.

However, Italian case law decided in the first case only and have not faced the second hypothesis.

Please also note that the acceptance of the reserved shares rules entails the acceptance of the disinheritance (which is a matter expressly included in the scope of the Regulation and of the applicable law under Article 23.1.(d)).

Recently, France issued a reform on the matters of succession (Law no. 728/2006).

According to certain authors, French reform shows us what the public policy currently means: what are the strong and immutable principles and which ones are weakened and overcome by the current custom(10).

Two are the main directions of the French reform: from one side, French reform allows the advance renunciation to the remedy against

(7) Milan Appeal Court, 4 December 1992, in *Riv. dir. internaz. priv. proc.*, 1994, p. 821; Tribunal of Sanremo, 31 December 1984, in *Riv. dir. internaz. priv. proc.*, 1986, p. 341.

(8) C.M. Bianca, *Diritto civile*[4], 2, Milano, 2005, p. 11.

(9) C.M. Bianca, *Diritto civile*[4], 2, Milano, 2005, p. 12.

(10) V. Tagliaferri, *Il diritto delle successioni e le nuove regole di assegnazione della ricchezza*, Milano, 2012, p. 179.

the violation of the reserved shares (*Renonciation anticipée à l'action en reduction* aka *RAAR*).

Two this purpose, a recent work of an author tries to apply to the Italian legislation a form of advance renunciation to the remedy of the reduction claim[11].

From the other side, current French Law allows the parties to enter into agreements as to succession in some cases provided by Law itself. As a matter of fact, the prohibition of the agreements as to succession is subject to important dispensations, so that the main rule seems not to be the prohibition but the admissibility of the agreements as to succession, albeit with certain limits.

As to the agreements as to succession in the Regulation, please consider as follows.

10. Agreements as to succession and public policy

Article 25 of the Regulation regulates agreements as to succession.

An agreement as to succession regarding the succession of one person shall be governed by the law that, under the Regulation, would have been applicable to the succession of that person if he had died on the day on which the agreement was concluded.

If the agreement as to succession regards several persons, the admissibility of this agreement should be confirmed by all the laws of all the persons involved in the agreement. As to its substantive validity and its binding effects, the agreement as to succession is governed by the law, from among those of the persons involved, with which it has the closest connection.

Parties of an agreement as to succession are entitled to choose the applicable law according to Article 22 of the Regulation (*i.e.*, the law of the nationality of the person or of the persons which are parties of the agreement as to succession).

Italian case-law offers different opinion on the agreement as to succession and, in particular, if it may have public policy nature or not.

A non-recent decision of the Court of Cassation stated that the agreement as to succession is not in contrast with the public policy and, accordingly, Italian Judge allows the enforcement of the foreign law in

(11) V. Tagliaferri, *Il diritto delle successioni e le nuove regole di assegnazione della ricchezza*, Milano, 2012, p. 253.

Italy(12). It should be noted that this decision mentions the "domestic public policy", but it gives it a more restricted meaning. However, some authors assume that Sec. 31 of the Preliminary Provisions of the Italian Civil Code (to which the decision refers) relates the international public policy only(13). Therefore, notwithstanding the wording, this decision could refer to international public policy.

Most recent decision of same Court maintained that the agreement as to succession is in contrast with the domestic public policy(14).

However, in the latter the Supreme Court does not decide a case of international succession, but a domestic case. The Court established that an agreement as to succession, which is in contrast with the public policy, should not be considered a will. In other words, the dispositions of the agreement as to succession should not be interpreted as dispositions of a testament and, as a consequence, they are finally null and void.

Certain authors state that the agreement as to succession is not in contrast with the public policy(15), without distinguishing between internal and international public policy. Other authors maintain that the contrast with the public policy should be decided after having considered the concrete impact on the *lex fori*(16).

As to the agreement as to succession, a reduction of the limits provided by the public policy could be suggested not only by the recent French reform, but also by the legislation in Spain.

(12) Cass., 5 April 1984, no. 2215, in *Giur. it.*, 1984, I, 1, p. 1368, according to which «*L'ordine pubblico contemplato da quest'ultima norma* [Section 31 of the Preliminary Provisions of the Italian Civil Code]*, infatti, ancorché da intendersi nel senso di ordine pubblico interno, da riscontrarsi con riferimento al momento della decisione, non può ritenersi comprensivo di ogni norma imperativa dell'ordinamento, quale l'art. 692 c.c., che fissa alla sostituzione fedecommissaria limiti soggettivi ed oggettivi più rigorosi della legge straniera (sia nel testo originario, sia in quello introdotto dalla riforma del diritto di famiglia)*» and «*L'ordine pubblico quale limite all'applicazione della legge straniera è costituito dal complesso delle regole e dei principi davvero fondamentali dell'intero nostro ordinamento, quale risulta essenzialmente dalla Costituzione*». Contra Cass., 14 July 1983, no. 4827, in *Giust. civ. Mass.*, 1983, issue no. 7, according to which «*Il patto successorio istitutivo, vincolando la volontà del soggetto a disporre della propria eredità, è nullo in quanto si pone in contrasto con il principio fondamentale (e quindi di ordine pubblico) del nostro ordinamento, della piena libertà di testare*».

(13) G. Contaldi, *Ordine pubblico*, in R. Baratta (ed.), *Diritto internazionale privato*, in N. Irti (org.), *Dizionari del diritto privato*, Milano, 2010, p. 275 and ff.

(14) Cass., 19 November 2009, no. 24450, in *Diritto & Giustizia*, 2009.

(15) C.M. Bianca, *Diritto civile*[4], 2, Milano, 2005, p. 12; T. Ballarino, *Diritto internazionale privato italiano*[7], Padova, 2011, p. 91.

(16) F. Mosconi, C. Campiglio, *Diritto internazionale privato e processuale*, II, *Statuto personale e diritti reali*[3], Torino, 2011, p. 285.

In this Country, there is a general prohibition of the agreements as to succession («*contrato sucesorio*»). However, this prohibition is subject to important exceptions, mainly in the context of family relationships(17).

11. Conclusions

Due to the shortness of this paper, conclusions are very hard to be drawn.

We maintain that any obstacle to the harmonization not fully justified by a material rule of public policy could limit the envisaged space of freedom recommended by the European Union.

The need to harmonize the rules of the European Countries and to create a space of freedom across Europe should entail an accurate and appropriate selection of the public policy rules and accordingly (probably and hopefully) a proper definition of the borders of the public policy.

In particular, that is true in Italy, where a possible reform of successions is currently debated, more precisely, on the reduction of the reserved shares and on the admissibility of the agreements as to succession.

The problems are material from a legal and economic standpoint.

The issue of the Regulation and the relevant debate will help to explore the limits of the freedom of will as well as of the freedom of contract.

From one side, cancelling the protection granted by the reserved shares means to consider (or not) the nuclear family as current value to be protected. From the other side, granting protection to (some types of) agreements as to succession means to refuse the full revocability of the will as current value to be protected.

In Italy, any reform must also necessarily keep into consideration a careful coordination with the general principles of contract, such as the lawfulness of obligations on futures and the problem linked to the determinability of the future succession as subject matter of an agreement (Sec. 1346 and 1348 of the Italian Civil Code).

The debate developed by the issue of the Regulation could lead to a reassessment of the most important principles of Italian law on successions.

Indeed, it is probable that these principles could be reviewed not only from a conflict of laws standpoint, but as a result of the harmonization of the substantive rules soon started by European Union.

(17) L. Díez-Picazo, A. Gullón, *Sistema de derecho civil*, IV, 2, *Derecho de sucesiones*[11], Madrid, 2012, p. 206 and ff.