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# PLANNING CROSS-BORDER SUCCESSIONS: THE PROFESSIO JURIS IN THE SUCCESSION REGULATION



1. The Regulation (EU) No 650/2012 (hereinafter, the Succession Regulation)[1] allows the choice of the law applicable to the succession. This choice is a very important innovation and a very useful tool for estate-planning purposes. It also represents a relevant change for a field which is traditionally regulated by provisions from which the parties cannot derogate.

Some EU Member States permit already the choice of law,[2] but such a choice is often subject to serious limitations in light of the protection of forced heirship rights.[3]

The idea of assigning parties a role in the definition of their own personal and family relations has a significant relevance in the private interna-

[1] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

[2] For an overview of the national legal systems allowing a choice of law, see BONOMI, *Successions Internationales: Conflits de lois et de juridictions*, in *Recueil des Cours*, t. 350, 2010, p. 198 ff.

[3] For example, Art. 25.2 EGBGB only permitted the choice of German law for those immovables which were situated in Germany. In other countries it is accepted that a foreign law can be designated, but the choice cannot deprive forced heirs of the rights that are granted to them by the law of that would govern the succession in absence of choice. See Art. 46 of the Italian Private International Law Act of 31 May 1995 No 218; Art. 80 of the Belgian Private International Law Code of 2004 and Art. 68(1) of the Romanian Private International Law Act of 1992.

tional law of the European Union. The same approach is followed in all EU Regulations in family matters.

Party autonomy as a connecting factor is recognized with regard to divorce and legal separation, according to Regulation No 1259/2010 (hereinafter, Regulation Rome III), [4] and the maintenance obligations, by virtue of reference to the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations in Article 15 of Regulation No 4/2009 (hereinafter, the Hague Protocol).[5] A certain role for party autonomy is also provided for in matrimonial property regimes and in the economic consequences of registered partnerships, according to the Regulations No. 2016/1103 and 2016/1104 that became applicable on 29 January 2019 (hereinafter, Property Regimes Regulations).[6]

Article 21 of the Succession Regulation provides the new, general, unitary rule that the law applicable to the succession as a whole shall be the law of the State in which the *de cuius* had his/her habitual residence at the time of death. Article 22, however, enables testators to choose the law of nationality as the law to govern their succession as a whole. But party autonomy plays also a role in Articles 24(2) and 25(3), which provide for a partial choice with regard to dispositions of property upon death (for example wills) and agreements as to succession.

Moreover, the Succession Regulation gives a particular weight to party autonomy in determining the competent court, providing a mechanism which would come into play where the deceased had chosen the law governing their succession according to Article 22. In order to avoid the application of a foreign law, which is a concern of the Succession Regulation, the parties are allowed to conclude a choice-of-court agreement in favour of the courts of the Member State of the chosen law. The rules of the Succession Regulation, through the application of a single law to the whole of the succession and of the habitual residence as a connecting factor for both jurisdiction and the applicable law, are devised so as to ensure that the au-

[4] Art. 5 of Regulation (EU) No 1259/2010 of 20 December 2010 on the law applicable to divorce and legal separation, in *O.J.* L 343, p. 10.

[5] Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, *O.J.* 2009 L 7, p. 10 (hereinafter, Maintenance Regulation).

[6] Art. 22 of Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes *O.J.*, 2016, L 183, p. 1, and Art. 22 of Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships *O.J.* 2016 L 183, p. 30.

thority dealing with the succession will, in most situations, be applying its own law.[7] The parallelism between *ius* and *forum* could be compromised by the use of party autonomy by the deceased, which leads to the application of his/her national law. To correct this, the Succession Regulation confers the authorities seized, pursuant to Article 4 or Article 10 of the Regulation (usually the courts of the habitual residence of the deceased) the power to refer the case to the authorities of the State of their nationality, if the parties to the proceedings have so agreed.[8] Even in absence of a choice-of-court agreement and at the request of only one of the parties, the authorities seized may decline jurisdiction if they consider that the courts of the Member State of the chosen law are better placed to rule on the succession, on a case- by-case basis.[9] However, when the deceased has chosen the law of a third State, the parties cannot conclude a choice-of-court agreement in favour of a court of that State. Consequently, the court will have to apply a foreign law.

Finally, party autonomy is taken into account also in the transitional provisions, which confer validity, under certain conditions, even to a *professio juris* made before the entry into force of the Regulation. According to Article 83(2), the choice made prior to 17 August 2015, shall be valid if it meets the conditions laid down in Chapter III or if it is valid in application of the rules of private international law which were in force, at the time the choice was made, in the State in which the deceased had his habitual residence or in any of the States whose nationality he possessed. To confirm the Regulation' s preference for succession planning, Article 83(3) provides for a similar rule in cases where a disposition of property upon death was made prior to 17 August 2015.[10]

2. Party autonomy provides a certain and predictable regulation of the succession, as stated in Recital 38, which clarifies that the Succession Regulation should enable citizens to organise their succession in advance by choosing the law applicable to their succession.

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[7] Rec. 27.

[8] Art. 5. Recs 27, 28.

[9] Arts 6 and 7.

[10] See REQUEJO, *VI. Succession Regulation*, in VIARENGO, VILLATA (eds.), *Planning the Future of Cross Border Families*, *Eufam's Policy guidelines*, Hart Publishing, 2020, p. 833 ff. On the application of Article 83(2)(3) to an agreement as to succession made prior to the entry into force of the Succession Regulation see *BGH, Beschluss vom 10. Juli 2019 – IV ZB 22/18*. The German federal Supreme Court deemed valid an agreement as to succession between a German deceased and her Italian partner, since both of them had been habitually resident in Germany at that time and had explicitly chosen German law.

The need to protect the predictability and stability interests of the deceased is even more justified when habitual residence is a main, objective connecting factor. The residence of a person, even if qualified as habitual, is by its very nature less stable than nationality, and in many cases it is fairly easy to change.

On the contrary, when the applicable law has been chosen by the parties, the change of the connection, whatever that is, does not lead to a change in that law. In other words, the choice remains operative and effective as the connecting factor and remains the will of the deceased.

Moreover, party autonomy may also be very useful for overcoming the difficulty in determining the habitual residence. Actually, habitual residence is a key concept in European law, in particular with regard to family matters. Indeed, many provisions on conflicts of laws (and jurisdictions) provided for by the European legislator make recourse to the habitual residence of one individual or the common habitual residence of the parties as the main relevant factor. Notwithstanding the large-scale use of habitual residence in these provisions, a definition of what is meant by habitual residence cannot be found in the regulations on family matters. Habitual residence should be regarded as an 'autonomous' notion. It must be determined *in concreto* by looking at all the factual circumstances denoting a certain degree of integration of the individual in a given country.[11] At least, the Succession Regulation dedicates two Recitals to the issue of the definition of habitual residence. Recital 23 states that determining the deceased's habitual residence requires an overall assessment of the living conditions of the deceased, taking into account all factual elements of life during the years preceding their death and at the time of their death. Recital 24 provides for some criteria for 'complex' cases.[12] However, many problems

[11] There is no case law of the CJEU yet on the autonomous interpretation of habitual residence for adults in the sphere of international family law. On 16 July 2020 the CJEU issued its first ruling on the determination of the deceased's habitual residence under the EU Succession. Case C-80/19, *E.E. & K.-D. E.*, 16 July 2020. . As it is well know, the CJEU has issued several judgments on the notion in connection with the jurisdictional rule on parental responsibility, established in Article 8 of the Brussels IIa Regulation. See CJEU, 2 April 2009, Case C-523/07, *A.*; 22 December 2010, Case C-497/10 PPU, *Mercredi*; 9 October 2014, Case C-376/14 PPU, *C. v. M.;* 8 June 2017, Case C-111/17 PPU, *OL v PQ*; 10 April 2018, Case C-85/18 PPU, *CV v DU*; 28 June 2018, Case C-512/17, *HR.* In the recent literature, inter alia, see LIMANTE, *Establishing habitual residence of adults under the Brussels IIa regulation: best practices from national case-law*, in *Journ. Priv. Int. Law*, 2018, p. 160 ff.; KRUGER, *Finding a Habitual Residence*, in VIARENGO, VILLATA (eds.), *Planning the Future of Cross Border Families* cit., p. 117 ff.; RE, *Habitual Residence in the Succession Regulation*, *ivi*, p. 133 ff.

[12] In the case C-80/19, *E.E. & K.-D. E.* cit., the CJEU provided some guidelines on the practical implementation of the above-mentioned recitals, ponting out which key factors should

may arise when the deceased's habitual residence must be found in practice. It is understandable that an individual would wish to exercise choice in order to align their interests with a more permanent point than undefined habitual residence.

Then, the person whose estate is involved is allowed to avoid, through the *optio juris*, the application of a law which might be contrary to its interest. The use of the last habitual residence as the objective connecting factor is based on the assumption that the deceased was most closely connected to their residence's State. However, the application of a closely connected law could not match with the expectations of the deceased. This assumption may be overcome through the choice of law in favour of another law considered by the deceased more suitable to their concrete interests. That is an obvious and legitimate aim of every choice-of-law rule, but in succession matters it raises some concerns with regard to the parallel need to preserve the protection of close family members, which is at the heart of many European national laws.

3. Another reason that explains party autonomy being favoured is the wish to select a single law for matrimonial property (or property consequences of registered partnerships) and succession in a context of estate planning.[13]

The strong interaction in every legal system between matrimonial property and succession laws justifies the need that the same law govern both of them. As already pointed out in the legal literature, characterization problems regarding borderline rules between matrimonial property and succession laws, as well as consistency and adaptation problems related in particular to the protection of the surviving spouse or partner can arise with the application of different laws.[14] Moreover, the liquidation of the property regimes is very often a question preceding the liquidation of the estate of a deceased person. In this regard, it should be recalled that in almost all legal systems the extent of the participation of the surviving spouse to the succession is affected by the marriage-property rules. In systems where the legal regime is the shared-property regime this participation is generally less significant. By contrast, in those States where the properties of the

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be assessed in the determination of the deceased's habitual residence.

[13] On party autonomy as motivation to pursue coordination in EU family law see GONZALES BEILFUSS, *The Role of Party Autonomy in Pursuing Coordination*, in VIARENGO, VILLATA (eds.), *Planning the Future of Cross Border Families* cit., p. 243 ff.

[14] BONOMI, *The Interaction among the Future EU Instruments on Matrimonial Property, Registered Partnerships and Successions*, in *Yearb. Priv. Int. Law*, 2011, p. 217 ff.

spouses are separated such a participation tends to be wider. Put in other words, the matrimonial regime may considerably modify the outcome of the rights of the spouse to the estate.

The coordination between the law applicable to the succession and to property aspects of marriage or a registered partnership by allowing the parties to submit all of these questions to a single law may be partially possible thank to the recent EU Regulations on matrimonial property and on the property consequences of registered partnership. This is true at least for the Member States that take part in the enhanced cooperation, which is the road taken by the European legislator in order to have the two regulations adopted.[15] The Regulations bring together rules on jurisdiction, the conflict of laws and the cross-border circulation of court decisions, authentic instruments and court settlements with regard to the property relationships of spouses or partners. Both of them allow an option between a limited number of laws, among which is the law of the parties' nationality.[16] Since in the Succession Regulation the choice is much more restricted than in the Property Regimes Regulations, only through the choice of the national law, it will be possible to combine the law applicable to the succession and the law applicable to property aspects of marriage or registered partnerships. However, a dissociation between the two laws cannot be avoided in case of spouses or partners of different nationalities. The choice of the law of which one of them is a national, the only possibility open to them accord-

[15] Council Decision (EU) 2016/954 of 9 June 2016 authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships, in *O.J.*, 2016, L159, p. 16. Seventeen Member States addressed a request to the Commission indicating their wish to establish enhanced cooperation between themselves after the failure, in December 2015, to reach a political agreement among all Member States on the proposals relating to matrimonial property regimes and registered partnerships adopted on 16 March 2011 (COM(2011) 126 final and COM(2011) 127 final). On the two Proposals of 2011, see, inter alia, BUSCHBAUM SIMON, *Les propositions de la Commission européenne relatives à l'harmonisation des règles de conflit de lois sur les biens patrimoniaux des couples mariés et des partenariats enregistrés*, in *Revue critique*, 2011, p. 801; VIARENGO, *The EU Proposal on Matrimonial Property Regimes*, in *Yearb. Priv. Int. Law*, 2011, p. 93; GONZÁLES BEILFUSS, *The Proposal for a Council Regulation on the Property Consequences of Registered Partnerships*, *ivi*. p. 183; DUTTA, WEDEMANN, *Die Europäisierung des internationalen Zuständigkeitsrechts in Gütersachen–Notizen zu den Verordnungsvorschlägen der Europäischen Kommission zum Ehegüterrecht sowie zum Güterrecht eingetragener Partnerschaften*, in GEIMERAND, SCHÜTZE (eds), *Recht ohne Grenzen–Festschrift für Athanassios Kaissis zum 65.Geburtstag*, Sellier 2012, p. 133.

[16] Art. 22 of both Regulations allows the parties to choose either the law of the State where at least one of them is habitually resident or is a national at the time the choice. Moreover, partners can also select the law of the State under whose law the registered partnership was created.

ing to the Regulation, leads inevitably to the application of two different laws for the other spouse or partner.[17]

For the Member States that do not take part in the enhanced cooperation, the law governing matrimonial property regimes or economic consequences of registered partnerships – assuming that they recognize registered partnerships and grant inheritance rights to them - depends on the choice-of-law rules of the *lex fori*. Therefore, a coordination may be difficult to achieve.[18]

4. One of the main changes introduced by the Succession Regulation is the application of a single law to the whole of the succession, to the exclusion of the scission principle. It follows that a single law will govern all of the property forming part of the estate, irrespective of the nature of the assets and regardless of whether the assets are located in another Member State or in a third State.

The monist approach adopted by the European legislator by avoiding the fragmentation of the succession, is primarily aimed at protecting the deceased's interests. However, as argued by some scholars, the strict exclusion of a dualist choice of law does not allow the testator to have their estate regulated by different laws, even if they would have a clear interest in it.

According to Article 22, the only law which may be chosen by a person to govern their succession as a whole is the law of the State whose nationality they possess at the time of making the choice or at the time of death. Dépeçage is outlawed, and a testator will not be able to use their freedom to subvert the Succession Regulation's unitary rule. In order to avoid the scission of the estate and preserve its unity, the Regulation does

[17] Cf. BONOMI, *The Interaction among the Future EU Instruments* cit., p. 230; MAOLI, *International Couples, Property Relations and Succession Matters in the new European Regulations*, in HEIDERHOFF, QUEIROLO (eds.), *Current legal challenges in European private and institutional integration,* Aracne, 2017, p. 141 ff.; KOHLER, *Choice of the applicable law*, in VIARENGO, FRANZINA (eds.), *The EU Regulations on the Property Regimes of international Couples. A Commentary,* Edward Elgar Publishing, 2020, p. 195 ff.

[18] A coordination depends on the choice-of-law rules regarding matrimonial property of the *lex fori*. A coordination may be possible if the spouses have the same nationality and the main connecting factor for property is the common nationality. In this case, the testator should choose their national law according to the Regulation, which combined with the law objectively applicable to property lead to a single law. The same result could be achieved in the other way, when the law applicable to property allows the choice of the habitual residence of either the spouses. The law of the habitual residence of the deceased, to be applied objectively according to the Regulation, will combine with the law chosen for matrimonial property. Cf. BONOMI, *Art. 22*, in BONOMI, WAUTELET (eds.), *Le droit européen des successions*, Bruylant, 2013, p. 314.

not provide for the choice of the lex rei sitae. It seems to follow a growing trend in the national, legal systems. In fact, most European countries adhere to the monist approach and some of them after having abandoned the special regimes for immovables.

With reference to the use of party autonomy, some variations to the unity principle can actually occur pursuant to Articles 24(3) and 25(3). Suffice here to notice that Articles 24(3) and 25(3) allow the choice of law with regards to dispositions of property upon death (for example wills) and agreements as to successions, as regards their admissibility, substantive validity, and binding effects between the parties of the agreement. It is possible, even if rare in practice, that this law does not coincide with the law applicable to the whole of the succession.[19] Let us take the example of an agreement as to succession between two parties with different nationalities. It is true that Article 25(2) refers to Article 22, but one of them, whose nationality has not been designated for the agreement, could choose later his/her national law to regulate his/her succession.

5. As for the other EU Regulations, as well as the Hague Protocol, the Succession Regulation has universal character. According to Article 20, the law designated pursuant to the Regulation shall apply whether or not it is the law of a Member State. The adoption of the *erga omnes* approach allows participating Member States to convoy within one legal instrument the whole of the rules dealing with conflict-of-laws issues in the area of succession. Therefore, the Succession Regulation has replaced *in toto* the national, conflict-of-laws rules.

Where the deceased made a choice of law, the *renvoi* mechanism provided in Article 34 must be excluded. Article 34 allows the relevance of the conflict-of-law rules of the law governing the succession when this is the law of a third State.[20] If those rules provide for *renvoi* either to the law of a Member State or to the law of a third State which would apply its own

[19] See LAGARDE, *Les principes de base du nouveau règlement européen sur les successions*, in *Revue critique*, 2012, p. 722; DAMASCELLI, *Diritto internazionale privato delle successioni a causa di morte*, Giuffré, 2013, p. 97 ff.

[20] On *renvoi* in the Succession Regulation see BONOMI, *Art. 34. Renvoi*, in BONOMI, WAUTELET (eds.), *Le droit européen des succession* cit., p. 554 ff.; DAVÌ, ZANOBETTI, *Il nuovo diritto internazionale privato delle successioni*, Giappichelli, 2014, p. 130; HELLNER, *Problemes des allgemeinen Teils des Internationalen Privatrechts*, in DUTTA, HERRLER, *Die Europäische Erbrechtsverordnung*, C.H. Beck 2014, p. 107 ff.; LAGARDE, *Les principes de base* cit., p. 704; ID., *Art. 34*, in BERGQUIST ET AL (eds), *Commentaire du Règlement européen sur les successions*, 2015, 150 ff.; SOLOMON, *Die Renaissance des Renvoi im Europäischen Internationalen Privatrecht*' in MICHAELS, SOLOMON (Hrgbs), *Liber amicorum K. Schurig zum 70. Geburtstag*, 2012, p. 237.

law to the succession, such *renvoi* should be accepted in order to ensure international consistency. Some exceptions to the application of *renvoi* are listed at paragraph 2 of Article 34: among them the case in which a choice has been made in favour of the law of a third State, in accordance with Article 22. It means that the succession is governed only by the substantive rules of the law chosen, even if this law designates through its own conflict-of-law provisions the law of a different country and does not want to apply it in the circumstances. Therefore, the succession could be governed by different laws in the State of the forum and in the State of the chosen law.[21]

6. The freedom of choice is limited to the law of a State of the nationality of a party. In order to promote the goal to empower the parties to organise their succession in advance, it would have been preferable to accord them a broader range of applicable laws. The reason that explains the narrow use of party autonomy in the Regulation is the concern, as explained below, that a law would be chosen with the intention of frustrating the legitimate expectations of persons entitled to a reserved share, based on the law objectively applicable.

However, nationality refers either to the time of making the choice or at the time of death. It is self-evident that by choosing the law of the nationality at the moment of the choice, an individual may organise their succession in advance, granting a certain, predictable, and permanent regulation of the succession as indicated in Recital 38. If the deceased has chosen the law of the State whose nationality they possess at the time of the choice, any subsequent change of nationality does not lead to a change in that law. In other words, the choice remains operative and effective as the connecting factor is and remains the will of the person and not the nationality. It means that if the testator loses nationality after the choice, the choice is still valid.

Take the example of a Moroccan citizen, living in Italy. He wishes his succession to be governed by the Moroccan law. Let us suppose that he loses his Moroccan nationality by acquiring Italian nationality. The choice in favour of the Moroccan law is still valid, even if at the time of death he does not have Moroccan nationality and he has lived in Italy for a very long time. Actually, the choice is valid even if has never lived in Morocco, assuming that he was born in Italy. Moreover, it is worth noting that, at the time of death, such a situation does not have any international aspect, be-

[21] Cf. BONOMI, *Art. 22* cit., p. 305 ff.

cause the Moroccan citizen lost the Moroccan nationality. Nevertheless, the Regulation will apply, even if the optio juris represents the only foreign connection of the deceased. [22]

The substantive content of the applicable law may also change as a result of a change in the national legislation. Obviously, this does not affect the determination of the applicable law. However, the testator may be subject to substantive provisions with a different content from what they expected. Accordingly, they can modify (in case of double nationalities or change of nationality) or revoke their choice at any time.

As the choice in favour of the nationality the de cuius possesses at time of the choice is still valid, even if they do not have that nationality at time of death, the choice of a nationality they do not possess at time of the choice could become valid if they have that nationality at time of death. The choice of a future, potential nationality is likely to be rare in practice because of its uncertainty. A person can die before acquiring the new nationality. The lack of certainty is actually at odds with the meaning and function of party autonomy as mentioned at the beginning. However, it could be useful in practice in a case where a person is reasonably sure to acquire the nationality of the State where they reside. Actually, the law of the habitual residence would apply even in absence of a choice, pursuant to Article 21, but a choice could be meaningful if the de cuius wants to be sure that a future change of residence will not affect the applicable law. In this case, the choice in advance of the future nationality law could serve the purpose to freeze the law of the habitual residence as applicable law. Moreover, it could also be useful when a person is planning to acquire a new nationality for reasons other than residence, for example marriage. In this case, the choice of law could be the only way to have that law applied to the succession.

The effects of the choice of law could be limited in cases where a third State is involved in the succession and it does not recognize the choice. Let us take the example of an Italian national who dies at a time when he/she is habitually resident in a Member State to which the Succession Regulation would apply, but has immovable property in the UK. Assuming that he/she has designated Italian law to govern her succession, some problems might

[22] Unlike Rome III Regulation, the Succession Regulation in defining its scope of application does not refer expressly to situations involving a conflict of laws. However, Rec. 7 mentions the removal of the obstacles to the free movement of persons in the context of a succession having cross-border implications as a goal to be achieved in the regulation. The question of what constitutes a cross-border situation may be controversial: see Opinion of Advocate General Campos Sánchez-Bordona in Case C-80/19 *E. E.*, 26 March 2020.

occur regarding conflicting competences of courts and authorities in the UK and abroad. While the courts in the Member State of habitual residence of the deceased would have to apply the Regulation and to follow its unitary approach for the succession as a whole, UK courts would, from their viewpoint, apply the lex situs to these immovables, without recognizing a choice of the lex successionis. In fact, a choice of the applicable law to the succession is not permitted under English law. The only aspect where party autonomy in English conflict-of-laws rules on succession is accepted concerns the interpretation of wills. Therefore, from the UK viewpoint, the choice of the law of her nationality would be void.

7. Recital 41 clarifies that the determination of the nationality or the multiple nationalities of a person should be resolved as a preliminary question. The issue of considering a person as a national of a State falls outside the scope of this Succession Regulation; the determination of nationality is subject to national law, in full observance of the general principles of the European Union.[23] However, no close connection with the national State is required in the Succession Regulation, thus no test of effectivity, to assess whether the law chosen is that of an effective nationality should be imposed by a court. The national law as an eligible law is not meant to express a genuine link with the deceased. The Succession Regulation does not provide any indication that only the effective nationality may or should be taken into account. Accordingly, the escape clause, pursuant to Article 21(2), in favor of the application of the law of the State with which the *de cuius* was manifestly more closely connected does not apply in case of a choice of law. As mentioned above, after the choice, the connection of nationality might change. These changes do not lead to an alteration in the applicable law.

The solution adopted in the Succession Regulation is in line with the approach of the Court of Justice to effective nationality, even if in other fields of law. The general principles indicated by the Court seem to deny any relevance to the effectiveness of any nationality that the individual may possess. In the *Hadadi* case, the Court, with regard to Brussels IIa

[23] This matter is addressed with similar wording in the Rome III Regulation, where it states that, '[w]here this Regulation refers to nationality as a connecting factor for the application of the law of a State, the question of how to deal with cases of multiple nationality should be left to national law, in full observance of the general principles of the European Union' (Recital 22). Therefore, national rules in contrast with general principles of EU law and the CJEU case-law should be disregarded for determining the preliminary question concerning the nationality.

Regulation,[24] suggested that where jurisdiction is based upon the common nationality of the parties involved, the plaintiffs may choose among the nationalities they possess, irrespective of any effective link with the Member State at stake. It confirms a trend that may be traced as far back as *Micheletti* case, where the Court refused to allow Spain to scrutinize the effectiveness of the link between the individual and Italy in order to grant him the right to exercise free movement within the EU.[25]

Also, in cases of multiple nationalities, it should not be assessed which one maintains the closest links with the deceased. The treatment of multiple nationalities could be an issue in EU, private international law rules, where nationality is used, like under national rules, as a connecting factor to determine the applicable law.[26] Article 22(1)(2) of the Succession Regulation expressly provides that '[a] person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death', without requiring any additional condition or link between the testator and the country of nationality. Thus, where the individual has more than one nationality, they should be able to choose the law of any country of which they are a national. By providing for an express solution to cases of multiple nationalities the Succession Regulation, unlike other EU Regulations,[27] solves any doubts, leaving no room to domestic rules. Actually, any other solution would be contrary to the liberal approach adopted in the *Hadadi* case and underlying the Succession Regulation.

The law chosen will apply, even if it is not the law of the effective nationality. This possibility is open also to third country nationals. The Regulation's rules apply *erga omnes*, in other words, when the law designated in

[24] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (hereinafter, Brussels IIa), in *O.J.* L 338 of 23 December 2003, p. 1., now set to be replaced by Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, in *O.J.* L178/2019, p. 1.

[25] CJEU 7 July 1992, Case C-369/90, *Micheletti*; CJEU 2 October 2003, Case C-148/02, *Garcia Avello*; CJEU 16 July 2009, Case C-168/08, *Hadadi*.

[26] See, among others, BARIATTI, *Multiple Nationalities and EU Private International Law. Many Questions and Some Tentative Answers*, in *Yearb. Priv. Int. Law*, 2011, p. 1; ID., *Multiple Nationalities and EU Family Regulations*, in VIARENGO, VILLATA (eds.), *Planning the Future of Cross Border Families* cit., p. 151 ff., KRUGER, VERHELLEN, *Dual Nationality = Double Trouble?*, in *Journ. Priv. Int. Law*, 2011, p. 601.

[27] However, the same solution should be followed where the parties to a relationship are empowered to choose the law of their common nationality or of the nationality of one of them, as it happens under Art. 8(c) of the Rome III Regulation.

accordance with the Regulation is the law of a non-Member State. Therefore, all nationalities of the deceased are placed on the same level.

7. The scope of the chosen law is very wide, including the whole of the estate and all succession issues.[28] According to Recital 42, the applicable law should govern the succession from the opening of the succession to the transfer of ownership of the assets forming part of the estate to the beneficiaries as determined by that law. It should include questions relating to the administration of the estate and to liability for the debts under the succession. These factors must be born in mind by a person wishing to plan their succession in advance by choosing the applicable law. Party autonomy is generally exercised by taking into consideration the substantive rules of the applicable law, and is based on the assessment, by the persons concerned, of the advantages and disadvantages of the substantive rules. As concerns succession, the choice of a certain law is usually based on the assessment of the rules regarding who inherits, what the portions and reserved shares are, and how wide the testamentary freedom is. The way an estate is to be administered may not be the first concern of the deceased in making their choice, but they must be aware of the consequence of their choice on the administration of the estate.

With regard to the determination of the beneficiaries, the law applicable to the succession should determine who the beneficiaries are in any given succession, as clarified in Recital 47.[29] Such a determination may depend on the answer to a preliminary question. For example, the spouse or partner's right to succession depends upon the validity of marriage or partnership. However, the Succession Regulation, in line with the EU legislation on family matters,[30] excludes family status from its scope, and

[28] Art. 23.

[29] Art. 23(2)(b).

[30] In this respect, the Maintenance Regulation provides that the recognition and enforcement of a decision on maintenance shall not in any way imply the recognition of the family relationship, parentage, marriage, or affinity underlying the maintenance obligation which gave rise to the decision. Along the same lines, Regulation Brussels IIa expressly excludes from the scope of its rules 'the establishment of parenthood'. Brussels IIa includes then, among the reasons for non-recognition of judgments, a double and generic incompatibility with other decisions matching the characteristics outlined in Art. 22(c) and (d). Finally, albeit with different wording and subject to different interpretations, Art. 1(2)(a), (b) and (f) of the Rome III Regulation, Art. 1(2)(b) of the Property Regimes Regulations, exclude family status from their scope. A different solution is provided by the Hague Protocol, according to which the *lex causae* 'shall determine inter alia a) whether, to what extent and from whom the creditor may claim maintenance'. But decisions issued pursuant to the Hague Protocol shall not affect the existence of a family relationship, such as parentage, marriage, or affinity whereby that obligation is owed.

does not provide what conflict rule should be adopted to determine the law applicable to preliminary questions. Consequently, it leaves open the alternative between the *lex fori* and the *lex causae* approach (an independent-dependant solution). Following the first approach, the judge applies the national conflict-of-law rules to determine who is entitled to the succession; the second the judge will apply the conflict-of-law rules of the law of the main question, in other words, the succession.[31]

The solution to the preliminary question belongs to the so-called general part of European private international law. In recent years, a growing number of contributions have devoted attention to how legal concepts traditionally categorized as general are designed in the Regulations thus far enacted by the European legislator. Additionally, they have asked whether and how these concepts could be codified in a Rome 0 Regulation or, more generally, in a Code of European Private International Law.[32]

Therefore, suffice it to note here that the issue of the solution to be given to the preliminary question with regard to the Succession Regulation seems to decrease in relevance essentially for two reasons. Firstly, in cases of choice of law, the parallelism between *ius* and *forum* pursued by the Succession Regulation through the mechanism settled in Articles 5, 6, and 7 makes this issue completely irrelevant. Secondly, provided that the *optio juris* is limited to the national law of the deceased and that nationality is still the primary connecting factor for personal status under national rules, the two approaches in most cases will lead to the same result.

Let us take the example of a Spanish national, habitually resident in Italy, who has concluded a same-sex marriage in Spain, according to the Spanish law. He owns immovables in Italy and dies in Italy. In his will, he bequeaths all his estate to his spouse, choosing the Spanish law as the applicable law. The validity of the will is contested by a forced heir before

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[31] The issue have been treated in particular in the German legal doctrine of private international law. It is disputed between the independent solution (*selbständige Anknüpfung*), which furthers international harmony of decisions, and dependant solution (*unselbständige Anknüpfung*), which serves internal harmony of decisions. See BERNITT, *Die Anknüpfung von Vorfragen im europäischen Kollisionsrecht*, Mohr Siebeck, 2010; GOESSL, *Preliminary Questions in EU Private International Law*, in *Journ. Priv. Int. Law*, 2012, p. 63. As concerns the Succession Regulation and EU Family Law see in particular DUTTA, *Die europäische Erbrechtsverordnung vor ihrem Anwendungsbeginn: Zehn ausgewählte Streitstandsminiaturen*, in *IPRax*, 2015, p. 32; PFEIFFER, WHITTMANN, *Preliminary Questions*, in VIARENGO, VILLATA (eds.), *Planning the Future of Cross Border Families* cit., p. 47.

[32] Cf LEIBLE, UNBERATH (Hrsg), *Brauchen wir eine Rome-O Verordnung?* Sipplingen, 2013, p. 202 ff.; LEIBLE, *Auf dem Weg zu einer Rom 0-VO – Plädoyer für einen Allgemeinen Teil des europäischen IPR*, in *Festschrift für D. Martiny*, 2014, p. 429; HAUSMANN, *Le questioni generali nel diritto internazionale privato europeo*', this *Rivista*, 2015, p. 499.

the Italian judge. The Italian judge, either by applying the conflicts-of-law rules of the *lex fori* or those of the *lex causae*, cannot consider the will invalid on the ground that in Italy same-sex marriages partnerships are not recognized.

8. Concerning the formal validity, Article 22 provides that a choice of law should be made expressly in a declaration in the form of a disposition of property upon death or be demonstrated by the terms of such a disposition. Furthermore, any modification or revocation of the choice of law shall meet the requirements as to form for the modification or revocation of a disposition of property upon death. This provision does not specify formal requirements. Provided that a disposition of property upon death is necessary, the choice of law must comply with Article 27, which favours the formal validity of such disposition by referring alternatively to different laws.

An *optio juris* included in a disposition of property upon death, for example, an agreement as to succession, is valid even if the disposition is prohibited in the State of the forum.[33] Let us take the example of a German national living in Italy, who enters into an agreement as to succession according to German law. The Italian judge cannot consider the choice of law in favour of the German law, and consequently the agreement invalid because Italian law prohibits the agreement as to successions. As mentioned before, the admissibility, substantive validity and binding effects between the parties of an agreement as to succession depend on the law chosen, pursuant Article 24(3).

The Succession Regulation allows tacit choice.[34] Recital 39 suggests that a choice of law could be regarded as demonstrated by a disposition of property upon death where, for instance, the deceased had referred in their disposition to specific provisions of the law of the State of their nationality or where they had otherwise mentioned that law. Let us take for example the creation of a testamentary trust by a British national or the establishment of a joint will by German nationals living in Italy, where joint wills are not allowed. However, the choice may be demonstrated by the terms of the disposition of property upon death, but not by the circumstances of the

[33] Cf. BONOMI, *Art. 22* cit., p. 319.

[34] The tacit choice represents a significant innovation, because it is not recognized in most EU member States. In some of them, for example in Switzerland and in Germany, it is deemed to be admissible by the case law by interpreting and applying the relevant conflict-of-laws rules, i.e. Art. 90 of the Swiss Federal Act on Private International Law and Art. 25, par. 2 *EGBGB*.

case. A presumed intention (in other words, neither expressed, nor inferred, but choice imputed from an analysis of the circumstances) is not taken into consideration by the Succession Regulation. Accordingly it seems impossible to assume a tacit choice by the language of the disposition, unlike in the Rome I Regulation.[35]

9. The ascertainment of the substantial validity of the *optio iuris* is governed by the *lex causae*. As pointed out in Recital 40, it should be for the chosen law to determine the substantive validity of the act of making the choice, that is to say, whether the persons making the choice may be considered to have understood and consented to what they were doing. The same should apply to the act of modifying or revoking a choice of law. On the contrary, the law chosen does not govern the admissibility of the choice, which is already founded on the Regulation. Accordingly, a *optio juris* should be valid even if the chosen law does not provide for a choice of law in matters of succession.

There is no doubt that consent issues, such as fraud, duress, mistake, and any other questions relating to the consent or intention of the person making the choice are included in the scope of the substantial validity governed by the chosen law.[36]

One may wonder whether the testator must be fully aware of the consequences of their choice. In other words, should the principle of the informed choice, defined as a basic principle in other regulations where party autonomy is a key criterion, also play any role in the Succession Regulation? The answer seems to be in the negative. In the Rome III Regulation, the principle of informed choice is meant to avoid potential abuses by one of the spouses to the detriment of the other spouse. To this end Article 6(2) sets out a corrective mechanism, empowering one of the spouses to claim that they have not validly expressed their consent, when the law designated brings prejudice to their interests.[37]

Article 22(3) of the Succession Regulation does not mention other elements pertaining to scope. In this regard, it seems to be correct to refer to

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[35] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations *O.J.* 2008, L177, p. 6. Neither the place where the disposition has been concluded could be considered an indicator of a tacit choice.

[36] See Recital 40.

[37] Art. 6(2) of the Rome III Regulation specifies that in order to establish that they did not consent, a spouse may rely upon the law of the country in which they have their habitual residence at the time the court is seized, if it appears from the circumstances that it would not be reasonable to determine the effect of their conduct in accordance with the law designated by the agreement. See also Rec. 18.

Article 26, regarding the substantive validity of dispositions of property upon death. Therefore, the capacity of the person making the *optio juris*, the admissibility of representation for the purposes of the choice, and the interpretation should be included in the scope.[38]

Finally, it must be kept in mind that even a choice made before the entry into force of the Succession Regulation, which occurred on 17 August 2015, can be deemed valid. Article 83.2 establishes that such a choice is valid if it meets the conditions laid down in the Regulation, such as the choice of the national law, or if it is valid in application of the rules of private international law which were in force, at the time the choice was made, in the State in which the deceased had their habitual residence or in any of the States whose nationality they possessed. For example a *optio juris* made by an Italian national in favor of the German law, provided that he lives in Germany at the time of the choice, must be deemed valid because in application of Article 46 of Italian Private International Law Act of 31.5.1995 No 218.

10. The choice of law could be in contrast to the expectations of family members on the applicability of certain provisions on forced heirship and lead to a law that actually endangers their protection. The main effect of forced heirship rules, provided mostly in continental Europe and Scotland, is to restrict the ability of testators to decide how their assets should be distributed after their death. Giving the testator the power to choose the applicable law entails the potential risk of a choice made with the only purpose to avoid forced heirship provisions. These testators could take advantage of party autonomy as a connecting factor by choosing a law which grants them more freedom than the law objectively applicable. In some States, for example in several U.S. states, the protection of close family members, even of the children, is totally absent. The concern, relevant to those States whose law of succession includes forced inheritance, is that testators could, if they wish, exploit the choice in order to avoid their property passing as prescribed by the forced inheritance rules. That is a major issue that has arisen in connection with the freedom of choice.

In order to avoid a law being chosen with the intention of frustrating the legitimate expectations of persons entitled to a reserved share, based on the law objectively applicable, the choice in the Regulation is limited to the law of a State of the testator's nationality.[39]

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[38] DAMASCELLI, *Diritto internazionale privato delle successioni* cit., p. 58.
[39] See LAGARDE, *Les principes de base* cit., p. 691.

This is the reason why the Succession Regulation does not allow the choice of another law, for example the law of the habitual residence. Theoretically, either the law of the last habitual residence or the law of the habitual residence at the moment of the choice could come to play. However, the former does not seem to be relevant as this law will be applicable already according to the objective choice-of-law rule.[40] On the contrary, the latter would have been advantageous in that it would have allowed the testator fix the applicable law regardless of a future change of their habitual residence.[41] However, the risk that testators might choose the law of their habitual residence during their lifetime, a law that may be less protective for the interests of the family members, justified the exclusion of such a choice. In other words, the choice limited to a law with a stable link with the deceased, such as nationality, has been deemed sufficient to avoid the risk of abuse. As a matter of fact, while the definition of habitual residence opens room for manipulation, this is unlikely to be the case with regard to nationality.

It is self-evident that even the choice of the national law does not guarantee, *per se*, the protection of the family members. An effective protection of family members depends on the content of the substantive provisions of the applicable law. Take the example of an English national living in Italy. The choice of their national law would deprive the heirs of the reserved share provided for under Italian law, applicable in absence of choice.

Most legal systems protect close family members against the exercise of the testator's freedom to testate. However, the landscape of the reserved heirship rules in Europe is extremely diverse. Some countries protect both spouse and children. Other countries protect primarily the children of the deceased, alternatively the spouse. Opposite positions between civil law and common law jurisdictions concern mandatory heirship rights of close family members.[42]

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[40] As already pointed out in the legal literature, such a possibility could have been of some interest in case of uncertain residence, in order to overcome the difficulty in determining the habitual residence. Cf LAGARDE, *Les principes de base* cit., p. 720. Moreover, the choice in favour of this law would exclude the functioning of the escape clause provided in Art. 21.2. Cf. BONOMI, *Art. 22* cit., p. 311.

[41] In favour of this solution, see Deutsches Notarinstitut (DNotI), *Étude de droit comparé sur les règles de conflits de juridictions et de conflits de lois relatives aux testaments et successions dans les Etats membres de l'Union Européenne*, p. 70. In the legal literature see also, among others, DUTTA, *Succession and Wills in the Conflict of Laws on the Eve of Europeanisation*', in *RabelsZ*, 2009, p. 569 ff.; KINDLER, *La legge regolatrice delle successioni nella proposta di regolamento dell'Unione Europea: qualche riflessione in tema di carattere universale, rinvio e professio iuris*, in *Riv. dir. int.*, 2011, p. 429 ff.

[42] In England, forced heirship rules do not exist. Surviving husbands or spouses and children can make a claim under the Inheritance (Provision for Family and Dependants) Act

Many divergences may be found also with regard to the protection of family members on the choice-of-law level. Some States award special protection by establishing, for example, as is the case with Italian law,[43] that the choice of law of the deceased, an Italian national, cannot deprive, under certain conditions, the heirs of the forced heirship rights granted to them by Italian law, as the objectively applicable law.

In the Succession Regulation there are no special protective rules for family members. A provision like the Italian one would have weakened the choice of law, in contrast with the pursued purposes of predictability and certainty, by leading to a fragmentation of the applicable law. Furthermore, those kind of protective rules seem to be more justified in a system based on the nationality rather than on the habitual residence as the objective connecting factor. It is open to dispute how worthy the protection of the expectation of an heir based on an uncertain law, such as that of the last habitual residence, may be.

In the absence of protective measures, one may wonder whether there are in the Regulation other possible mechanisms to avoid the risk of abuse of rights or fraud. However, before that, one should wonder if the choice of the national law could be someway conceived as a kind of fraud.

The *fraude à la loi* is actually considered in the Succession Regulation, in Recital 26, which provides that nothing in the Regulation should prevent a court from applying mechanisms designed to tackle the evasion of the law, such as *fraude à la loi*, in the context of private international law.[44] *Fraude à la loi* may be defined as a modification of a factual element constituting a connecting factor with the only aim to circumvent the application of a certain law. It is possible to imagine, even if it is rare in practice, the acquisition of a State's nationality for the purpose of the choice. However, it is quite impossible to demonstrate in practice the fraudulent intent,

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1975, which may lead to a discretionary grant of maintenance. Therefore, English nationals, habitually resident in other EU States, who would prefer English laws to apply to succession on their death, should elect in their will for English law to apply. See LEIN, *Legal consequences of the decision by the UK not to take part in the adoption of an EU Regulation on succession* (Brussels, European Parliament, 2010).

[43] Art. 46(2) of the Italian Private International Law Act**.** Under Italian law, which followed the nationality principle, the testator could choose the application of the law of their habitual residence. However, the choice of law becomes ineffective if the deceased after the choice changed their nationality or, respectively, their habitual residence referred to in their choice. Moreover, in the case of succession to an Italian national, the choice of law shall not affect the rights that Italian law confers on the heirs who are resident in Italy at the moment of the decease of the person whose estate is in question.

[44] See VILLATA, *Predictability First! Fraus Legis, Overriding Mandatory Rules and Ordre Public under EU Regulation 650/2012 on Succession Matters,* this *Rivista*, 2019, p. 714 ff.

because the Succession Regulation does not require an effective link to the chosen law. Not only is a genuine link not required, but the acquisition of a State's nationality for the purpose of the choice is not even conceived as *fraude à la loi*. If correct, then such an acquisition may remain in the legitimate boundaries of the functioning of party autonomy.

12. It is questionable whether, and to what extent, the public-policy clause can play a role this regard. Article 35 of the Succession Regulation establishes, with the familiar formula, that the application of a provision of the law designated by virtue of the Regulation may only be refused if such application is manifestly incompatible with the public policy of the forum.[45] The main function of public policy is to protect the fundamental values of the forum State against unacceptable results which may derive either from the application of foreign law or from the recognition of foreign judgments. The respective provisions of the European Regulations require the threshold of a manifest conflict with public policy.[46] The application must be restrictive according to the case law of the Court of Justice[47] and also to Recital 58, which, in line with all the European Union private international law instruments, emphasizes the exceptional nature of the use of public policy.

The Commission proposal specified in the second paragraph of the public-policy provision that differences between the laws relating to the protection of the legitimate interests of the relatives of the deceased must not be used to justify its use. The suppression of the second paragraph does not change anything. Actually, it was meant to avoid the application of public policy in order to disregard foreign law with different modalities of protection. Thus, from the wording of Article 35 it seems clear that public policy cannot be invoked against foreign laws which do not provide for fixed shares of the estate for family members but provide for mechanisms based on judicial discretion, as is the case with the family provisions under English law.

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[45] The wording of Art. 35 is identical with the wording of Art. 31 of the Property Regimes Regulations (see GEBAUER, *Article 31, Public Policy (Ordre Public*), in VIARENGO, FRANZINA (eds.), *The EU Regulations on the Property Regimes of international Couples* cit., p. 306 ff.) and it is very similar to the corresponding public policy clause provided by the Rome III Regulation (Art. 12).

[46] HESS, PFEIFFER, *Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law. Study*, PE 453.189, 2011.

[47] Case C-394/07, 2 April 2009, *Marco Gambazzi v DaimlerChrysler Canada Inc., CIBC Mellon Trust Company*; Case C-7/98, 28 March 2000, *Krombach v Bamberski*; Case C-38/98, 11 May 2000, *Renault v Maxicar*.

What about a foreign law which does not provide any protection? One may recall some judgments of the supreme courts within the civil law system, where the compulsory portion is firmly rooted in legal traditions, and which prove to be quite controversial regarding the recourse to public policy. For example, the Italian *Corte di Cassazione* in 2006 stated that Canadian law, applicable in that case as the deceased was Canadian, was not contrary to the public policy, even if it did not provide for forced heirship.[48] In the same line of reasoning are judgments of the *Tribunal fédéral Suisse*,[49] the *Tribunal supremo español*,[50] and the *Cour de Cassation*.[51] On the contrary, the *Bundesverfassungsgericht* (German Constitutional Court) stated that the right of the children to be entitled to a reserve portion is guaranteed by the Constitution.[52]

Actually, one may wonder how useful this case law could be considered, as these judgments have been rendered with regard to the national conflict-of-law rules. By applying the Succession Regulation, one must keep the objectives of the Regulation in mind, and particularly the objective of ensuring the application of a single law to all of the succession property and the favour for the freedom of individuals to dispose of their assets as they wish.

However, public policy may reasonably come into play in particular cases where one of the spouses or the children according to the applicable conflicts-of law rules is entitled to any compensation and sufficient protection cannot somehow still be secured. [53] The lack of safeguards for these two categories of relatives must be ascertained on a case by case basis. As widely recognised and confirmed in Recital 58, the incompatibility with the public policy must be assessed *in concreto* in each given case and not *in abstracto* with reference to the foreign applicable law.

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[48] *Corte di cassazione*, 24 June 1996, No 5832, in questa *Rivista*, 2000, p. 784.

[49] *Hirsch c. Cohen*, AtF 102 II 136 (1976).

[50] *Tribunal supremo*, 15 November 1996, *Lowenthal*.

[51] *Cour de cassation* 1re civ., 27 September 2017 Nos 16-13.151 (JurisData No 2017-018698) and 16-17.198 (JurisData No 2017-018703). The *Cour de Cassation* held that the absence of compulsory shares in the applicable foreign succession law does not per se violate the French ordre public. The foreign law can only be set aside if its application in the specific case leads to a situation that is incompatible with essential principles of the French legal system. Therefore, said exception may be invoked only when the unprotected family member is in precarious economic situation or in a state of need.

[52] *BVerfG*, 19 April 2005, in *FamRZ*, 2005, p. 872, note MAYER, 1441; in *NJW*, 2005, p. 1561.

[53] DUTTA, *Succession and Wills* cit., p. 582: BONOMI, *Art. 35*, in BONOMI, WAUTELET (eds.), *Le droit européen des succession* cit., p. 474; CONTALDI, GRIECO, *Art. 35 Public policy (Ordre public)* in CALVO CARAVACA, DAVÌ, MANSEL (eds), *The EU Succession Regulation. A Commentary*, Cambridge University Press, 2016, p. 507.

Although the public policy exception does not seem to be overly relevant with regard to the protection of family members, it could nonetheless be invoked when the law chosen is in contrast with undisputable, fundamental values, such as the principle of non-discrimination. Take the example of a choice in favour of Islamic law made by a person living in an EU country. The application of their national law, in which the women receive half the share of inheritance available to men who have the same degree of relation to the decedent with the consequence that, where the decedent has both male and female children, a son's share is double that of a daughter's, is in contrast with the principle of non-discrimination.

In this regard, it must be borne in mind that the concept of public policy, as determined by national law and aiming primarily at the preservation of certain family models, is subject to compatibility with a growing Europeanisation of the public policy exception, which focuses on safeguarding individual rights and on the prohibition of discrimination.

Such a common notion has been evoked in the latest EU Regulations, with reference both to the role of fundamental rights and to the consolidation of common principles. In Recital 81 of the Succession Regulation there is a reference to the fundamental rights and principles recognised by the Charter of Fundamental Rights of the European Union, stating that the Regulation should be applied by the competent authorities in Member States in observance of those rights and principles. [54] An "European control" [55] within the Regulation is evoked in the second sentence of Recital 54, which states that '[…] the courts or other competent authorities should not be able to apply the public policy exception in order to set aside the law of another State or to refuse to recognise or, as the case may be, accept or enforce a decision, an authentic instrument or a court settlement from another Member State when doing so would be contrary to the Charter of Fundamental Rights of the European Union (Charter), and in particular Article 21 thereof on the principle of non-discrimination'.[56]

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[54] In similar terms see Recital 30 of the Rome III Regulation and Recital 54 of the Property Regimes Regulations.

[55] As the Court of Justice held in the context of public policy as a defence to the recognition and enforcement of foreign judgments: Case C-7/98, 28 March 2000, *Krombach* cit., para. 23.

[56] See also Recital 25 of the Rome III Regulation, Recital 54 of the Regulation (EU) 2016/1103 on matrimonial property and Recital 53 of the Regulation (EU) 2016/1104 on the property consequences of registered partnership. Finally, Art. 10 of the Rome III Regulation can be traced back to the general framework of the common values of public policy, in that it provides for the applicability of the *lex fori* where the foreign applicable law 'does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex'. With such a provision, the Regulation aims to ensure respect for the principle of non-

In conclusion, a breach of the principle of non-discrimination does justify a limitation based on public policy. Things are different with regard to the issues of the protection of forced heir or safeguard of the reserved share of the estate. As already said, a case-by-case approach is needed. While it is difficult at present to foresee the attitude of continental European courts towards this exception, it nevertheless seems that public policy may play a role only in very extreme cases.

SUMMARY: *This article addresses the role of party autonomy in the the Regulation No. 650/2012 in a context of estate planning, Therefore, the the coordination between the law applicable to the succession and to property aspects of marriage or a registered partnership as provided in the Regulations n. 2016/1103 and 2016/1104 is analysed. This article furthermore examines the optio juris functioning and, in particular, it focuses on the object of the choice, the determination of the nationality, whose law may be chosen, the formal and substantial validity of the agreement. Finally, the choice of law could be in contrast to the expectations of family members on the applicability of certain provisions on forced heirship and lead to a law that actually endangers their protection. The issue of the protection of close family members in connection with the freedom of choice is taken in account.*

discrimination between a man and a woman in its specific enforcement of substantive and procedural equality before the law, and thus removes any doubts in all the Member States bound by it.