

Notarial Academy of the European Affairs Commission (CAE)

Conclusions of the meeting held in Barcelona on Thursday 19th October

by Valentina Rubertelli, CAE President

THE FUTURE OF THE RESERVED SHARE IN EUROPEAN SUCCESSION SYSTEMS

The issue of the protection of persons entitled to a reserved share in successions is of great interest to notaries throughout Europe.

The debate taking place in various academic and political circles on the liberalisation of the succession system also closely affects the notarial world in two ways:

- on the one hand, facilitating the movement of assets resulting from successions or gifts;
- secondly, reducing succession-related disputes.

This is therefore a theme with a twofold significance, and one that falls well within the broader theme of dejudicialisation.

Round table

The panelists chosen to take part in the round table were from systems that have their own distinctive features:

- **Italy**, with perhaps the most rigid system;
- **France**, whose system was made more flexible following the 2006 reform;
- **Switzerland**, which has made its system more flexible following a very recent reform;
- **Spain**, with its multiplicity of succession regimes, specific to each autonomous community;
- **the United Kingdom**, which does not have a mechanism equivalent to the reserved share, but nevertheless has a protection system in the form of “Family Provisions”.

Results of the questionnaires

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The questionnaires addressed to delegates highlighted the following findings summarised in the table below.

1) On the existence of a reserved share

The institution of the reserved share exists in **ALL** countries, although some, such as Estonia, Ukraine, Lithuania and Northern Macedonia, have a reserved share subject to conditions (reserved for minors or heirs financially dependent on the deceased, or disabled heirs or children living with the deceased or unable to provide for themselves, etc.).

In **ALL countries**, the reserved share corresponds to a **portion of the estate**, even in Estonia, Ukraine, Lithuania and Northern Macedonia, where the reserved share is half of the lawful intestate share (and is not a maintenance claim calculated on the basis of needs).

It should be noted, however, that in Spain and Hungary, the **spouse** is entitled to **usufruct** only.

2) On beneficiaries

CHILDREN are **ALWAYS** heirs entitled to a reserved share.

In 19 countries, the spouse is entitled to a reserved share, that is to say in 90% of countries.

NB : in France, the spouse is entitled to a reserved share, but only if there are no descendants.

In Hungary, the spouse has a reserved share limited to usufruct, to enable him/her to provide for his/her own needs.

In 14 countries, i.e. 61%, parents are heirs entitled to a reserved share, but often in the absence of descendants.

Brothers and sisters are never heirs entitled to a reserved share (except in Serbia, Slovenia and Northern Macedonia, if they are in need).

3) On the nature of the reserved share

In 9 out of 23 countries (39%), the reserved share is in value (right of claim).

In 14 out of 21 countries (61%), the reserve is in kind (in rem).

4) On the judicial or amicable nature of actions in abatement

In 4 countries, actions in abatement may be made directly before a notary (Hungary, Ukraine, Serbia and Croatia);

In 5 countries, these actions in abatement are necessarily judicial.

In 14 countries (61%), the abatement may be carried out before a notary, with the agreement of all the heirs.

5) *On the possibility of waiving actions in abatement in advance*

In 9 out of 23 countries, it is possible to waive actions in abatement in advance (i.e. in 39% of countries).

In those countries where it is possible to waive actions in abatement prior to death, **the formalities of the act of waiver are generally strict**: before a court or by notarial act.

For example, in France, the act is drawn up before 2 notaries.

6) *On the risks for a purchaser of an asset resulting from a succession, gift or legacy*

In all countries where the reserved share is expressed in value (right of claim), this risk is of course limited.

However, there are other ways in which the reserved share in value helps curb this risk:

- In Croatia, the reserved share is in kind (in rem), but succession is "to the property" rather than "to the person", so that the estate is settled before any sale of succession assets.
- In France, the risk is reduced thanks to the notarial practice of involving the presumed heirs entitled to the reserved share in the act of sale (or directly in the act of gift) in order to grant their consent to the (current or future) sale of the property.
- In Portugal, succession assets can only be sold with the agreement of all the heirs.
- Checks are also carried out by the notary in Ukraine and guarantees are included in the act of sale.

7) *On the international public order nature of the reserved share*

It is rare to find a clear answer from the legislator or in case law.

However, it is worth noting that:

- In Germany, **the reserved share was held to be of international public order** in one specific case:

In a decision delivered in 2022 (as had the Higher Regional Court in Cologne previously), in which an Englishman who had lived in Germany for decades had chosen his national law, the Federal Court of Justice held that this choice of law was contrary to German public order and refused to apply English law to the dispute concerning the reserved share, thereby granting the claimant a reserved share in accordance with German law.

The decisive factor was that, apart from his nationality, the deceased had had no ties with England for several decades. The estate was located entirely in Germany and the son, who claimed his portion of the reserved share, lived in Germany. In such clear-cut cases, in the future German courts will keep on delivering similar decisions if the chosen foreign law does not provide for comparable protection of the heir entitled to a reserved share.

- In France, there is **compensation** for children excluded from succession by virtue of foreign law:

In 2017, the French Supreme Court ruled that a foreign law that fails to recognise the reserved share is not in itself contrary to international public order, unless the application of that law leaves a child in a situation of economic precariousness or need.

However, following this decision, in 2020 the legislator introduced into the Civil Code a sort of right of collection for a child excluded from succession by virtue of foreign law:

Art. 913 para 3 of the Civil Code: When the deceased or at least one of his children is, at the time of death, a national of a Member State of the European Union or habitually resides there and when the foreign law applicable to the succession does not allow for any reserved share mechanism to protect children, each child or his heirs or any other entitled person may make a compensatory deduction from the existing property situated in France on the day of death, so as to be reinstated in the reservatory rights granted to them by French law, within the limit of those rights.

Overview table

	Is there a reserved share (compulsory portion)?	For who? How much?	Nature of the reserved share	How to claim the reserved share?	Possibility to waive in advance the reserved share	(PIL) Protection by international public policy?
Germany	Yes	-Children/ descendants -spouse -father and mother in the absence of descendants	Financial compensation, claim for payment.	Claim before Court	Yes	Yes (but it depends on the specific case)
Andorra	Yes	-Children/ descendants (1/4) -father and mother in the absence of descendants (1/2)	Financial compensation, claim for payment.	-	Yes, by contract between parents and children, in a public deed	No
Bulgaria	Yes	-Children/ Descendants (2/3 max) -spouse (depending on number of children) -father and mother in the absence of descendants (1/3)	<i>In rem</i> right	Claim before Court	No	No
Croatia	Yes	-children/ Descendants (1/2 of the legal portion attributed by law) -spouse/ partner/ cohabiting partner (1/2 of legal portion) -parents (only in case of need: 1/3 of the legal portion)	<i>In rem</i> right	Court action if there is no agreement between the parties If there is an agreement, before the notary.	Yes	Yes

Spain	Yes (except in certain autonomous communities such as Navarre)	-Children (2/3) -spouse (usufruct) -father and mother in the absence of children (1/2)	<i>In rem</i> right	Legal action in the absence of agreement between the parties	No (except in certain autonomous regions where agreement as to succession are permitted)	No
Estonia	Yes, under certain conditions	-minor child -spouse -heir dependent on the deceased ½ of the legal portion attributed by law	Claim for payment (but the bequeather's spouse may request establishment of real right on an immovable which was the matrimonial home of the spouses)	Legal action in the absence of agreement between the parties	Yes	No
France	Yes	-Children (1/2, 2/3 or 3/4) -spouse in the absence of children (1/4)	Financial compensation, claim for payment.	Court action if there is no agreement between the parties, If there is an agreement, before the notary.	Yes (strict formalism of 2 notaries)	Not according to the Cour de cassation, unless the reserving child is in a state of economic precariousness or need. However, the legislator intervened following this decision: art. 913 al 3
Georgia	Yes	-descendants -spouse - father and mother (1/2 of the legal portion)	<i>In rem</i> right	Before the notary	No	No
Greece	Yes	-descendants -spouse or partner -father and mother (1/2 of the legal portion)	<i>In rem</i> right	Clause in will deemed unwritten	No	Yes

Hungary	Yes	-Children (1/3 of their legal portion) ; -spouse/registered partner (reserved share limited to the usufruct of assets needed to cover needs)	Claim for payment (in principle)	Before the notary in charge of the inheritance procedure, with the possibility of appealing the notary's decision to the court.	Yes	No
Italy	Yes	-children -spouse -ascendants in the absence of children	<i>In rem</i> right	Court action	No	No
Lithuania	Yes, under certain conditions	-descendants -spouse -father and mother (1/2 of the legal portion) If they financially depended on the deceased	<i>In rem</i> right	Court action : The heir must demonstrate that he was financially dependent on the deceased at the time of his/her death.	No	No
Luxembourg	Yes	-Children (1/2; 2/3; 3/4) -spouse	Financial compensation when the gifts were made to successors ; In kind (in rem), if made to non-inheritors.	Court action if there is no agreement between the parties, If there is an agreement, before the notary.	No	No
Northern Macedonia	Yes	-Descendants and spouse if they lived with the deceased or are unable to support themselves (1/2 of the legal share); -parents and siblings unable to support themselves (1/3 of the portion provided by law)	<i>In rem</i> right	Court action if there is no agreement between the parties, If there is an agreement, before the notary.	No	-
Malta	Yes	-children (1/3 or 1/2 depending on their number) -spouse (1/4 or 1/3)	Financial compensation, claim for payment.	Court action if there is no agreement between the parties If there is an agreement, before the notary.	No	-

Netherlands	Yes	Children and descendants	Financial compensation, claim for payment.	Court action	No	No
Portugal	Yes	-children/ Descendants (1/2 or 2/3) -spouse (1/3 or 1/2) -ascendants (1/2 or 1/3)	<i>In rem</i> right	Court action if there is no agreement between the parties If there is an agreement, before the notary.	No	No
Romania	Yes	-descendants -spouse -father and mother, in the absence of children (1/2 of the legal portion)	<i>In rem</i> right	Court action if there is no agreement If there is an agreement, before the notary.	No, but the heirs can consent to the alienation of an asset in favour of a successor.	No (according to the author)
Serbia	Yes	-children (1/2 of the legal share) -spouse (1/2 of the legal share) -father and mother (1/3 of the legal share) -brothers and sisters (1/3 of the legal share if they are permanently unable to work and do not have the necessary funds provided for living)	claim for payment (unless otherwise decided by the judge or notary, who may grant an <i>in rem</i> right)	Before Court or a notary (if a notary is acting as a commissioner of the Court in the succession procedure)	No	No
Slovenia	Yes	-children (1/2 of the portion provided by law) -spouse (1/2 of the legal portion) -father and mother (1/3 of the legal portion) -brothers and sisters (1/3 of the legal share if in need)	<i>In rem</i> right	Claim before Court, unless there is an agreement between the parties	Yes	Yes
Switzerland	Yes	-Descendants (1/4 or 1/2) -spouse/ registered partner (1/4, 3/8 ^e or 1/2)	Financial compensation, claim for payment.	Claim before Court, unless there is an agreement between the parties	Yes	No

Turkey	Yes	-descendants -spouse -father and mother	<i>In rem</i> right	Court action	Yes	No case law
Ukraine	Yes, under certain conditions	-Minors and disabled children -Disabled spouse (half of the legal portion)	<i>In rem</i> right	Before a notary	No	Yes (if foreign law provides no protection for children)
Total:23	All 23 countries have a reserved share or similar mechanism	-In 100% of countries where there is a reserved share, children are always entitled to a compulsory portion. - In 21 countries, spouses are entitled to a reserved share, i.e. in 91% of countries . - In 14 countries, i.e. 61% of countries, parents are entitled to a reserved share, but often in the absence of descendants. - Siblings are very rarely entitled to a reserved share (only in Serbia and Northern Macedonia, if they are in need).	In 9 countries (39%), the reserved share is paid in the form of financial compensation (claim for payment). In 14 countries (61%), the reserve is in kind (<i>in rem</i> right).	In 4 countries, the claim for the reserved share can be made directly before the notary (Hungary, Ukraine, Serbia and Croatia); In 5 countries, the claim is necessarily judicial. In 14 countries (61%), the heirs entitled to a reserved share can ask for it before a notary, if all the parties agree.	In 9 out of 23 countries, it is possible to waive in advance his/her reserved portion (i.e. in 39% of countries).	6 countries could refuse to apply a foreign law granting no reserved share to children on the grounds of international public policy.

Points for reflection

The aim of the meeting was not to promote the total abolition of the system to protect heirs entitled to a reserved share of the estate (this would not be in line with our history or culture).

Moreover, no European country, not even the United Kingdom, gives the testator complete freedom: Common Law rights also provide for the freedom to dispose of one's property freely, even if they do so using other legal instruments. However, the shortcomings of the Common Law mechanisms are very evident: in the case of most of these rights, it is the judge who assesses, on a case-by-case basis, whether a relative of the deceased has received a reasonable share of the estate, with regard to his personal situation and, in particular, his assets. If our law were to move towards this kind of maintenance and judicial mechanism, the weaknesses

inherent in this instrument would be imported: the cost of litigation for the defendant, the judicialisation of successions, judicial uncertainty, the unpredictability of criteria and solutions, and so on.

The subject of the debate was therefore not to abolish the institution of the reserved share (as in Great Britain or Canada), but rather to make it more flexible where it appears too rigid.

To this end, a study of the different European succession systems has been useful in striking a balance between, on the one hand, the expression of individual freedom (the freedom to make a will) and the right to property, and on the other, the protection of children, family solidarity and the preservation of social peace.

Conclusions

As a legal effect of filiation, the reserved share helps build the child's identity: removing it would greatly weaken filiation. The reserved share also ensures a minimum level of equality between brothers and sisters and helps prevent the re-emergence of discrimination between children from a first marriage in blended families.

The reserved share also serves to protect the freedom of the future deceased person against the risk of legacy hunting, a risk that population ageing is making increasingly frequent today.

RECOMMENDATIONS

The CAE, convened in Barcelona on 20th October 2023 and chaired by Valentina Rubertelli, therefore suggests the following possible adjustments to the reserved share¹ :

- Elimination of the **reserved share of ascendants** by attributing a claim for maintenance in return for the disappearance of the reserved share;
- Transition from a **reserved share in kind (in rem)** to a simple **reserved share in value** (cash compensation);
- **Reduction in the amount of the reserved share** and corresponding increase in the disposable portion;
- **Consent to the transfer of the donated property and waiver of the right to exercise a reduction in kind against the third party purchaser** from the moment of the gift;
- **Advance waiver of action in abatement**, enabling the heir entitled to a reserved share to waive in advance any action in abatement (in an agreement on succession particular) ;
- **Creation of new agreements on succession** to encourage a negotiated contractual succession.

¹ Drawing in particular on certain reforms introduced in France in 2006, and the Report of the “Reserved Share” Working Group under the direction of Cécile Pérès, President of the 108th Congress of French Notaries for the French Ministry of Justice: <https://www.justice.gouv.fr/reserve-hereditaire>

- **Subsequent gifts:** a double gift encumbered by an obligation on the part of the first beneficiary (the encumbered party) to retain the gifted property or rights and, on his death, pass them on to a second beneficiary who has to be named in the act. For example, a father or mother who wishes to ensure the future of his or her disabled child may make a gift to that child while designating his or her other children or their descendants as the second beneficiaries.
- **Power of attorney with posthumous effect** allows a future deceased person to appoint an agent during his lifetime to manage all or part of his succession instead of the heirs: this has proved to be particularly useful for the transfer of businesses or company shares.
- **Intervivos division:** a hybrid act that allows the future deceased to divide his estate. In this case, the gifted assets may be valued on the day of the intervivos division for the purposes of attributing and calculating the reserved share, provided that all the heirs entitled to the reserved share (living or represented at the death of the ascendant) have received a share in the anticipated division and have expressly accepted it.
- **Transgenerational intervivos division** - Another noteworthy innovation in the French law of 23 June 2006, the transgenerational intervivos division is based on a generation leap freely consented to by the child entitled to a reserved share: "when the ascendant makes an intervivos division, his or her children may consent to their own descendants being the beneficiaries in their place, either entirely or in part". Against a demographic backdrop of longer life expectancy, the aim is to encourage grandparents to pass on assets directly to their grandchildren in return for the child waiving his own rights, including those entitled to a reserved share, and thus to channel wealth more rapidly to the younger generation.
- **Clause relating to the administration or legal enjoyment of assets given or bequeathed to a minor** - This clause allows the author of a gift to withdraw the assets given or bequeathed to a minor from legal administration or enjoyment. Its practical usefulness has been demonstrated in two cases in particular. The first is when an ascendant, such as a grandparent, wishes to pass on property to his grandchildren while prohibiting his own child or the child's spouse from administering or enjoying the property. The second is when the father or mother of a minor wishes to settle the property consequences of his or her premature death by depriving the other parent, from whom he or she is separated or divorced, of the rights conferred by law as legal administrator of the child's property. In these situations, the settlor gives a power of attorney to a third party - for example, an uncle or aunt of the child, a step-parent, or even a stranger to the family - to administer the property passed on to the child during his or her minor age, and deprives the excluded parent of his or her right of legal enjoyment.