LIST OF CONTROVERSIAL ISSUES

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On the basis of the Scientific Questionnaires' results, as collected and analysed in the Assessment Report, it is possible to understand which issues have been considered interesting for all involved countries and reveal differences, thus also calling for some improvement in the uniform application of the EU Regulation on Successions[1]. The same issues will also be flagged to focus the e-learning course on, as stated in its Programme.

Specifically, the listed issues deal with the relationships among Cross-Border Successions and the following problematic topics:

1. ***Polygamous Marriages***

   In all the concerned Countries the internal matrimonial laws require monogamy and according to the prevalent standpoint it is a public policy issue, but the concrete consequences of this position are debated. According to the French and Portuguese Reports, as well as to the Italian and Hungarian Notaries and to some Italian Family Lawyers, if the deceased and his surviving spouses are foreign nationals and the domestic connection consists of the deceased's leaving some estate located on the national territory, then it is not justifiable to invoke the public policy clause and deny the internal application of a foreign succession law rule, which would entitle several surviving spouses to inherit simultaneously (see French Court of Cassation, 24th September 2002, n. 00-15.789, but also Italian Court of Cassation, 2nd March 1999, n. 1739). On the other hand, according to the Hungarian Judges, such a solution is never acceptable, because polygamy is always in manifest contrast with public policy. According to the Spanish Report polygamous marriages cannot produce successions law effects, but the same Report shows that a quite similar effect has been recognized by a recent judicial decision (Supreme Tribunal, 24th January 2018, n. 84), granting a survivor's pension to the widow of a polygamous deceased Moroccan soldier, who had served in the Spanish Army for West Sahara.

[1] Another list of controversial issues, more country-specific and targeted on Hungary, has been prepared by ELTE University and is uploaded in the Portal together with the present one in the same deliverable.

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Moreover, in all the concerned Countries (and also in other Countries, such as Albania), the children born from polygamous marriages have the same rights of those born from monogamous marriages, from a succession law point of view too, and thus they inherit equally. The Hungarian Academics hypothesize that the child of a polygamous marriage could be individually adopted by the parent's other spouse, while the Spanish Report hypothesize that the latter can bequeath by testament his/her assets to this child.

2. *Sham Marriages*

This issue reveals differences among the concerned Countries.
In Hungary actions against sham marriage can be brought by any interested person, also after the death of a sham spouse in order to deny inheritance rights to the other one. Neither the Spanish legal system provides time limits, but case-law is quite wary when third parties challenge a marriage after the death of a spouse, because in this case to ascertain the actual will of the marrying parties is deemed to be very difficult. In Portugal a third party can challenge a sham marriage within three years from its celebration or within six months from the subsequent moment when he had knowledge of its sham nature.
On the other hand, according to Italian Civil Code sham marriages can be challenged only by the spouses within a year from the celebration, while generally speaking third parties have no rights, because, as underlined by a Family Lawyer's Report the proposal to give such a power also to the public prosecutor was rejected by the legislators. However, according to some recent statutes, police authorities have the power to deny family reunification in any time if it is asked on the ground of a sham marriage.

3. *Repudiation*

In all the concerned Countries, the equality of spouses is a public policy issue, and this is the main difference between consensual extrajudicial divorces and marital *talaq*. However, it does not imply a total denial of any possible effect for the foreign repudiations.
According to Spanish Academics public policy doesn't prevent the recognition of the wife's status as repudiated when she asks for such a recognition, in order to be considered free to marry again. In Portugal, the Tribunal of Lisbon, 18th October 2007, stated that Moroccan law contrast with public policy because it denies to the wife the right to divorce, but not because it recognizes such a right to the husband.

According to Hungarian Notaries ascertaining whether *talaq* infringes public policy depends on a thorough examination of all the circumstances of a specific case, thus especially whether such divorce was also the intention of the other spouse (i.e. the wife).
Moreover, under Hungarian Law the spousal right of inheritance does not depend on the formal existence of marriage, but on the actual matrimonial relationship between the parties at the time of the death of one of them. Therefore, even if *talaq* is not recognised in itself, the, at least *de facto*, separated spouse has no inheritance rights. On the other hand, according to Italian Notaries the repudiated wife has inheritance rights on the deceased husband's assets left in Italy, but they also report on a minority case-law that has deemed *talaq* as not contrasting with public policy (Court of Cagliari, 16th May 2008).

4. *Disinheritance and Unworthiness to Succeed*

This issue reveals differences among the concerned Countries.
According to the Spanish Report reserved shares and unworthiness to succeed are not public policy issues, as demonstrated also by Regional Laws that have always derogated the National ones in this regard (e.g. Basque Civil Law), and so only foreign rules that turns out to be discriminatory on the ground of gender, religion or ethnicity (e.g. reserved share denied to daughters and granted to sons; or unworthiness to succeed because of apostasy) could be considered as contrasting with public policy. An analogous position is affirmed by the Italian Notaries.
French Judges have recently agreed that the rules on reserved shares are not a public policy issues (Court of Cassation, 27th September 2017, n. 16-17.198 and n. 16-13.151).
In other Countries the issue is still debated. According to the Hungarian Notaries the rules on reserved portions are not of a public policy nature, while Hungarian Judges and Academics don't agree. Likewise, in one of the Portuguese answers reserved share are defined as a public policy issue, while another one does not agree, and the Academic Report the issue is defined as dubious.

5. *Differences among Marriage, Civil Partnership and Cohabitation*

This issue reveals differences among the concerned Countries.

a) In France the surviving civil partner has less inheritance rights than the surviving spouse, but foreign laws that recognize to the surviving

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partner the same inheritance rights of the surviving spouse (e.g. the Dutch one) is not in contrast with public policy.
In Hungary and Italy, the surviving same-sex partner has the same inheritance rights of a surviving spouse: according to the Hungarian Notaries and to an Italian Academic this is not a public policy issue, and so, if the applicable foreign law provides to the surviving same-sex partner a right of inheritance of a lesser degree than in case of a spouse, then such a provision will prevail, while the Hungarian Judges and Academics, as well as some Italian Family Lawyers, consider such a foreign law contrasting with public policy.
In Spain and Portugal civil registered partnership does not exist. However, according to the prevailing opinion in Portuguese legal scholarship, both recognition or denial of inheritance rights provided by foreign laws with regard to civil registered partnerships would not be in contrast with public policy.

b) In Hungary same-sex marriage is not allowed, but, unless the lack (deplored by the Academics) of specific rules in this regard, a recent decision of the Metropolitan Court of Budapest stated that if a same-sex couple entered into a marriage abroad, pursuant to a foreign law, their relationship is recognised as a same-sex civil partnership; however, in case of the death of one of the partners, the surviving one inherits in the same manner as a surviving spouse, unless the applicable foreign law provides differently. In Italy such a conversion is provided by statutory laws with specific regard to the hypothesis of a foreign marriage involving an Italian citizen (Court of Cassation, 14th May 2018, n. 11696), while, according to a Family Lawyer, the foreign marriage between two foreigners could be registered as a marriage tout court.
In France, Spain and Portugal same-sex marriage is allowed, and so in these Countries there isn't such an issue of conversion. According to the Portuguese Academic Report, the conversion of a Portuguese same-sex marriage determined by a foreign law would not produce effects in Portugal.

c) In Hungary different-sex couples are not allowed to form a registered civil partnership, but only a notarial partnership without successions law effects. However, a foreign law providing for a different-sex civil partnership is not deemed to be in contrast with public policy and, in such a case, the applicable succession law will determine the rights of the surviving partner. On the other hand, the Hungarian Notaries underline that there aren't legal means to "requalify" or "convert" a different-sex registered civil partnership to a marriage status. Seemingly in Italy the situation is quite similar.

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In Spain and Portugal civil partnership does not exist, while in France it is open to both same-sex and different-sex couples, and so in these Countries there isn't such an issue of conversion.

d) According to some Portuguese answers, *de facto* cohabitations produce limited successions law effects (e.g. in the matter of tenancies and pensions), but a foreign law that provides more or less of these effects is not deemed to be contrasting with public policy. In Italy *de facto* cohabitations produce some limited successions law effects too, and, according to some Family Lawyers, a foreign law that denies these effects would be contrasting with public policy.
In Spain recognizing successions law effects to a merely de facto cohabitation has been judged unconstitutional, because such effects would be imposed to the parties without any expression of their will (Constitutional Court, 23rd April 2013, n. 93): therefore, according to the Spanish Report, also a foreign law with analogous provisions would be deemed as contrasting with public policy. In Hungary *de facto* cohabitation does not give rise to intestate succession rights, but, according to the Hungarian Notaries and Academics a foreign law granting succession rights to the surviving cohabitant would not infringe public policy, while the Hungarian Judges do not agree with this solution.

6. *Premarital Agreements*

This issue reveals differences among the concerned Countries.

a) In Hungary it is possible for spouses and civil partners to arrange their property interests via a Premarital Agreement and also to dispose of their assets in the event of their death under a Matrimonial Property Agreement.
In Spain generally speaking the National Code doesn't allow Premarital Agreements with successions law effects, but some Regional Laws do, and, accordingly, foreign agreements with such a content are not deemed to be in contrast with public policy. Similarly, in Portugal general provisions do not allow these agreements, but in some exceptional cases, such as Antenuptial Agreements, they are admitted, and, accordingly, foreign agreements with such a content could not deemed to be in contrast with public policy.
In Italy Premarital Agreements with effects on successions are prohibited and a recent Bill meant to introduce them has not been approved by the Parliament. With regard to the foreign ones, according to a Notary, they are in contrast with public policy, while, according to

a Family Lawyer and to an Academic, this is not an international public policy issue.
In France *Ketubah* and *Mahr* Agreements have turned to be difficult to qualify: therefore, a case by case analysis is needed and it is not possible to always automatically label them as contrasting with public policy.

b) In Hungary it is possible for *de facto* cohabitants to arrange their property interests via a Property Agreement that may also contain testamentary provisions. In Spain similar rules are set out by some Regional Law (e.g. the Catalan one), and so a foreign agreement with such a content would not be deemed as contrasting with public policy.
In Portugal these agreements are not allowed, but the foreign ones are not always considered as in contrast with public policy.
In Italy these agreements are not allowed, and, according to Family Lawyers, the foreign ones could be deemed as contrasting with public policy.
The French Report stands for a case by case analysis and states that it is not possible to always automatically label them as contrasting with public policy.

7. *Adaptation of Rights in Rem*

This issue reveals strong differences among the concerned Countries.

a) In Spain the number of rights in rem is unlimited (principle of *numerus apertus*), and so, according to the General Direction for Public Registries and Notaries, 18th February 2016, any foreign right endowed with the structure of a right *in rem* (i.e. an absolute and immediate right) can be registered, even if it not regulated by the domestic law. France too, after the leading case decision *Maison de la Poésie* (Court of Cassation, 31st October 2012 n. 11-16304), has endorsed the principle of *numerus apertus*.
On the other hand, in Hungary, Italy and Portugal the limited number of rights in rem (principle of *numerus clausus*) prevents from registering any other in rem right created or passed under succession, even if the law applicable to succession is a foreign law, recognising this right. In such cases, according to the Hungarian Notaries, art. 31 of the EU Succession Regulation will be applicable, and a right recognised by the domestic law, which is - as to its content and function - closest to the right *in rem* under the foreign law, will have to be registered.

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b) In Spain, according to the Law n. 29 of 2015, the competent authorities to adapt rights *in rem* are Notaries and Public Registries, but a final decision in controversial cases is taken by the Courts of Justice.
In Hungary the Act LXXI of 2015 provides for a special proceeding to adapt an unknown foreign right *in rem*: when the competent registry perceives the necessity of the adaptation, it applies the Central District Court of Buda with exclusive competence on adaptation, and whose decisions are appealable to the Budapest-Capital Regional Court.
In France, Italy and Portugal, a special proceeding does not exist. In France the most typical cases regard the adaptation of common law trusts, while in Portugal another relevant example is the adaptation of leasehold into superficies.

8. *Post Mortem Fertilization*

This issue reveals strong differences among the concerned Countries.

a) In Spain gametes are not considered objects of inheritance, because of their non-patrimonial nature, but the husband or cohabitant may consent in testament that is sperm will be used by his surviving wife or cohabitant for a *post mortem* fertilization, while gametes may be also bequeathed for heterologous donation or for research purposes.
According to Hungarian Judges, gametes cannot be objects of inheritance, nor the object of any will, while post mortem fertilization is not allowed: therefore, the stored gametes, that cannot be used for reproductive purposes because of the death of the concerned person, will have to be destroyed or used for research purposes, independently from his/her will.
Neither in Italy *post mortem* fertilization is allowed, even if according to an Academic such an absolute prohibition may be unconstitutional, while according to a Family Lawyer, although the issue is very controversial, the testator should have the right to modify or integrate in the will his/her previously expressed consent to medical and/or social freezing.

b) In all the concerned Countries, embryos or pre-embryos cannot be objects of inheritance, nor can be the object of a will, while post mortem implantation in the woman's uterus may be allowed, even in Italy and Hungary where post mortem fertilization is prohibited, provided that the fertilization had already taken place when the man was alive (see Tribunal of Bologna, 16th January 2015).

c) According to the specific statutory rules provided by Spanish Law, a person born from posthumous assisted reproduction (*post mortem* fertilization or *post mortem* embryo implantation) can be considered heir only if the deceased had consented to such a procreation.
On the other hand, according to the general legal principles taken into consideration by the Hungarian Judges and by the Italian Family Lawyers as well as the Academics, he/she can be considered heir in any case.
In all the concerned Countries third parties' bona fide purchases have to be protected, while an Italian Family Lawyer calls for a legislative intervention establishing a clear time-limit for the successions law effects of posthumous procreation.

d) According to the Spanish and Hungarian Reports a frozen embryo cannot be considered as an heir. The Hungarian Judges underline that the Civil Code's provisions mentioning conception for the purposes of legal capacity are evidently related to intrauterine conception and cannot easily be referred to *in vitro* fertilization.
On the other hand, according to an Italian Family Lawyer and to an Academic, a cryopreserved embryo has the same conditional inheritance rights of an already implanted embryo.

9. *Successions of Digital Assets*

In Spain a specific regulation of these successions had been enacted with the Catalan Law 27th June 2017 n. 10, but it has been challenged as unconstitutional and therefore its application will remain suspended till the constitutional judgement is delivered.
In Italy these issues have been dealt with mainly from a data protection law point of view by both case-law and legal scholars; according to a Notary the testamentary disposal of passwords is permissible, while an Academic reported about the judgment delivered by the German Supreme Court on 12th July 2018 as a new European leading-case in the matter of social media profiles' successions.
According to Hungarian Judges and Notaries, digital data cannot be objects of inheritance, while the rights and duties deriving from an agreement concluded by the deceased person with the electronic storage provider, and his/her rights of access to his/her data, may be inherited.

10. *Definitions of Habitual Residence*

This issue reveals strong differences among the concerned Countries.

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In Hungary habitual residence is statutorily defined, for the purposes of Private International Law, as the place where a person actually lives having regard to all circumstances of the case on hand; for the purposes of definition thereof the intention of the person affected must also be considered: as this definition is provided by an Act in force since 1st January 2018, there is no legal practice about its interpretation yet. According to an Academic, if taken in comparison with the previous definition, the new one puts more emphasis on factual questions. Moreover, Judges take into consideration also the LXVI Act of 1992, defining habitual residence as the address of the apartment where the citizen lives for more than 3 months without the intention of final leave.
In Portugal a statutorily definition does not exist. A Portuguese answer, referring to article from 82 to 88 of the Civil Code, has defined the habitual residence as the place where a person has fixed the center of his personal and social life. According to the Institute for Public Registries and Notaries, information can be derived from the fiscal domicile or from the utility bills.
In Spain habitual residence is not statutorily defined for the purposes of Private Law, but only for those of Tax Law: therefore, the importance attributed by EU Successions Regulation to this criterion appears problematic.
Neither in France nor in Italy a legal definition of habitual residence is provided by statute law, and so French Notaries are waiting for the definition to be elaborated by the EU Court of Justice with regard to the EU Successions Regulation, while Italian Notaries stand for a case by case approach.

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