INTEGRATION, MIGRATION, TRANSNATIONAL RELATIONSHIPS. GOVERNING INHERITANCE STATUTES AFTER THE ENTRY INTO FORCE OF EU SUCCESSION REGULATIONS.
GoInEUplus

This Project is funded by the European Union's Justice Programme 2014-2020

GoInEu plus practical guidelines on cultural mediation in family and succession law

Background and methodology

The Practical Guidelines of *Integration, migration, transnational relationships. Governing inheritance statutes after the entry into force of EU succession regulations* (in short GoInEU plus Practical Guidelines) were prepared by the GoInEU plus Coordinator, thanks to the collaboration on data collection of the whole GoInEU plus consortium, as a deliverable of the GoInEU Plus project funded by the European Union's Justice Programme 2014-2020.
The Guidelines would satisfy a number of criteria.
It would reflect and make clear the intent of the EU legislator set out in the following Regulations:

- No 650/2012 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;
- No 1103/2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes,
- No 1104/2016 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.

The GoInEU plus Practical Guidelines will also include **possible solutions** to problems that are not directly addressed by the sections of the above-mentioned Regulations. Guidelines shall be therefore useful for legal practitioners such as lawyers practising family law, judges, notaries, and also for employees of public administrations in the performance of activities that require registry office certificates.
The GoInEU Practical Guidelines have been elaborated considering the Regulations and the existing case law, praxis, questions and problems arising from debates during GoinEu plus seminars and workshops. The project consortium aims at proposing emerging guidelines indicating the sources from which those interpretative paths arise. To this end Guidelines will be divided into the following:

1. **Preface: predictability, certainty and flexibility in the application of the Regulations**
2. **Habitual residence**
3. **Public policy (*ordre public*)**
4. **Registered partnership**
5. **Law governing agreements as to succession and matrimonial or partnership property agreement.**

1. Preface: predictability, certainty and flexibility in the application of the Regulations

The European Union adopted several Regulations in order to implement the European Union aim of maintaining and developing an area of freedom, security and justice in which the free movement of persons is ensured.

Within the Regulations' contents, measures relating to judicial cooperation in civil matters having cross-border implications have been adopted because they are necessary for the proper functioning of the internal market.

1.1. Paying attention to the compatibility of the rules applicable in the Member States, concerning conflict of laws and of jurisdiction, **Regulation No 650/2012 aims** at letting citizens being able to **organise their succession in advance** in the European area of justice. At the same time, it aims at effectively guaranteeing the rights of heirs and legatees, of other persons close to the deceased and of creditors of the succession.

1.2. Thanks to the **Regulations 1103 and 1104 of 2016** the EU legislator wants to reach the following objectives: i) **improving the free movement of persons** in the Union, ii) giving the opportunity for **spouses and registered partners** to **arrange their property relations** in respect of themselves and others during their life as a couple and when liquidating their property.

1.3 The **common goal** of these Regulations is therefore to **avoid contradictory results**. For this reason the law applicable to a succession, to a matrimonial property regime, or to the partnership property regime should govern that succession or matrimonial/partnership regimes as a whole, irrespective of the nature of the assets and regardless of whether the assets are located in another Member State or in a third state[1].

1.4 Greater **predictability** and **legal certainty** cannot be sufficiently achieved by the Member States, but can rather, by reason of the scale and effects of these Regulations, be better achieved at Union level.

1.5 Nevertheless, in the European area of justice, legal unity must be achieved while **respecting diversities** of the national legal systems (for instance Member States' legal systems, including public policy (*ordre public*), and national traditions in this area).

To this end, In accordance with the principle of proportionality set out in Article 5 of the Treaty on European Union, these Regulations do not go beyond what is necessary in order to achieve those objectives.

Respecting national traditions means also considering that a Regulation can also be the result of an enhanced cooperation. This is the case of Regulations 1103 and 1104 of 2016 that are directly applicable only in Belgium, Bulgaria, the Czech Republic, Germany, Greece, Spain, France, Croatia Italy, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland and Sweden.

In order to improve flexibility and resilience in respect to the concrete situations, all the Regulations at stake give relevance to **private autonomy**. In other words, the persons involved have the possibility of choosing the law applicable to their succession and matrimonial or partnership property regimes. Nevertheless, the Regulations wording cannot solve all the practical problems/issues deriving from the so called transnational families, not only because of the coordination with the conflict of law provisions but also because of the fragmentation that at the moment characterize the EU Family law.

These Guidelines taking into account the GoInEu plus project results aims at clarifying the most controversial issues.

[1] See recital No 37 of the Regulation No 650/2012; recital No 43 of the Regulation No 1103/2016; recital No 42 0f the Regulation No 1104/2016.

2. Habitual residence

The 'habitual residence' criterion is pivotal in all the three Regulations.
'Habitual residence' of the spouses/partners or future spouses/partners, or of one of them, is in fact the **first criterion listed in art 22** (both of Regulation 1103 and 1104 of 2016) according to which the spouses/partners or future **spouses/partners can opt for the applicable law**. Otherwise, they can chose the law of the country of **nationality** and, as for registered partners, also the law of the **country** in which the **partnership** has been **registered**.

2.1 'Habitual residence' is also very important when the partners/spouses or the deceased did **not** made a **choice-of-law agreement** (see respectively art. 26.1 of the Regulation 1103, art 26.2 of Regulation 1104/2016 and art. 21.1 of Regulation No 650/2012). Regulation No 650/2012 provides as **general connecting factor,** for the purposes of determining both jurisdiction and the applicable law, the **habitual residence of the deceased at the time of death**.
According to Regulation No 1103/2016**, first common habitual residence after the conclusion of the marriage** is the first criterion listed in order to identify the applicable law in the absence of choice by the spouses, the same criterion came into play also for registered partnership in peculiar circumstances (art. 26.2 of Regulation 1104/2016).
Nevertheless, none of the Regulations gives a definition of habitual residence.
Recital No 23 of the Regulation No 650/2012 gives some hints: "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 […]".

2.2 Reference is made to the European Court of Justice decisions[2], even if, as far as family law is concerned, a clear definition is still missing.

2.3 Important hints can therefore be deduced by the so called EU 'Habitual Residence Test' that should facilitate its application in practice by Member States' authorities[3]. The guide refers to specific criteria to be taken into account:

- family status and family ties;
- duration and continuity of presence in the Member State concerned;
- employment situation (in particular the place where such activity is habitually pursued, the stability of the activity, and duration of the contract);
- exercise of a non-remunerated activity;
- in the case of students, the source of their income;
- how permanent a person's housing situation is;
- the Member State where the person pays taxes;
- reasons for moving to another country;
- the person's intentions based on all the circumstances and supported by factual evidence.

[2] The case C-80/19 of the Court of Justice of the European Union is pending and probably some more element will araise oncerning to habitual residence related to succession. See also Court of Justice of the European Union, case C-20/17, 21 June 2018

[3] The EU 'habitual resident test' is available at http://europa.eu/rapid/press-release_IP-14-13_en.htm.

The complexity of determining habitual residence is taken into account by the Regulations themselves, recital No 24 of the Regulation 650/2012 is explicit in this concern.
A "manifestly closest connection should, however, **not be resorted to as a subsidiary connecting factor whenever the determination of the habitual residence of the deceased at the time of death proves complex**" (recitals 25 of Regulation No 650/2012).
However, national courts seems to be more acquainted with more stable criteria such as nationality and the *lex rei sitae* for immovable[4], but the latter criterion is not even explicitly allowed according to art. 22 of both Regulation 1103 and Regulation 1104 of 2016.

3. Public policy (*ordre public*)

As far as public policy is concerned, all the three Regulations at stake have the same approach:
"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".

3.1 "However, 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"[5].
Judicial decisions demonstrate that **cultural mediation** is therefore pivotal in order to avoid discriminations.
Public policy shall be therefore used not to evaluate the validity of a foreign instrument (*kafala*, polygamous marriage and so on) but it shall be used as an exceptions, while **balancing values**. For instance, if the recognition of a polygamous marriage is instrumental to recognise the right to succession of one of the wives, refusing such a recognition will lead to a discrimination. A reasonable balance of values is therefore necessary: pluralism is not in itself detrimental to physical and mental development of a person. Actually, polygamous families can be worthy of protection if they intend to contribute to the physical and mental development of each member.

4. Registered partnership

According to the principle of proportionality set out in Article 5 of the Treaty on European Union, Regulations do not go beyond what is necessary in order to achieve those objectives. This is the

[4] Tribunale di Salerno (Italy), April 14th, 2018.
[5] See art. 35 and recital 58 of the Regulation No 650/2012, art. 31 and recital 54 of the Regulation No 1103/2016, and art. 31 and recital 53 of Regulation No 1104/2016. Public policy should be interpreted considering the possible violations of fundamental rights. Spanish and Portuguese case law is, in this respect, very interesting. Compliance with public policy at the international level has a clearly constitutional character linked to the fundamental rights and public freedoms defined, guaranteed and basically shared by the European Constitutions.
See Tribunal Supremo Español, 27 January 1998, 2924 regarding a case of repudiation and Tribunal Supremo Español, 19 June 2008, n. 3054 regarding a case of polygamy; Court of Appeal of Évora, 5 February 2009 where a man left his patrimony to his three children, excluding his wife and the son they had in common.

reason why, Regulation No 1103/2016 does not define 'marriage', which remains defined by the national laws of the Member States.

Interestingly, **Regulation 1104/2016 gives a definition of registered partnership** according to which "'registered partnership' means the regime governing the shared life of two people which is provided for in law, **the registration of which is mandatory under that law** and which fulfils the legal formalities required by that law for its creation".

Nevertheless, recital No 17 does specify that the definition is "solely for the purpose of this Regulation" and that "[t]he actual substance of the concept should remain defined in the national laws of the Member States". In fact, nothing in the Regulation "should oblige a Member State whose law does not have the institution of registered partnership to provide for it in its national law".

4.1 The EU legislator had probably in mind the idea of **excluding the *de facto* cohabitation**, but actually opened some doubts for the so-called 'registered cohabitation' that in some legal system (Italy, for instance) coexists beside registered partnership.

5. Law governing agreements as to succession and matrimonial or partnership property agreement.

Concepts such as succession and property regimes can of course have their own domestic and EU disciplines, but, as it is usually the case, they are linked to each other. As a consequence **European rules** not only have to find **harmonization** with the **conflict of law** rules but also among **EU Family law itself**, that, at the moment is fragmented in different regulations.

5.1 **Borderline cases** arise, and probably will arise even more in the judicial practice, when considering the agreements foreseen in the three regulations: i) agreements as to succession (art. 3 lett. b) of 650/2012); ii) matrimonial property agreements (art. 3 lett. b) of 1103/2016); iii) partnership property agreements (art. 3 lett. c) of 1104/2016).

Even if Regulation 650 establishes that questions relating to matrimonial property regimes and property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage are excluded from the application of the Regulation, and even if Regulations 1103 and 1104 shall not apply, among the others matters, to the succession to the estate of a deceased partner, some problems can arise in borderline cases, for instance, a pre-matrimonial agreement with some provisions in case of death). On the other hand, an agreement as to succession can directly or indirectly impact matrimonial/partnership property regimes and the other way around.

The Regulations are quite clear in declaring their scopes, nevertheless borderline issues cannot be avoided and **coordination is not always easy** to reach especially as far as Regulation 650/2012 and 1103/2016 are concerned. Where a choice of law agreement does exist (according to the parties autonomy given by the three Regulations) coordination among them can be reached and the party/ies autonomy shall be respected.

5.2 In the **absence of such a choice of law** such coordination is not easy even if the main connecting factors are the same (Habitual residence and nationality). In fact, the **timing** at which the regulation refers can be very different: the **habitual residence at the time of the death**, as prescribed by art. 21.1 of Regulation No 650/2012 is not necessarily the same as the **first common habitual residence after the conclusion of the marriage** as prescribed by art. 26.1 Regulation No 1103/2016.

5.3 The problem of course can entail also a **partnership property agreement with an impact on succession**. In absence of a choice of law coordination shall be found between the **habitual residence at the time of the death** and the **law of the State under whose law the registered partnership was**

This Project is funded by the European Union's Justice Programme 2014-2020

created. This is true unless the judicial authority decides that the law of a State (other than the State under whose law the registered partnership was created) shall govern the property consequences of the registered partnership. This can happen if the law of that other State **attaches property consequences to the institution of the registered partnership** and if the applicant demonstrates that: (a) the partners had their last common **habitual residence** in that other State for a **significantly long period of time**; and (b) both partners had relied on the law of that other State in arranging or planning their property relations (art. 26.2 of Regulation No 1104/2016).

5.4 In these cases a conventional solution needs to be encouraged. In absence of conventional choices we could propose to use the theory of prevailing nature of the act[6]: if the prevailing nature is *mortis causa*, Regulation 650 will be applied even if there are some effects with regard to matrimonial or partnership property regime.

Author: Caterina Mugelli, Post-doctoral Researcher, University of Firenze, GoInEU Plus

[6] See the Italian Cassation Court: Cass. sez. Un. 12th May 2008, n. 11656 on mixed contracts.