The predisposition and planning of succession to the control of an enterprise in Italy: the alternatives to a will.

Andrea Bortoluzzi
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University of Insubria

The predisposition and planning of succession to the control of an enterprise in Italy: the alternatives to a will.

1. The title of the article provokes debate.

It refers to the instruments for devolving an estate that offer alternatives to the will, allowing the settlor to exercise autonomy in the disposal of assets, in other words to derogate from the discipline of the *successione legittima*\(^1\) and, where this is allowed, from that of the *successione necessaria*\(^2\).

Rather than tackling the theme by looking at the rules of positive law and how they apply to individual cases, I have preferred to adopt a different stance and to start by considering the practical requirements of individuals in relation to positive law. In truth, the title reflects both sides of the law – positive and customary – since a system of fair institutions is always based on the conjunction between the two sides of the law: the formal and the procedural, the informal and the customary.\(^3\).

If there exists a practice that tends to regulate succession in ways other than by the legal forms (and exist it does), this is because there are criticalities in the present point of equilibrium.

2. Looking at our subject, in actual fact the crisis is ‘permanent’, because it is in matters of succession and of contract that there is most likely to be friction between custom and statute. And while the contract is the most probable point of friction in economic relations, succession is the most common point of friction in family relationships.

\(^1\) Legal succession: forced inheritance by the operation of law in the event of intestacy or the invalidity of a will or when the will disposes of only part of an estate.

\(^2\) Forced inheritance by the operation of law protecting the interests of the relatives of the deceased (ascendant, spouse, descendant) if the will ignores their rights or if the deceased’s assets have been transferred to other persons during his lifetime by other legal instruments, circumventing the legal rules of forced inheritance.

\(^3\) D. North, *Why some countries are rich and some are poor*, in Kent Law Review, 77, 1, Chicago, 2001, 321.
In matters of contract, the issue is the relationship among individuals in the market, each having equal rights. The limits on their exercise of autonomy in regulating their own relations are imposed by the rules on contracts in general set out in Book Four, Title II, of the Civil Code (article 1321 et seq. of the Civil Code) and in particular by the general clauses of the contract (the safeguarding of trust in article 1338, fairness in article 1374 and good faith in articles 1337 and 1375). Here the Authority performs the role of protecting collective interests on some occasions; on others it confers the force of law on an agreement that has been arrived at between individuals.

In family matters, the emphasis is on the relationship among individuals within the family, a self-ordered community based on its own rules and the relations between the members of that community.

The rules governing such a community that has become an institution should first of all be measured according to the principles laid down by the Italian Constitutional Charter, whose inspiration is the respect for the family partnership, the societas famigliare, which must be regulated by the substantive equality of husband and wife (articles 2 and 29 of the Constitution).

They are then regulated by the provisions of the Civil Code in the matter of personal and patrimonial relationships within the family (Book I, Titles V-XII) and by those on the subject of inheritance (Book II, Titles I-V bis), as revisited in the light of the 1975 Family Law Reform, with due regard for the constitutional principles mentioned above.

Inheritance is devolved only by law or by testament (article 457). Patti successori, in other words inter vivos agreements of inheritance, whether establishing one or more heirs or disposing of assets forming part of a future inherited estate or waiving the right to a future inheritance, are prohibited (article 458).

The positive law of succession does not seem to provide alternatives to the devolution of succession by law or by testament.

It also places a number of restrictions on the testator’s rights: the nullity of the fideicommissum (article 692); the intangibility of the rights of the legittimario, the ‘forced heir’ with a statutory right to a share of the deceased’s estate (articles 457, paragraph III, 536, 549); the non-renunciability of the azione di riduzione, or the abatement action to which an heir protected by the rules of successione necessaria is entitled to take against a breach of the rules of forced inheritance (article 557, paragraph II); and the lawfulness and feasibility of individual provisions contained in body of the will (article 634).

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4 Article 458 as cited in by G. Alpa, V. Zencovich, in Italian private law: ‘Prohibition on agreements of succession: Any agreement to dispose of one’s succession is void; any act by which a person purports to dispose of or renounce rights which he may hope to acquire by a future succession is also void.’
3. It could well be said on this subject that there are two opposing institutions and that one could be faced with a conflict between the regulation of a succession ensuing from an act of autonomy and the legal rules on succession.

There is a conflict between the aspiration to be able freely to determine the destination of one’s own patrimonial assets after one’s death and the constraints imposed on the exercise of such free determination.

The title of the article refers to instruments that are alternatives to the will, but it might be more appropriate to speak of instruments that are alternatives to the legal regulation of succession as a whole.

This is because the will is the only instrument offering scope for derogating (where permitted, and within the limits to which this is permitted) from the legal provisions on succession by the operation of law.

Recourse to what are known as alternative forms to the will is called for, because of:

1. the conflict between the social rule or the rule of autonomy and the statutory rule;
2. the limitations imposed in positive law on the testator’s power of disposition.

The first conflict arises when the rules of family succession differ from those of the legal discipline of devolution through inheritance.

The concept of succession implies that thought be given to the unbroken continuity of the conduct of a managerial activity (with the unity of the property being preserved and managed by the heir on behalf of the community of heirs), whereas the concept of heredity consists of the transfer to others of the ownership of assets (the property is divided up and the shares are attributed to the settlor’s children).

Often the social rules that determine the designation of the person who is destined to take over the control of the family are in conflict with the legal rules governing devolution by inheritance, in other words the assignment of the ownership of the inherited assets.

This is the case that frequently arises with succession within an enterprise, in which the legal rules of the devolution of a business by inheritance conflict with those of succession to the control of that undertaking.

On the one hand, there are the legal rules that protect the ‘forced heirs’, whereby the law attributes a share in the estate to each one; on the other, there are the rules of family policy on bestowal that regulate the person or persons to whom the succession to the control of the undertaking is attributed.
The second conflict arises in that the limitations on the testator’s capacity contained in the Civil Code do not permit of the unity of property in the paternal line of inheritance, since the amendments to the law of succession introduced following the reform of family law attribute a share in the estate to the surviving spouse, when the estate is devolved both by the operation of law and by testament (articles 536 and 565 of the Civil Code).

Nor is it permitted to proceed by the fragmentation of property in the same line among the members of a family in accordance with the personal expectations and economic needs of the heirs or the expectations of the enterprise.

There is also a conflict between the economically efficient inherited attribution of the business in accordance with the rules of family policy and the rigidity of the legal system, which reflects the criteria of depersonalisation in determining those entitled to the inherited estate and abstraction\(^5\) in the attribution of shares of the estate to which they are entitled or reserved shares (articles 536 et seq. and 565 et seq.).

4. The reasons for this conflict are historical in origin.

The history of the law of succession is a history of contrasts between the legal and the social rules of devolution by inheritance.

The origin is first of all universal succession under Roman law, based on the transfer to the individual of the prerogatives inherent in a collective body and therefore the prerogatives of the continuity of that body beyond the lives of its members. The heir continues in the whole right of the deceased’s universum ius, in the sense of the family peculium or the heir’s qualified and dependent ownership of the parental assets, by being called to act as the political representative of the family and the administrator of the family fortunes.

In this framework, Roman law of ancient times conceives testamentary freedom as a contractual remedy to devolution by succession according to the legal rules that favoured the enlarged family community (gentiles) over the community of affection (in particular, women excluded by the legal rules of devolution by succession) in determining the destination of inherited property\(^6\).

The subsequent institutionalisation in the Middle Ages of the patriarchal family community, with the affirmation of primogeniture, is a further element in the contrast between the reasons for the community of affection and the political and economic reasons for maintaining the unity of the landed estate\(^7\).

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\(^{5}\) A. Bortoluzzi, Successione nell’Impresa,Digesto IV, Sezione Commerciale, Updated**p. 881.


The fragmentation of the inherited estate into a series of individual rights of the heirs according to statute, followed by the collapse of primogeniture of inheritance under the French Revolution, leads to friction with the opposing demands for the affirmation of parental authority and the family hierarchy.

The retention of the individual fragmentation of the inherited estate combined with the marked patriarchal tendency of the Napoleonic Code evidenced the contrast with models of devolution that take into account family requirements, which tend to favour devolution by unitary succession.\(^8\)

The preservation of the French model of succession in the Italian Civil Code of 1942 as regards the individual fragmentation of ownership in matters of succession derived from the Enlightenment, and the affirmation of the Napoleonic concept of male patriarchal control, are tempered here by the acceptance in the Code of the constitutional principles and essential equality of the conjugal prerogatives of family control.

The reasons for conflict in the resulting legal rules lie in the demand for the negation of the spouse's rights of succession or for a distribution of the inherited estate among the heirs based on personality and the definitiveness of the attributions of inheritance.

The latter demand is addressed by the most recent legislative changes: the introduction into the Civil Code of the Patto di Famiglia (article 768 bis), or family agreement, the 'consolidation' of the gift when there are claims upon it by 'forced heirs' (legittimari) (articles 561 and 563), and the Vincolo di Destinazione (article 2645 ter) or 'restraint for a purpose'.\(^9\)

They introduce a model of family contract that replaces 'affectio familiaris' by the 'necessitate' inherent in an entrepreneurial relationship, which favours a model of succession directed towards favouring individual interests, leading to aspects of conflict with the rights in the Community-based family model of the Constitution.

The latest provisions are in fact based not on the Constitutional Charter but on a model of 'distance government' inherent in the diffused authority of global law and European law in particular.\(^10\)

This is European positive law as set out in the Principles contained in articles 3 and 4 of the EC Treaty, which lay down the objectives for Member States with a view to the establishment of an internal market, one without restraints of solidarity, through the affirmation of individual rights and interests (in particular article 3(2)).

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\(^9\) Limitation of the property rights of the owner for the benefit of the beneficiaries (seen from the owner's viewpoint) and for the separation of the assets (seen from the viewpoint of third parties, including creditors).

\(^10\) A. Bortoluzzi, on Proportionality, Digesto delle Discipline Privatistiche, Sezione Civile, Update ***
All these changes and the related points of friction between the models of legal succession and social succession are not just coincidental but are brought about by the continuing crisis into which the legal discipline on succession has been plunged, given the social changes in the institution of the family.

The pendulum has swung between succession and inheritance, between the collective and the individualistic model. The Italian Civil Code of today bears the watermark of this constant work over many centuries and, as is even more clearly evident, of at least three models: the collective family – albeit highly authoritative – model of the Napoleonic Code as filtered in the 1942 Italian Civil Code; the egalitarian collective family model in the Constitution; and the markedly individualistic model of market law of Community origin.

The first model bears the traces of the family law of the Revolution, in other words a liberal and individualistic Code, one that guarantees the rights of younger brothers and of sisters as against the rights of primogeniture, and droit coutumier, those rights that were tempered (or sacrificed?) on the altar of paternal authoritarianism by the Napoleonic regime that followed\(^\text{11}\).

The second model, that of democratic family law in the post-war period that lays down individual family rights, disclaims the authoritarian paternal model and recognises the equal dignity of the woman and of all members of the family community.

The third model, the de-institutionalisation of the family and the dispersal of the separate individualities of its members, a distance regulation of individuals, is directed more towards abolishing exclusion from competition than towards guaranteeing equality of opportunity\(^\text{12}\).

5. It should not be forgotten that recourse to alternatives to legal succession (whether intestate or testate) has also been brought about by tax regulations.

The search for alternatives to the legal devolution by succession has often been influenced by the quest for a form of taxation that is less onerous than inheritance tax.

On the subject of succession, article 42 of the Constitution lays down the principle that ‘the law establishes the regulations and limits on intestate and testate succession and the rights of the State in matters of inheritance’.

As is obvious, these limits on hereditary devolution are imposed in the interests of the collectivity, and it is no coincidence that the provision expressly refers to the ‘rights of the State in matters of inheritance’.


Provision for the taxation of a succession is made by a fiscal levy in pursuance of the Constitutional principles of diverting a share of the asset components of an inherited estate towards the community, for obvious reasons of solidarity.

It is also true that the Constitutional principles of solidarity favour that approach, but this also entails transaction costs in addition to those represented by the act of succession, which tends by its nature to remove the inherited assets from the market and therefore possibly sidestepping the objectives and principles laid down by articles 3 and 4 of the EEC Treaty.

In the field of tax law, these two opposing principles have led to the repeated reformulation of inheritance taxes.

On occasions an indiscriminate estate duty has been advocated, at times this has been limited to large estates only, and at others it has been abolished altogether.

Law 296/2006, for example, reintroduced the inheritance tax after its abolition by Law 383/2001, prescribing tax thresholds directed against medium-to-large estates.

The inherent tax burden means that the social rules governing succession come into conflict with the statutory tax rules, paving the way for a search for alternatives to the intestate or testate devolution of inherited assets.

Here again, family law clashes with the law of the State, creating another criticality that calls for a search for new forms of equilibrium.

While on the one hand devolution by succession is found to be efficient for the testator according to the legal rules, there are grounds for conflict with tax regulations, which are directed towards satisfying the Constitutional principles of solidarity.

If the settlor turns to instruments providing an alternative to the legal instruments in order to avoid the tax transaction costs, so that the motives of family solidarity prevail over those of republican solidarity, he must cut through the interwoven fabric of constraints on his testamentary autonomy and the prohibitions of forms of contract in matters of inheritance.

One opening in the dense thicket of this set of limitations may be for the settlor to resort to instruments other than those of intestate or testate succession in order to regulate the disposal of his estate.

Some may have advance effects in that he predisposes his succession (with the choice of a possible successor being made before the death of the settlor so that the property may be administered more efficiently by the heir), while others may have pre-planned effects (his disposal of the assets becomes effective by provisions implemented after his death).
I should like to analyse these instruments, starting from the objectives that the person making the provision may set himself as regards the size of his estate.

With one caveat.

On some occasions recourse may be made to the predisposition or to the pre-planning of succession, on others it may be made in consideration of the particular volume of the assets in the estate, and on yet others the recourse may be based on the particular needs to protect the settlor or his heirs or to promote economic interests.

I would like here to dwell in particular on succession as regards the assets of an undertaking.

6. In positive law, succession is not in the undertaking but in its business. Succession in the running of the undertaking remains a question of fact associated with the conduct of the business, even when the undertaking is conducted in the form of a company.

The rules on the subject of succession regulate the devolution of the business asset, the rules on the undertaking regulate the procedures for the conduct of business, taking the form of a de facto authority exercised by an individual or collective entrepreneur over the business asset.

In both an individual and a collective business, the succession in the ownership of the business assets is regulated according to the rules and within the limits specific to the subject of succession.

In the case of the individual undertaking, the succession is in the business assets.

The activities of an undertaking may be conducted by other individual or collective entrepreneurs who are not the owners of the business assets, where the business is leased to them by the owners.

They may be conducted individually by just one of the heirs by virtue of the fact of material possession of the business, even though the community of the business persists.

They may also be conducted, again individually, by a single heir who is the owner of the business attributed to him at the time of division of the estate (whether by testament or inter vivos).

They may also be conducted on a collective basis, where the members of the community decide to bring a company into being.

In the case of a collective undertaking, given the particular nature of the holding as a second degree intangible asset, the partner’s death leads not to the transfer to another person of the business asset but to the transfer of the holding, which is no more than the title
justifying the exercise of the administrative and asset rights to which that person is entitled.

This makes the transmission of the business asset more efficient in terms of transaction costs, since what is being conveyed is not the business assets but the rights conferred by ownership of a share therein, without this constituting a derogation from the system, founded on the transmission of the inheritance of the holding (the title for the transfer of the holding is the offer and resulting acquisition of the inheritance) and on the exercise of social rights based on the provisions of law and the company’s statutes.

Having discussed the mechanism regulating the transfer of a business and the succession in the rights pertaining to the conduct of a business, since our article is addressed to a study of the forms of hereditary devolution that are alternatives to the legal forms, we shall not take into consideration what are known as the ‘clausole statutarie a predisposizione successoria’, or the clauses of the statutes providing for succession that are to be found in the patti sociali – partners’ agreements – in partnerships, or in the statuti, or articles of association of corporate enterprises (clauses on optional continuance, mandatory continuance, succession or entry clauses, and clauses on the transmission of the administrative function and of mandatory joint ownership).

As we have seen, these clauses regulate not the devolution of the holding by the right of succession, iure successionis, but the exercise of the powers granted by reason of the status socii, the status of partner; that exercise is regulated by right of partnership, iure societatis, according to the rules governing the effects of the transfer.

7. The ordinary instrument for the predisposal of succession is generally the gift of the business together with the holdings in the business, known as a ‘donazione di riferimento’; in other words, the gift is such as to give the donee a controlling stake in the company and therefore the capacity to appoint the administrative body and approve the company’s accounts.

The transfer of a business by gift or of the reference stakeholding in a company to specified potential heirs means that they will be entitled to de facto succession in the running of the enterprise.

This is what is known as a complete succession, i.e. a succession designed to transfer both the ownership and the management of the enterprise in the exercise of its business.

Such recourse to the gift, however, must be handled prudently. This prudence is necessitated by certain provisions of the Civil Code designed to circumvent the effects of an act of disposition prompted by motives of higher family interests.

We refer to the provision that protects the quota di riserva, the share of a testator’s estate reserved by law for certain heirs: if that share has been violated, an heir can take action to reduce the proportion of the gift to the other heirs, an azione in riduzione (articles 535,
559, 560, 561 of the Civil Code), and has a *diritto di sequela*, a right of pursuit against a third party who has then acquired that share (article 563 of the Civil Code).

Other provisions relate to the
- *irrenunciabilità preventiva* – the inadmissibility of an heir’s waiver prior to the testator’s death of the right to the *azione di riduzione* – (article 557(2));
- the *revocability* of a gift due to *ingratitudine* (article 801 of the Civil Code) or to the subsequent subsequent appearance of children (article 803 of the Civil Code)
- and therefore the inadmissibility of a waiver, before the testator's death, of the right of action on this account (article 806 of the Civil Code).
- the donor’s obligations as to the payment of maintenance to the donee, which have precedence over any other obligee (article 437 of the Civil Code).

It should also be borne in mind that a tax regulation contained in Law 342, 21 November 2000, states that the provisions on avoidance in article 37bis of Presidential Decree 600 of 29 September 1973 are also applicable to the subject of succession and gifts: any gifts that may be brought into being merely for the purposes of evasion are deemed to be ineffective for tax purposes.

Besides the gift, a testator wishing to provide for succession to the control of an undertaking may also have recourse to other acts that, while not constituting in substance a direct gift, do come within the area of gratuitous donations.

This is the field of *indirect or atypical gifts*. The exercise of autonomy in the offer of a gratuitous consideration other than a *donazione* is regulated by article 809 of the Civil Code, which opens up a virtually inexhaustible range of ‘other acts of liberality’ besides those covered by article 769, which regulates direct gifts.

An indirect form of liberality is when this is implemented not by the contract that is typical of a *donazione* but by another *negotiating instrument* whose typical purpose differs from what is known as the *’causa donandi’,* yet is able to produce not only its own inherent direct effect but also the *indirect effect of enrichment without consideration in return*, an effect intended by one party (the benefactor) for the benefit of another party (the beneficiary)

One of the possible applications to the subject under discussion, the indirect atypical gift, is to arrange for the acquisition by a given potential heir of a reference stakeholding in a company or the ownership of an enterprise, *providing for the payment of the price for its transfer in his stead.*

Moreover, article 1(4 bis) of the Consolidation Act on *gift and estate duty* contains a concessionary provision that exempts *indirect liberalities* from gift duty if they relate to

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the transfer or creation of intangible rights or the *transfer of businesses* ‘that are liable to proportional registration duty or to VAT’.

It is thus possible that an indirect gift made by means of the transactions under discussion, in other words exclusively in the case of a *transfer of business*, may be exempted from the gift duty that would otherwise be applicable to indirect gifts ‘arising from acts subject to registration’ according to the same normative measure.

This measure requires that, at the time of the sale of the business, the *indirect aims* pursued in the negotiations should be explicitly declared by an explicit reference to the payment made by the third party; this has raised the problem of the nature of such a declaration in substance and in form.

From the substantive viewpoint, would this be an unlawful transaction? The truth is that a declaration such as described, expressed in the form of *documentary evidence*, does not alter the unique nature of the contract, which is a *sale stipulated for the purpose of liberality*.

The enunciation of a purpose of this nature, which is shared by the parties to the act and is not typical of the transaction in question, is undoubtedly *lawful*, enabling the notary to take acknowledgement of the instrument, since the lawfulness of the indirect transaction must be examined in the light not of the typical cause of the transaction engaged in by the parties but of the *ultimate purpose of the transaction* that they are pursuing.

The question of lawfulness in this particular case is of legal relevance to the extent that transactions may be annulled if their *grounds* (common to all parties) *are unlawful*.

Also from the viewpoint of substance: is this a *simulated transaction*?

Such a declaration does not conceal the purposes underlying the chosen transaction: the parties declare that they want, and in fact do want, the transaction they are bringing into being; they wish in fact to be subject to one specific legal discipline, not to the application of a different legal discipline; they consistently seek the effects that are the *typical effects* of the transaction they are adopting, in whose absence they would not achieve their aim, which presupposes but is not identified as the attainment of their effects. This differs from what happens with simulation: the parties seek to be *subject to the discipline typical* of the transaction adopted.

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14 ‘The cause of this transaction is only ever that of the transfer of the property, never the making of a gift. As regards form, therefore, account will be taken of the discipline of the contract of purchase; as regards the donee’s capacity to receive, account will be taken of the discipline of gifts’. T. Ascarelli, Riv. Dir. Comm.1930, II, p.462.

The rules as to form that pertain to a contract of assignment of a business (a public instrument or an authenticated private deed, according to article 2556 of the Civil Code) should therefore be applied to the indirect gift of a business, even if this mentions that payment has been made or that provision for payment has been set aside or that a third party has assumed an obligation to pay.

Apart from the formal discipline, the common discipline regulating direct gifts also applies to indirect gifts, in other words the provisions on the abatement of gifts to reinstate the share of the forced heir (article 555 et seq.), on revocation due to ingratitude or to the subsequent appearance of children (article 800 et seq.) and on collazione, or hotchpot – the blending of property to secure equality of division of the estate (articles 737 et seq.)

The fact that the deed of sale mentions that provision for payment has been set aside, or that payment has been made, or that the obligation to pay has been assumed by the third party making the act of liberality, changes nothing in terms of the qualification of the contract; in the absence of such a declaration, however, the burden of proof of the origin of payment is incumbent upon the person bringing an action for a abatement in the other shares.\textsuperscript{16}

The action for abatement of other heirs’ quotas cannot be brought, however, if the payment made by the third party is not intended to bring about an indirect act of liberality.

The reasons motivating the donor to organise in a given way the interests he expresses objectively under the contractual rule become of functional relevance in the case of an indirect liberaliy.\textsuperscript{17}

It will then be possible, when explicitly clarifying that the third party has performed its obligation at the time of the contract, to demonstrate by written evidence that this has been finalised in the absence of a spirit of liberality.

In such a case, depending on the hypothetical fact constituting the offence, the discipline regulating the management of another party’s affairs (article 2028 of the Civil Code) or unjust enrichment (article 2041) will then be applied, enabling the person performing his obligation to take action for recourse against the promisor.

In the corporate field, another possible form of indirect gift is the contribution to a company in kind or in cash in its deed of incorporation or against an increase in its share capital, when the contribution is on behalf of another party, who is not the contributor.

\textsuperscript{16} Court of Cassation judgment 441/337 and 91/4986. A. Palazzo, op. cit., p. 54.

\textsuperscript{17} A. Bortoluzzi, Donazione: scambio improntato a gratitudine o scambio annullato dalla gratuità? Quaderni Fiorentini per il pensiero giuridico moderno, 32, 2003, p. 546
The owner of a business could thus contribute it on the incorporation of a company whose holdings have been paid up in the name of the designated successors.

A practice of this kind (qualified as performance by the third party, who may be motivated by liberal intent) has been legitimised by the reform of capital companies, which has made it possible to pay up capital holdings to an amount not proportional to the contributions to capital.

In a Società a responsabilità limitata (private limited company), according to article 2468(2) of the Civil Code, the deed of incorporation may provide that shareholders’ holdings can be set at an amount not proportional to the capital contributions.

The articles of association of a Società per Azioni (public limited company) may state that the allocation of shares need not be in proportion to the share of the capital subscribed (article 2346(4)).

In a private limited company, the reference quota can also be placed in the name of a potential heir by means of an operation of recapitalisation, with the subscription right being granted to outside third parties as permitted by the articles of association and by the partners (article 2481 bis).

A similar operation is permitted in public limited companies, in which a capital increase can be paid up by contribution in kind (article 2441), or when the operation of placing the increase with third parties is carried out in the company’s interest (the resolution on the increase must be approved by the number of shareholders representing over half of the share capital).

Of note is another hypothesis: that recourse to an indirect gift to a spouse for the purpose of pre-disposing the succession may be made in the case of a partnership and a sole proprietorship by taking advantage of the special regime of the community of property of husband and wife.

If one of the spouses is an entrepreneur, there can also be recourse to the regime of the deferred holding referred to in articles 177(b) and (c) and 178 of the Civil Code.

Where one spouse intends to enrich the other at the time when the community of property is broken up, to include its break-up due to death, that spouse can set aside the fruits of his or her own assets and the proceeds from a separate activity – article 177(b) and (c) of the Civil Code – and, by constituting the proof of their origin, make a testamentary disposition of just half of those assets and proceeds, as well as half of the assets intended for the conduct of his or her undertaking or increase in the capital of the undertaking, even if this was incorporated before the community of property (article 178 of the Civil Code).

In order to attribute the reference shares in a company or an undertaking to a predesignated successor, allocating all or part of the profits derived from the exercise of
the activity of the undertaking with, or by means of, those assets to one or more given beneficiaries, another instrument can be used.

That instrument is what is known as the ‘vincolo di destinazione’ – restraint for a purpose – regulated by article 2645 ter of the Civil Code.

The intention here is to define how that legal provision is to be applied to the ‘model fact situation’, given the legal vagueness of the deed and of the attachment.\(^{18}\)

The requirement of the legal provision in question as regards the deed of restraint for a purpose, i.e. that it be for an ‘interest worthy of protection’, is undoubtedly satisfied when this takes the form of a liberal attribution in favour of a beneficiary suffering from a disability and/or who is no longer capable of providing in full or in part for his own interests (article 404) and provided that the subject of the attachment consists of movable assets recorded in public registers (article 2645 ter).

Movable assets recorded in public registers may be considered to be either the quotas of partnerships or private limited liability companies or the shares of listed companies.

It remains to be seen whether the reason for the deed of attachment may just be the intention to protect the beneficiary, so that it acquires characteristics similar to those of the charitable trust, or whether article 2645 ter, having been ‘dropped into’ the rules in the Civil Code on the subject of recording in public registers, highlights the decisive favour in which the restraint for a purpose is held in the legal system.

In this manner, without being able to achieve the effects of segregation achieved by means of being recorded in public registers, the attachment – with its binding effects on the parties – could well be created with regard to universitates iuris – aggregates of rights and duties – such as undertakings, the transfer of ownership of which is also subject to public registration, or to shares in unlisted companies and whose beneficiaries are not necessarily persons with a disability.

If one looks at the interest of the market in an efficient transfer of the undertaking and in protecting the interests of both the family and the undertaking, an restraint for a purpose used for its planning effects in order to keep the succession to the control of the undertaking separate from the inheritance of the assets of that undertaking could well satisfy the requirement of article 1322, i.e. that the interests should be worthy of protection.

The deeds of autonomy and therefore the deeds of indirect gift include deeds of implementation, in other words those that inter alia ‘render it possible for others to exercise a power’\(^ {19}\).

\(^{18}\) M. Graziadei, L’articolo 2645-ter del Codice Civile e il Trust: prime osservazioni, in I Trust interni e le loro clausole, Rome, 2007

\(^{19}\) R. Sacco, see the entry on Autonomia in Il Diritto Privato, op. cit.
The institute of the *imprese famigliari*, or family business (article 230 bis of the Civil Code) regulating the *de facto* collaborative relationship established between the individual entrepreneur and his or her family members may allow for a choice of collaborators to be made by the entrepreneur. This also has repercussions on the pecuniary level (only the collaborator is entitled to the pecuniary rights specified by article 230 bis).

The family business not only takes the practical form of a *liberal attribution* by the individual entrepreneur to his or her collaborators, in that it is the entrepreneur who chooses the participants, but it also allows the *predisposition of succession* in the business as a result of that choice.

From the time when the relationship is dissolved, to include its dissolution by reason of the *death of one of the participants*, that participant’s quota can be consolidated with the holding of all the other participants, whose only obligation is to settle the quota by a payment to the heirs of the deceased collaborator.20

In the event of the family business being ‘converted’ into a company incorporated by the individual entrepreneur and his or her collaborators, this option also means that the entrepreneur can, by the *contribution of the business* to the company, make a preferential gift of the business assets to the collaborators.

This is possible if the collaborators, in return for the entrepreneur’s contribution of the business, release their quotas by *waiving* the amount of their claims against the family firm in respect of *profits* and *increases* that have occurred in the meanwhile on the *assets* acquired and on the *goodwill*.21

8. These being instruments that are alternatives to the will in the devolution of succession in a collective enterprise, consideration cannot be given, as stated, to a combination of the instrument of succession in the undertaking regulated according to the rules of *statutory succession* (whether intestate or testate) in holdings in the company, with clauses on the *predisposition of succession* stipulated among the parties in the exercise of their autonomy, where this is permitted in the field of company law.

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20 With a family firm, although not having a corporate structure, a body of interests can be consolidated in the name of certain persons. In addition to such consolidation, a further characteristic of the family firm is the right of pre-emption pursuant to article 732 of the Civil Code, ‘which operates in favour of the persons chosen by the entrepreneur who has taken the initiative of setting up the family business, outside any community of inherited assets that may have been created by an intestate or testate succession’. A. Palazzo, op. cit., p. 123.

21 The debt towards the collaborators is a company debt. With further reference to the tax implications of the transactions, see M. Beghin, *Il conferimento dell’azienda gestita in regime di impresa famigliare nella disciplina del D.Lgs. 383/1997*, in Riv. Dir. Trib, 7, 1999, p. 647 et seq.
The device used to this end is recourse to the transfer mortis causa of holdings, based on the rules of intestate or testate succession and on the regulations on the continuance of the partnership relationship with the heirs of the deceased partner, in some cases according to the law or according to the rules of the articles of association or agreements among the partners, depending on whether the holdings are in capital companies or in partnerships.

From an empirical analysis of the methods of recourse to such an instrument, the main reasons in favour of that recourse seem to be the protection of the heirs and the undertaking (and therefore its creditors), leading to a ‘cogent’ succession in ‘friendly’ hands, or the defence of the original shareholding structure, achieved by ensuring that the holding is not open to attack by the potential heir or heirs, rather than a concrete proposal for legal devices designed to promote succession in the undertaking.

The instruments used for the purpose are different. Let us look at them individually.

**Differentiation** between the firm and the family in order to promote a relationship between them that is ‘less closely based on family ties’²², departing from internal custom, has a not inconsiderable impact in matters of succession; in that sphere, a central role is performed by the separation between ownership and control, or rather the structuring of the management of the firm taking account of the special function carried out by the administrative organ in the area of ‘corporate governance’.

According to many scholars, a smoothly operating collegiate administrative organ can help to improve business results and bring about the continuity of undertakings²³, whose efficiency is also demonstrated at the time of succession in the undertaking.

In this case, succession in the ownership of the reference quotas or in the undertaking does not affect, nor is it affected by, its management system, which is untouched by ownership changes and events.

Recent research has identified medium-sized family firms in Italy which have smoothly operating boards of directors that are open to non-family members, who play an active part and contribute positively in various roles:

- a role of maintaining equilibrium where ownership is in single hands; a participatory role that can offset any loss of cohesion between owner/manager partners and non-manager partners;
- a role of monitoring the managing director or executive committee, so that managerial incapacity can be reduced and a propensity to acquire personal benefits to the detriment of the partners can be counteracted;


- a role of facilitator in family relationships in situations in which personal tensions and difficulties arise; a role of strategic governance.24

Where a board of directors open to persons outside the family is already in place, it will inevitably promote a clear-cut differentiation between succession in the conduct of the undertaking and the inheritance of the business.

Such differentiation means that the transmission of the family wealth can be entrusted to the undertaking and to the individual entrepreneur at different times.

Article 2203 of the Civil Code regulates the person of the ‘institore’ – the deputy or agent appointed to the control of an undertaking – to whom an individual entrepreneur may delegate all the managerial functions entailed in the business of the enterprise.

Where it is wished to plan for the devolution of the business by inheritance, keeping it separate from the proprietary assets, recourse could well be made to a management contract, whose compatibility with the Italian legal system has been clearly established.25

In entering into such a contract, day-by-day management is entrusted to persons outside the family, while retaining the general management of the undertaking within the family, thereby breaking down its organisation into proprietary direction and managerial direction.

The former is confined to choosing and monitoring the management, while the latter, in performing ‘day-by-day duties’, is the one that implements the company ‘thinking’. This, then, is the practical instance of the breakdown between ‘directors’ and ‘officers’ that is to be found in the field of company management in common law.

Irrespective of the conclusion of a management contract and without specifically tackling the questions of ‘corporate governance’ implied by the regulatory framework for company administration as outlined by the reform of company law and as presaged at European level by the High Level Group of Company Law Experts,26 such a distinction can be made, using the instruments offered by the reform of capital companies.27

In the Società per azioni – the public limited company – it can be made according to whether one adopts the traditional system (an administrative body and a board of statutory auditors) or the dualistic system (a management board and a supervisory

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board) or a unitary system (board of directors and an internal committee set up by the board).

In the traditional system, it can be made by recourse to the delegation of powers to an executive committee or to one or more managing directors to whom the ‘day by day duties’ are assigned, within the limits laid down by article 2381 [IV] of the Civil Code, subject to the control and strategic management of the Board in its exercise of the functions listed in article 2381 [III] of the Civil Code.

In the dualistic system, there are the different functions of the management board, which is assigned the day by day duties, and the supervisory board, whose members may be independent, which is responsible for the strategic management of the company (articles 2409 duodecies and terdecies).

In the unitary system, the day by day duties are the responsibility of the board of directors, while strategic management is the responsibility of the committee for the supervision of management (articles 2409 septiesdecies and octiesdecies).

The cogent presence in both bodies of the latter model of components satisfying the prerequisites of independence laid down for auditors in the traditional model (article 2399) and, if the company by-laws so provide, the requirements laid down by the codes of practice drawn up by the trade or business associations or for management companies on the regulated markets offer a further guarantee of the separation between ownership and control.

Separation of this kind would seem appropriate in achieving a greater distinction between the undertaking and the family, which has beneficial results, as we have also seen when discussing the transmission of succession of an enterprise.

The same conclusion cannot be reached as regards the Società a responsabilità limitata, in that the models for such limited liability companies and for società personali, or partnerships, have been brought closer to each other by the legislators.

Among the consequences have been a streamlining of the organisational mechanisms and recognition of the management powers of the partners as such, in other words ‘without the need for any interposition of management bodies’, according to the model administrative procedure laid down by the reform (articles 2475 and 2475 bis of the Civil Code)

This does not allow of an effective distinction between the strategic direction and the management of the enterprise.

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28 P. Benazzo, La s.r.l. nella riforma del diritto societario, in various authors, Verso un nuovo diritto societario, cit. p. 111-117.
Admittedly, however, there is no reason why the partners may not, within their permitted sphere of autonomy, resort to the ‘corporative model’ of administration, and therefore to rules more specific to the Società a responsabilità limitata, so that the distinction mentioned above can be made.

This is not possible in a società di persone, given the lack of organic structuring of the model and the non-differentiation of the roles of the director and the partner.

This legal model does not, then, lend itself to effective use in the planning of a succession, which is partly based on the distinction between the transmission of ownership and succession in the running of an enterprise, except within narrow limits, and a possible transmission of the administrative function to a given heir.

As we have mentioned, one of the instruments that can be used to promote a closer relationship between the management team and the company in order to foster ‘loyalty’ is the offer of ‘stock options’.

Various methods can be used with this instrument, depending on whether it is directed towards employee managers or non-employees.

As regards plans for the benefit of employees, recourse can be made to a capital increase, with the exclusion of the option right covered by article 2441(8) of the Civil Code.

As regards non-employees, an exclusion of this kind must be exercised in compliance with the procedures and within the limits stated in article 2441(6) of the Civil Code.

The debate has in fact been less on the legitimacy of selective stock options than on whether they should come under the regulation set out in the final paragraph of article 2441.

It has been argued, however, that – disregarding the lexical obscurities of both the Civil Code and the tax regulations – the issue of shares to managers may be favourably viewed, given that the shareholders’ sacrifice should be compensated by the specific advantage in terms of a better result, as reflected in an increase in the shareholder value.

This would be a hypothesis in which ‘the fact that exclusion of the option right in itself corresponds to the interest of the company is all the more evident than it is if the issue of option rights is directed towards the whole body of employees’.

Stock options reserved for managers are to be considered as an instrument of choice for ‘aligning’ the interests of the management with the interests of shareholders, with a view to the ‘creation of value’ for the shareholders.

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29 S. Patriarca, Successione nella quota sociale, successione nell’impresa e autonomia statutaria, Milan, 2002.
Despite these considerations, it should not be overlooked that in practice there could be *instances of unlawfulness*, as exemplified by the possible conflict of interests that may arise in the whole or in part of the board of directors, and the possible cases of discriminatory behaviour that might be liable to sanctions under labour legislation.\(^{31}\)

For the same purpose of maintaining the ownership and the control of a company separate, there could be recourse to a family *holding*, conceived as a separate proprietary ‘strongbox’ separate from operating enterprises organised through subsidiary companies.

By structuring entrepreneurial activities as a group, it is possible to *limit* the regulation of *events in the succession* of ownership as part of the transmission of the shares of the company *heading the group*.

The group leader and its subsidiaries are run in accordance with a *system* regulated by the rules applicable to the *corporate models* adopted for the individual companies in the group, having regard to their systemic configuration.

The regulatory framework applicable in this case is the one for groups introduced by the reform both in the starting point of reference, in other words in the section on the ‘Management and coordination of companies’ in Title Five of the Civil Code, and in the fragments of organisational by-laws for a *dominant* or subsidiary *società per azioni* contained in the regulations for that corporate model.

As far as the subject discussed here is concerned, there are no innovations of significance to that regulatory framework.

This is in part because the body of regulations now introduced merely makes the decision-making process of a company in a group *more transparent*, guaranteeing those working within the group (the directors and supervisory bodies) greater *certainty*, being confined to regulating *de facto groups* and therefore upholding the theory that the discipline of the group is founded more on ‘status’ than on ‘contract’.

This is a theory shared by the group of experts appointed by the European Union that has put forward a set of observations and recommendations with a view to identifying a series of *common principles* of company law.

These recommendations are centred on the introduction of rules of *transparency* regarding the group structure and infra-group relations, so that the management can adopt and coordinate a group policy.

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\(^{31}\) The EU group of experts, in discussing the subject of the stock option, has reached the conclusion that there is no need to prohibit the remuneration of directors in shares, but that appropriate rules should be issued. Recommendation III.11 of the Report is devoted to the remuneration of directors. See EU Report cit, p. 64.
This would ensure that the *interests of the company’s creditors* are effectively protected and that there is a fair balance of burdens and advantages (what is called the theory of compensatory advantages) for shareholders, and also that rules be issued for the procedural and substantive regulation of the insolvency of group companies\(^32\).

Practical experience has indicated that the most efficient model for the legal configuration of a dominant company or the lead company in a group is that of a *Società a responsabilità limitata* and that of a *Società in accomandita per azioni*, or partnership limited by shares.

Subject to the observations already made on succession in an enterprise by recourse to the model of the *Società a responsabilità limitata*, all that remains to be said on the *Società in accomandita per azioni* is that it is used to ‘preserve the financial conquests that have been achieved within large families holding a majority stake, through consolidation in a few entrepreneurial hands\(^33\).

The aim, therefore, is to counteract the dispersion resulting from the fragmentation of shareholder stakes at the time of transfers from one generation to the next\(^34\).

As regards the succession of *partners with limited liability*, the regulations applicable to transfers of shares in a *Società per azioni causa mortis* are also applied to the shares to which they are entitled.

In the case of *partners with unlimited liability*, the question is different.

In one school of legal thought, the discipline applicable to the interest of an unlimited partner in a *società in accomandita semplice*, or limited partnership, should be applied as it stands\(^35\). Another school holds that ‘death extinguishes one of the relationships that used to be in the name of the unlimited partner (that of administration) and brings about a normal succession causa mortis in the ownership of the shares to which the unlimited partner was entitled.

In this case, the heir would automatically acquire the status of a *partner with limited liability*\(^36\).

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\(^34\) S. Patriarca, op. cit., p. 127.


If the intention is to pursue that aim, it would seem to be preferable – albeit in the absence of explicit legislative guidance – to resort to a **covenant clause** along the lines indicated above.

A comprehensive review of acquisitions and mergers would be beyond the scope of this paper, even though operations of this kind could usefully be undertaken in order to tackle the issues associated with a ‘succession without heirs’ or a succession in which there are several heirs expectant, some of who are ‘passive’.

It would therefore be worthwhile to take a look at the body of regulations on the **leveraged buy out**, which has recently been introduced by the reform of company law in article 2501 *bis*.

This provision takes into consideration the classic situation of the acquisition of the control of one company (*the target*) by another company (often incorporated for that purpose, and known as the ‘*newco*’), which, in order to make the acquisition, obtains funding *to be repaid* by the company resulting from the merger (of the ‘*target company*’ with the ‘*newco*’) out of the economic and financial earnings that it produces, relying on the **resources of the target itself**.

An explicit body of regulations such as this settles a series of questions (which are also connected to a precedent set on the subject in criminal proceedings by the Court of Cassation) on whether such a transaction might ultimately constitute **fraud** according to article 2358 of the Civil Code, which prohibits **operations** conducted with a company’s own shares, or even avoidance of the regulations on **the acquisition and subscription** of the company’s own shares (articles 2357 and 2357-*quater* of the Civil Code)\(^{37}\).

The finalisation of a transaction of this kind, however, should follow the **procedure laid down** in the provision in question, the aim of which is to promote the provision of comprehensive internal and external information to the companies concerned with the operation.

Following the amendment to article 2358 made by the recent Legislative Decree No 142 of 4 August 2008 (implementing Directive 2006/68/EC), one of the ‘instruments’ that can be used to plan succession in an undertaking is what the Directive refers to as **financial assistance**.

In particular, on certain specific conditions, a *Società per azioni* (but not a *Società a responsabilità limitata* or a cooperative society) may **make loans or provide security** for the acquisition of (or subscription to) its own shares.

As an alternative to the facilitating mechanism of the MLBO that has been discussed here, it could be assumed that the ownership structure of the company could be **consolidated in the person of a ‘chosen heir’**, and settlement made for the quotas held by other family members, by means of:

A) the **direct granting of a loan** by the company to the ‘dauphin’, endowing him with the necessary liquidity to acquire the shares held by the other family members;

B) the **collateralisation** of the company assets (for example by a mortgage) so that the chosen heir can obtain from a credit institution the funding needed to acquire the holdings in the company.

To protect the integrity of the share capital, the new article 2358 establishes that the amounts loaned (or the security pledged) may not exceed the limit of the **distributable profits** and the **available reserves** evidenced by the most recent balance sheet.

The ‘administrative’ precautions are equally stringent: the financial assistance transaction must be authorised **by an extraordinary general meeting**, to which a report must be submitted by the directors attesting – *inter alia* (see article 2358, second paragraph) – that it is in the specific **interest of the company** to enter into the transaction.

From this viewpoint, it could be considered that the elimination of the risks associated with the fragmentation of ownership of the company following the succession event is undoubtedly a **corporate interest meriting protection**, one that is sufficient to justify the realisation of the financial assistance transaction.38

The range of methods for the predisposition of succession in an undertaking has recently been extended by a fact situation described and regulated by the Civil Code, that of the *Patto di famiglia*, covered by article 768 et seq. of the Civil Code.39

This *family agreement* can be used to dispose of the succession in an enterprise in advance, providing for an ‘advance division’ of an entrepreneur’s patrimony by assigning the assets of the enterprise (and therefore its control) to one or more of the statutory heirs while allocating other assets to the others.

It can also be used by placing an obligation on the heir who is assigned the assets of the firm to **make payment** for those assets to the other statutory heirs.

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38 G. Bortoluzzi, *La disciplina dell’assistenza finanziaria per l’acquisto di azioni proprie e della loro accettazione in garanzia*, Research doctorate in Italian and international commercial law, Università Cattolica del Sacro Cuore di Milan (XXIV Ciclo), Study seminar, 20 February 2009.

As article 458 is worded, it would seem that the family agreement is an exception to the prohibition of agreements to dispose of a succession. On closer consideration, however, the family agreement is not subject to the prohibition on what is known as a patto successore istitutivo – an agreement whereby a party establishes his heir or legatee – since it does not constitute an instrument causa mortis.

This is represented as a source of one or more attributions inter vivos made by the entrepreneur or the proprietor of holdings in the company.

It seems to be qualified as a renunciation of the right to bring an ‘azione di riduzione’, and therefore as an exception to the rule laid down by article 557, even when this is of a non-voluntary but statutory nature, in that it is the consequence of a deed of execution.

Without attempting here to qualify the family agreement, we feel it would be helpful to say a few words on its effects.

The first alternative is that a family agreement is represented as a deed of conveyance drawn up by the person disposing of the assets of an enterprise by assigning them to one or more descendants. In this case, the effects manifested by the family agreement will be twofold in nature, real and mandatory.

Its only real effect will be the contractual effect, whereas the obligation upon the assignees of the firm or the company holdings to pay the other participants the value of the share to which they are entitled is seen as an effect with a statutory source.

These are naturalia negotii – terms stemming from the contract itself – and a renunciation would take the form of a derogation of the agreement from the regulatory discipline on the subject in the Code.

The other alternative is that the family agreement is a deed specifying the attribution of the enterprise and the holdings to one or more of the participants, and of other capital assets to the participants who are not attributed the enterprise and the holdings.

In this alternative case, the effects are simultaneously all contractual and conveyancing (except that the acquisitions may be subject to collazione – the blending of property – and riduzione – the abatement of other shares to achieve equality of division – which in any case is an effect of a statutory nature).

The settlor’s attribution of assets to all the participants constitutes a derogation from the obligation on the assignee of holdings and the enterprise to pay a settlement to the other participants.
A participant who is not the assignee will, in agreeing to receive the assets attributed to him, manifest his intention to renounce that settlement.

Such attributions are drawn from the *quota legittima* – the reserve to which the statutory beneficiaries are entitled – and are therefore *not* subject to an action for abatement.

If the assets assigned to persons to whom the enterprise or the holdings have not been attributed were to exceed their value, these may be subject to the blending of property and the abatement of other shares in respect of that surplus value.

Andrea Bortoluzzi