Infringement of English inheritance law against German ordre public due to the absence of a right to a compulsory portion of children – discussion of BGH, judgement of 29 June 2022 – IV ZR 110/21

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In the judgement to be discussed, the Federal Court of Justice confirms for the first time the incompatibility of the application of foreign inheritance law with German ordre public, insofar as children of the deceased would thereby be cut off from their compulsory share. The decision will have a considerable influence on succession arrangements in cross-border situations, so that it is worthwhile to examine in detail the reasoning and scope of the decision as well as the remaining room for manoeuvre for practitioners.

I. Introduction

The Federal Court of Justice (*Bundesgerichtshof*, *BGH*) ruled in its judgment of 29 June 2022[1] that the application of English inheritance law to the estate of a testator living in Germany on the basis of a choice of law in the testamentary disposition is incompatible with German ordre public insofar as children of the testator are thereby deprived of their claim to a compulsory portion, which, according to the Federal Constitutional Court (*Bundesverfassungsgericht*, *BVerfG*), decision of 19 April 2005 – 1 BvR 1644/00[2] – is in principle irrevocable and independent of need, and there is a sufficient domestic connection. Hereby, the BGH rules differently than a number of supreme court decisions of other European jurisdictions have done, which have rejected the ordre public relevance of their own right to a compulsory portion. The BGH's decision puts an end to the long-standing discussions in literature and case law on whether a lack of compulsory portion claims can constitute a violation of German ordre public at all. At the same time, however, the decision does not resolve a whole series of uncertainties and consequential problems, or only creates them, which have to be dealt with in practice.

II. The decision of the BGH in detail

1. Facts of the case and course of proceedings

The plaintiff is the adopted son of the deceased and asserts claims for information and valuation against the deceased's estate pursuant to Sec. 2314 para. 1 of the German Civil Code (*Bürgerliches Gesetzbuch*, *BGB*), invoking his (German) right to a compulsory portion. The testator had British citizenship, but had lived in Germany for more than fifty years and had had no connection with Great Britain for more than thirty years. In a notarial will dated 13 March 2015, the deceased chose English law for his succession upon death, appointed defendant no. 1 (a non-profit limited liability company) as sole heir and appointed defendant no. 2 as executor.

The Regional Court (*Landgericht*, *LG*) of Cologne[3] had dismissed the action as unfounded. It was true that the minimum participation of children of the deceased in the estate was protected by fundamental rights according to the jurisidiction of the Federal Constitutional Court and thus

1 BGH, judgement of 29 June 2022 – IV ZR 110/21, NJW 2022, 2547 = DStR 2022, 1917.

2 BVerfG, decision of 19 April.2005 – 1 BvR 1644/00, NJW 2005, 1561; confirmed by BVerfG, decision of 26 November 2018 – 1 BvR 1511/14, ZEW 2019, 79.

3 LG Cologne, judgement of 10 July2020 – 20 O 246/19, BeckRS 2020, 49567.

suitable to constitute an infringement of German ordre public. However, the lack of a compulsory portion for an economically independent descendant of full age under the permissibly chosen English law did not constitute such a blatant contradiction to the German legal system that a manifest incompatibility within the meaning of Article 35 of the EU Succession Regulation[4] had to be assumed.

However, the plaintiff succeeded with his request for information before the Cologne Higher Regional Court (*Oberlandesgericht*, *OLG*)[5] as the court of appeal. It was true that the testator could have permissibly chosen English law, which does not recognise a claim to a compulsory portion comparable to German law. However, in view of the fundamental decision of the BVerfG on the significance of the right of children to a compulsory portion, English law was manifestly incompatible with German ordre public. The plaintiff was therefore entitled to a compulsory portion and the associated claims for information, which, however, could only be asserted against defendant no. 1 as sole heir. With regard to defendant no. 2, the action was dismissed.

The judgement of the BGH of 29 April 2022 now fully confirms the previous decision of the OLG Cologne.

2. Reasons for judgement

The Senate affirmed a claim of the plaintiff against defendant no. 1 under Section 2314 para. 1 BGB.

(a) Generally permissible choice of law

The BGH agreed with the lower courts that the choice of law was admissible under Article 22 para. 1 of the EU Succession Regulation. The testator's will was dated 13 March 2015, whereas the Regulation on the EU Succession Regulation has only been in force since 17 August 2015. However, since the deceased had died in 2018, the law applicable under Article 83 para. 4 of the Regulation (more likely Article 83 para. 2 was meant) was the law which the deceased had chosen to apply before the effective date in a disposition of property upon death in accordance with the law which could be chosen under Article 22 of the Regulation.

(b) The right to a compulsory portion as part of German ordre public

In the present case, however, the applicable English law of succession was manifestly incompatible with the German ordre public within the meaning of Article 35 of the EU Succession Regulation. The right to a compulsory portion, as an institutional guarantee, was integral part of the German ordre public. In its landmark decision of 19 April 2005, the BVerfG clarified that, with reference to the guarantee of the right to inherit under Article 14 para. 1 sentence 1 in conjunction with Article 6 para. 1 of the German Constitution (*Grundgesetz*, *GG*), the right to a compulsory portion of the deceased's children is a fundamental right in the sense of an inalienable and non-need-based minimum economic share in the deceased's estate. This right to a compulsory portion protects the family-law bond established by descent beyond death and in this respect restricts the freedom to make a will.

(c) Absence of adequate rights to a compulsory portion under English law

In the opinion of the BGH, English law falls short of these requirements in its legal and concrete form. According to the provisions

4 Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, 4 July 2012, OJ No L 201, 107.

5 OLG Cologne, judgement of 22 April 2021 – 24 U 77/20, BeckRS 2021, 15421.

of the relevant Inheritance (Provision for Family and Dependants) Act 1975 ("Inheritance Provision 1975"), there is no quota-based right to a compulsory portion or compulsory right of inheritance, but at most a means-tested financial participation in the estate at the discretion of the court, which in the specific case failed because the last domicile of the deceased was not in England or Wales, as required for the claim. In addition, the provisions of the Inheritance Provision 1975 were not compatible with the requirements of the BVerfG with regard to the compulsory portion, also in view of the fact that they were at the discretion of the courts and depended on numerous factors of the individual case.

(d) No contradiction with the requirements of the EU Succession Regulation

This was also in line with the requirements of the EU Succession Regulation. The coexistence of Article 35 and Article 22 of the Regulation shows that the European legislator considered the protection of the beneficiary of the compulsory portion to be possible in individual cases, even if this affects the testator's in principle given freedom of choice of law. The rationale in recital 38 sentence 2 of the EU Succession Regulation, according to which the beneficiaries of the compulsory portion are already protected by the fact that the possibilities of choosing the law under the Regulation are limited to the deceased's home law, would not be contrary to this. A case of application of recital 58 sentence 2 of the Regulation, according to which a breach of ordre public could not be assumed if it would violate the Charter of Fundamental Rights of the European Union, could also not be assumed.[6] The fact that the Commission's proposal[7] still provided for the inclusion of an exception (missing in the final Article 35 of the Regulation) for rights to a compulsory portion in the provision on the ordre public exception also spoke in favour of the possibility of a breach of German ordre public.

(e) Sufficiently strong domestic connection

The BGH justified the sufficiently strong domestic connection required for recourse to the ordre public reservation with the last habitual residence of the plaintiff and the testator in Germany, the location of the testator's assets in Germany and the plaintiff's German nationality.

(f) Legal consequence of the infringement

Since English law does not provide for a claim of the plaintiff to a share in the estate that meets the requirements of Article 14 para. 1 sentence 1 in conjunction with Article 6 para. 1 GG, the gap created by the infringement of German ordre public is not to be closed by this law as the primary lex causae, but by recourse to German law on the compulsory portion, which provides for the claim to a compulsory portion (information).

(g) Referral to the ECJ

The BGH did not refer the case to the European Court of Justice (ECJ) on the grounds that Article 35 of the EU Succession Regulation was concerned with the compatibility of the chosen law with the ordre public of the state of the court appealed to. Whether there is an infringement of ordre public can only be

6 Notwithstanding the question of the effect of England not becoming a Contracting State to the Regulation.

7 According to Article 27 para. 2 of the proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, COM/2009/0154 final. - COD 2009/0157, the application of a rule of the law may not be considered to be contrary to the public policy of the forum on the sole ground that its clauses regarding the reserved portion of an estate differ from those in force in the forum.

answered by the national court for the respective national law.

III. Classification of the decision

1. Current opinions in case law and literature

The question of whether and under what conditions a foreign right to a compulsory portion that is inadequate according to the German concept can be corrected within the framework of ordre public has so far been highly controversial.

The older case law until the decision of the BVerfG of 19 April 2005 assumed that the absence of a claim to a compulsory portion under the applicable foreign law is not suitable to constitute an infringement of ordre public.[8] A reaction to the decision of the BVerfG was appeared with the decision of the Berlin Appellate Court (*Kammergericht*, *KG*) of 26 February 2008 – 1 W 59/07, which already regarded the older case law as outdated and a violation of ordre public as possible, but could still leave a decision on this open.[9]

In the literature, the treatment of rights to a compulsory portion within the framework of ordre public remained highly controversial even after the decision of the BVerfG of 19 April 2005. Some argue that a transfer of the German right to a compulsory portion to other legal systems via Art. 35 of the EU Succession Regulation is regularly prohibited.[10] Another view considers a violation of ordre public in the absence of rights to a compulsory portion to be possible in principle, but wants to link it to further preconditions. For example, the violation should be excluded if an adult and economically independent descendant is affected[11] or if the person concerned is not a burden on German social welfare.[12] The predominant opinion, on the other hand, with reference to the jurisdiction of the BVerfG, assumes a violation of ordre public in any case if a descendant is not granted any share in the estate according to foreign regulations.[13]

The further question of whether a lack of entitlement to a compulsory portion can also be compensated by other rights, in particular compulsory rights of inheritance or claims to maintenance, and whether the ordre public violation does not apply with regard to these, is predominantly answered in the affirmative. The (economic) result of the application of the law is to be taken into account.[14]

With its decision, the BGH states that, against the background of the BVerfG's jurisdiction, neither the case law and literature denying an infringement of ordre public nor the opinions in literature that want to link the violation of ordre public to further prerequisites can be upheld.[15] In the opinion of the BGH, a compensation of missing compulsory portion claims by

8 Reichsgericht JW 1912, 22; BGH, judgement of 21 April 1993 – XII ZR 248/91, NJW 1993, 1920, 1921; OLG Cologne of 26 June 1975 – U 215/74, FamRZ 76, 170; OLG Hamm, judgement of 28 February 2005, ZEV 2005, 436, 439.

9 KG, judgement of 26 February 2008 – 1 W 59/07, NJW-RR 2008, 1109.

10 See, for example, *Ayazi*, NJOZ 2018, 1041, 1045; doubting *Süß*, Erbrecht in Europa, § 5 Grenzen der Anwendung ausländischen Erbrechts Rn 19; leaving open the result with regard to the constitutional rank of the right to a compulsory portion *Herzog*, ErbR 2013, 2, 5; cautiously *Simon*/*Buschbaum*, NJW 2012, 2393, 2395.

11 *Ludwig*/*A. Baetge*, in: Herberger/Martinek/Rüßmann/Weth/Würdinger, jurisPK-BGB, 9th ed. 2020 (as of 25 April 2022), Art. 35 EuErbVO Rn 9, 17, 21; *Röthel*, in: FS v. Hoffmann, p. 348, 361 f.; *Dörner*, in: Staudinger, BGB, Neubearb. 2007, Art. 25 EGBGB Rn 726; *Staudinger*/*Beiderwieden*, juris PR-IWR 6/2021, Note 2.

12 *Dutta*, in: MüKo-BGB, 8th ed. 2020, Art. 35 EuErbVO Rn 8 with further references.

13 For example: *Köhler*, in: Kroiß/Horn/Solomon, Nachfolgerecht, 2nd ed. 2019, Art. 35 EuErbVO, Rn 8; *Looschelders*, in: Hüßtege/Mansel, BGB - Rom-Verordnungen, 3rd ed. 2019, Art. 35 EuErbVO Rn 23; *J. Schmidt*, in: BeckOGK-EuErbVO (as of 1 August 2022), Art. 35 Rn 22.2; *Thorn*, in: Grüneberg, BGB, 81st ed. 2022, Art. 35 EuErbVO Rn 2; *Voltz*, in: Staudinger, BGB, Neubearb. 2013, Art. 6 EGBGB Rn 190 (as of 31 May 2021) in each case with further references.

14 See, for example, *J. Schmidt*, in: BeckOGK-EuErbVO, as of 1 August 2022, Art. 35 Rn 12; *Lagarde*, in: Bergquist/Damascelli/Frimston/Lagarde/Odersky/Reinhardtz, EuErbVO, 2015, Art. 35 Rn 6.

15 Recitals 21, 27 of the decision discussed.

means of substitute mechanisms such as the English Inheritance Provision 1975 is also ruled out, since these regulations, being dependent on discretion and individual cases, would not meet the requirements of the BVerfG.[16]

2. Current opionions in other European jurisdictions

The ruling of the BGH deviates from a number of decisions in other European jurisdictions, which did not see a violation of ordre public in the choice of law excluding the compulsory portion.

(a) Austria

In the judgement of 25 February 2021, the Supreme Court (*Oberster Gerichtshof*, *OGH*)[17] denied a violation of ordre public in a case in which the British testator had excluded her descendants' claims to a compulsory portion by choosing her home law in her will. This was justified on the one hand by the lower significance of the right to a compulsory portion, which – unlike in Germany – is not explicitly mentioned in the context of the property guarantee in accordnance with Article 5 of the Fundamental Laws Governing the General Rights of the Citizens (*Staatsgrundgesetz*, *StGG*) and is structured in a differentiated manner under simple law with possibilities for withdrawal, reduction and deferral. Ultimately, the specific case had only a very slight domestic connection due to the location of the affected assets in British trusts and the British nationality of the plaintiffs. The court expressly left open whether a stronger domestic connection would lead to a different result.

(b) Italy

The Italian Court of Cassation[18] ruled as early as 1996 that claims to a compulsory portion are not covered by ordre public. The succession of the Canadian testator was governed by the law of his native country, which excluded his daughter from participating in the estate. The court rejected a violation of ordre public, in particular because Article 42 of the Italian Constitution, which regulates property and inheritance law, makes no reference to the beneficiaries of the compulsory portion, who are therefore not entitled to any special protection under ordre public.

(c) France

The French Court of Cassation also ruled in two judgments of 27 September 2017 that the exclusion of the right to a compulsory portion does not violate French ordre public.[19] In both cases, the respective estates were subject to Californian inheritance law in accordance with the provisions of French private international law, which did not provide for a compulsory portion for the children disinherited by the will. The Court of Cassation justified its rejection of a violation of ordre public by stating that the rights to a compulsory portion had lost importance due to the reform law of 23 June 2006 as well as the EU Succession Regulation (which did not yet apply to the succession cases), which allows for the exclusion of rights to a compulsory portion by choice of law. Moreover, a violation of ordre public was only possible in exceptional cases and not for claimants who were of age and not economically needy.

The French legislator then prohibited circumvention of the French right to a compulsory portion by amending the Code Civil[20] in 2021. However, the scope of application and compatibility with the EU

16 Recital 28 of the decision discussed.

17 OGH Vienna, judgement of 25 February 2021 – 2 Ob 214/20i, ZEV 2021, 722.

18 Court of Cassation, judgement of 24 June 1996 – Cass., Sez. II Civ., n. 5832.

19 Court of Cassation, judgements of 27 September 2017 - Cass Civ 1 n. 16-13151, Cass Civ 1 n. 16-17198; discussion by *Stade*, ZErb 2018, 29, Süß, ZEV 2017, 567 as well as *ibid*., Erbrecht in Europa, § 5 Grenzen der Anwendung ausländischen Erbrechts Rn 15 ff.

20 Loi n° 2021 - 1109 du 24 août 2021 confortant le respect des principes de la République; on this subject in detail *Boosfeld*, ErbR 2022, 186.

Succession Regulation are highly controversial.[21]

IV. Evaluation of the decision

The decision cannot be accepted without further ado. It is doubtful whether Article 35 of the EU Succession Regulation can constitute a violation of ordre public even in connection with the more recent jurisdiction of the BVerfG and in the case of a complete absence of a child's entitlement to a compulsory portion. This does not seem self-evident, especially in view of the German fundamental rights in cases with foreign implications and the purpose of the EU Succession Regulation. Even if one – probably correctly – answers this question in the affirmative, it would be going too far to apply this result without restriction to all cases in which an economic participation in the estate under the foreign law does in fact take place, but in terms of quantity or the nature of the claims is even somehow inferior to the German law on compulsory portions. However, this is at least implied by the BGH. Unfortunately, there is no discussion of the person of the correct defendant. Insofar as a referral to the ECJ is rejected, this cannot be agreed with.

1. Scope of Article 35 of the EU Succession Regulation in general

According to Article 35 of the EU Succession Regulation, a provision of the law may be refused if its application is manifestly incompatible with the ordre public of German law. The decisive factor is the concrete result of the application of the law, not the abstract regulatory content of the foreign rule per se. The wording of Article 35 of the Regulation, according to which the incompatibility must be "manifest", already makes it clear that Article 35 of the Regulation is to be interpreted narrowly and is only to be applied in exceptional cases.[22] A further restriction is that a sufficiently strong domestic connection is required. [23]

Such a narrow understanding of Article 35 of the EU Succession Regulation is compelling in view of the conception of the Regulation. The latter assumes the fundamental admissibility of a choice of law and sufficient protection of the persons affected thereby, in particular the beneficiaries of the compulsory portion, by the fact that according to Article 22 of the Regulation only the deceased's home law can be chosen, as can also be seen from Recital 38 of the Regulation. Conversely, the resulting restrictions on the right to a compulsory portion of the beneficiaries of the compulsory portion are in principle to be accepted.[24] An excessively broad understanding of the ordre pubic reservation would seriously run counter to the harmonisation objective of the Regulation.[25]

This is not changed by the inclusion of the BVerfG's decision of 19 April 2005, which only referred to domestic German facts, so that for this reason alone an unseen transfer of the statements made by the BVerfG to a foreign factual situation is prohibited.[26] Although the observance of German fundamental rights is of paramount importance due to their constitutional status within the framework of ordre public, their significance and scope may, however, also

21 *J. Schmidt*, in: BeckOGK-EuErbVO (as of 1 August 2022), Art. 35 Rn 22.4.

22 *Odersky*, in: Hausmann/Odersky, Int. PrivatR in der Notar- und Gestaltungspraxis, 4th ed. 2021, § 15 Anwendbares Erbrecht Rn 340; *J. Schmidt*, in: BeckOGK-EuErbVO (as of 1 August 2022), Art. 35 Rn 12.

23 On the requirement and "relativity" of the domestic reference with regard to the significance of the violated principles of the lex fori: *Köhler*; in: Kroiß/Horn/Solomon, Nachfolgerecht, 2nd ed. 2019, Art. 35 EuErbVO Rn. 5; *Voltz*, in: Staudinger, BGB, Neubearb. 2013, Art. 6 EGBGB Rn 161 (as of 31 May 2021).

24 *Ayani*, NJOZ 2018, 1041, 1043; *Looschelders*; in: Hüßtege/Mansel, BGB - Rom-Verordnungen, 3rd ed. 2019, Art. 35 EuErbVO Rn 23.

25 *J. Schmidt*, in: BeckOGK-EuErbVO, as of 1 August 2022, Art. 35 Rn 12; *Lagarde*, in: Bergquist/Damascelli/Frimston/Lagarde/Odersky/Reinhardtz, EU Inheritance Regulation, 2015, Art. 35 Rn 6.

26 *Holtz*/*Lorenz*, DStR 2022, 1917, 1923.

be limited in advance according to the jurisdiction of the BVerfG in cases with foreign implications.[27] According to the "Spaniard decision" of the BVerfG[28] , it must be examined in each individual case to what extent the respective fundamental right acquires validity according to its wording, content and function, taking into account the equality of other states and the autonomy of their legal systems for facts relating to foreign countries[29]. Not every application of the law that would be contrary to fundamental rights in a purely domestic situation is also contrary to fundamental rights in a foreign situation and thus suitable to constitute a violation of ordre public.[30]

2. Breach of ordre public in the case to be decided by the BGH

Against this background, it is astonishing how self-evident the Federal Court of Justice declares the minimum participation of the children in the estate postulated by the BVerfG to be part of the German ordre public and the application of the German law on compulsory portions to be (apparently) fully applicable.

At least for the case decided, in which the concrete application of English law did not result in any participation of the child entitled to the compulsory portion under German law, one will have to assume a violation of ordre public as a result. If one were to see this differently, the essence of the right to a compulsory portion as a result of the guarantee of the right to inherit and of family protection would be completely undermined in corresponding foreign cases. Such a far-reaching discrimination of the holder of the right to the compulsory portion compared to a purely domestic situation does not seem appropriate against the background that a sufficiently strong domestic connection[31] must always be demanded within the framework of the ordre public review.[32]

This result is also not surprising in view of the fact that in other countries stronger rights of heirs and compulsory portions have not been enforced[33], since there was no constitutional protection here, which the Austrian Supreme Court (this in explicit distinction to German law) as well as the Italian Court of Cassation also expressly emphasised. Nothing else should apply in French law[34], even if the lack of constitutional rank was not explicitly emphasised in the respective decisions. Germany's outsider position is justified by its special constitutional situation.

3. Breach of ordre public in other cases

The decision of the BGH, however, does not deserve approval insofar as it gives the impression that any shortfall of the relevant foreign provisions behind the model of the German law on compulsory portions constitutes a violation of ordre public, which is to be remedied by full application of the German law on compulsory portions.

The BVerfG justifies the required minimum participation of children in the estate precisely in the sense of a constitutional institutional guarantee, the concrete

27 *Looschelders*, in: Hüßtege/Mansel, BGB - Rom-Verordnungen, 3rd ed. 2019, Art. 35 EuErbVO Rn 10, 14; *Voltz*, in: Staudinger, BGB, Neubearb. 2013, Art. 6 EGBGB Rn 135, 141 (as of 31 May 2021).

28 BVerfG, decision of 4 May 1971 – 1 BvR 636/68, BVerfGE 31, 58 = NJW 1971, 1509.

29 BVerfG, decision of 4 May 1971 – 1 BvR 636/68, BVerfGE 31, 58, 87 (insofar not reprinted in NJW 1971, 1509).

30 *Köhler*, in: Kroiß/Horn/Solomon, Nachfolgerecht, 2nd ed. 2019, Art. 35 EuErbVO Rn 5; *Voltz*, in: Staudinger, BGB, Neubearbeitung 2013, Art. 6 EGBGB Rn 141, 190 (as of 31 May 2021); *Looschelders*, in: Hüßtege/Mansel, BGB - Rom-Verordnungen, 3rd ed. 2019, Art. 35 EuErbVO Rn 26.

31 See Fn. 23.

32 In conclusion, *Bühler*, Notar 2022, 191, 195; *Windeknecht*, NJW 2022, 2547, 2552 f.; *Weber*, RFamU 2022, 424, 430; on OLG Cologne: *Lehmann*, ZEV 2021, 698, 701; in contrast, *Holtz*, DStR 2022, 1917, 1923, is doubtful.

33 But so *Lehmann*, ZEV 2021, 698, 702 on the decision of the OLG Cologne.

34 See *Benzina*, Les enjeux constitutionnels de la réserve héréditaire, in: Pérès/Potentier, La réserve héréditaire, 2019, p. 17 para 11.

fulfilment of which is incumbent on the legislature with a broad scope of discretion, which in principle the BGH also takes note of.[35] If the German legislature already has a wide margin of discretion, this must also be the case for provisions of the foreign law, even before the required narrow interpretation of the ordre public reservation (see above no. 1), this must apply all the more to provisions of the foreign legislature[36] – a violation of ordre public can only be assumed if, in a specific individual case, the mandatory minimum required by German ordre public is not met. This minimum is not congruent with the right to a compulsory portion as laid down by regular (i.e. non-constitutional) German law and would have to be determined in the individual case. This then also results in the legal consequence of a breach of ordre public: The existing gap is to be filled in such a way that a result is achieved that just complies with ordre public.[37]

The BGH did not have to comment on the quantitative lower limit, since the complete absence of a claim to a compulsory portion constitutes a violation of ordre public and the extent of participation in the estate was not to be decided at the level of the claim to information and valuation pursuant to section 2314 para. 1 BGB. Nonetheless, the recourse to the German law on compulsory portions, which was found to be necessary and not further restricted,[38] gives the impression that the German law on compulsory portions in its entirety, i.e. including the corresponding full quotas of compulsory portions, is decisive for the breach of ordre public and the filling of the gap. This must be rejected. If the foreign legal system provides for a lower participation in the estate, this is only detrimental insofar as it would fall short of the mandatory minimum required for by the German ordre public.[39]

The BGH's blanket statement that the Inheritance Provision 1975 or similar substitute mechanisms are generally not suitable to compensate for a child's missing compulsory portion must also be rejected.[40] In the context of Art. 35 of the EU Succession Regulation, it correctly depends on the existence of a result that is incompatible with German ordre public in the *specific* individual case. The BGH correctly justifies such a result in its decision by stating that the claimant was not entitled to any claims under English law due to the lack of domicile in England or Wales.[41] On the other hand, it goes too far to *generally* deny the application of English law on the grounds that it provides for judicial discretion and depends on numerous factors of the individual case.[42] This would ultimately amount to an abstract examination of foreign law, which is precisely not permitted within the framework of the orde public. If the concrete application of foreign law shows that an insufficient compulsory portion is compensated for by other provisions, for example of maintenance law, a violation of ordre public is therefore ruled out, even if the application of foreign law is discretionary or depends on indeterminate legal concepts.[43] This applies all the more if these rights even go beyond the German right to a compulsory portion and grant the beneficiary a share in the estate in the sense of a right of inheritance. Against this background, it is surprising that the OLG – now confirmed by the BGH – also expressly

35 Recitals 14, 23 of the decision discussed.

36 *Kindler*/*Kränzle*, in: Groll/Steiner, Praxis-Handbuch Erbrechtsberatung, 5th ed. 2019, para 41.89.

37 *Bühler*, Notar 2022, 191, 195; *Lehmann*, ZEV 2021, 698, 702; *Ayazi*, NJOZ 2018, 1041, 1044; *Pfeiffer*, LMK 2022, 811862, p. 2 et seq; *Süß*, Erbrecht in Europa, § 5 Grenzen der Anwendung ausländischen Erbrechts Rn 19; *Voltz*, in: Staudinger, Neubearb. 2013, Art. 6 EGBGB Rn 143 (as of 31 May 2021); *Lorenz*, in: BeckOK-BGB, 63rd edition, Art. 6 EGBGB Rn 18.

38 See recital 30 of the full text of the decision discussed.

39 *Lehmann*, ZEV 2021, 698, 702; *Pfeiffer*, LMK 2022, 811862, p. 3; *Bühler*, Notar 2022, 191, 195 et seq.

40 Recital 28 of the decision discussed.

41 Recital 19 of the decision discussed.

42 Recital 28 of the decision discussed; in this sense also: *Bühler*, Notar 2022, 191, 195; *Weber*, RFamU 2022, 424, 430; *Voltz*, in: Staudinger, Neubearb. 2013, Art. 6 EGBGB Rn 190 (as of 31 May 2021) still on Art. 6.

43 *Bühler*, in Notar 2022, 191, 195; *Weber*, RFamU 2022, 424, 429; *Lehmann*, ZEV 2021, 698, 701 f.

ruled out compensation through compulsory rights of inheritance.[44]

Finally, the decision, just like the BVerfG decision of 19 April 2005, does not comment on whether a minimum compulsory share of spouses or parents is also to be assumed.

4. Wrong defendant

It has so far gone unnoticed, except by *Bühler*[45], that defendant no 1, i.e. the heiress according to *German* understanding, is probably the wrong defendant. According to the permissibly chosen and – apart from mandatory breaches of ordre public – primarily applicable *English* law of succession, the entire estate initially passes to defendant no. 2 as *executor.* It would therefore be consistent to also involve defendant no. 2 as a defendant.

5. Referral to ECJ

The BGH's assumption that a referral to the ECJ within the framework of preliminary ruling proceedings pursuant to Article 267 para. 3 TFEU was not necessary, since the decision on the incompatibility with the ordre public of the court seised could only be decided by the latter, falls short of the mark.[46] Even if the examination of the German ordre public in principle falls to German courts, it is up to the ECJ to monitor the outer limits within which a state may rely on the ordre public in the first place due to the embedding of the ordre public reservation in Article 35 of the EU Succession Regulation. The principles established by the ECJ in its Krombach decision[47] also apply within the framework of Article 35 of the EU Succession Regulation.

In view of the fact that for the assessment of the European dimension of ordre public (see above IV. no. 1) as well as the fact that in other European jurisdictions contrary decisions exist (see above III. no. 2), a referral to the ECJ would have been desirable.[48]

V. Significance for legal practice

The decision will have a considerable influence on advisory practice and succession planning in cross-border situations. Clients who have or are planning succession planning under foreign law and have strong ties to Germany can no longer rely without further ado on this being recognised before German courts insofar as beneficiaries of the compulsory portion are in a worse position compared to what they would be under German law.

Accordingly, the legal practice must prepare itself for the fact that the choice of foreign law to avoid or reduce the compulsory portion will in future only be possible to a very limited extent or will be associated with a considerable risk. The statements of the decision can be understood in such a way that it applies even if the foreign law does not provide for a complete exclusion of the beneficiary of the compulsory portion, but falls short of the German compulsory portion law (in particular through a lower compulsory portion quota) or if other types of (maintenance) claims are granted, in particular those that are means-tested and subject to judicial discretion.

The decision of the Federal Court of Justice was issued for a case with a strong domestic connection. Therefore, there seems to be room for a choice of law that avoids the compulsory portion, especially in cases where a sufficient domestic reference is not that clear, in particular where the testator still maintains close ties to the foreign country or where substantial testator assets are located there. The

44 OLG Cologne, judgement of 22 April 2021 – 24 U 77/20, BeckRS 2021, 15421 Rn 22; *Bühler*, Notar 2022, 191, 194 f.; *Lehmann*, ZEV 2021, 698, 701 f.

45 *Bühler*, Notar 2022, 191, 196.

46 See recital 31 of the full text of the decision discussed.

47 ECJ, judgement of 28 March 2000 – Case C-7/98, NWJ 2000, 1854.

48 *Bühler*, Notar 2022, 191, 196; Pfeiffer, LMK 2022, 811862, p. 2; *Lehmann*, ZEV 2021, 698, 702; doubting *Weber*, RFamU 2022, 424, 429.

extent to which the principles of the decision can be transferred to the compulsory portion claims of spouses and children is open. Until there is certainty about this, special caution is also required here with regard to compulsory portion claims existing according to German law.

Due to the risk that, if a foreign law with insufficient compulsory portion claims is chosen, German compulsory portion law will be applied in this respect, other arrangements should be considered in addition or as an alternative to the choice of foreign law in order to avoid and reduce the compulsory portion.

The testator's possibility of unilaterally withdrawing the compulsory portion from the beneficiary pursuant to Section 2333 BGB is limited to extreme cases which are rarely encountered in practice, so that this way is usually ruled out. A secure exclusion is always possible by means of a waiver of the compulsory portion pursuant to Section 2346 para. 2 BGB with consent of the beneficiary of the compulsory portion, who will, however, in case of doubt (if he or she agrees to this at all), have this waiver be compensated.

Therefore, above all the possibility remains to reduce the future estate assets and thus also the amount of any compulsory portion claims as far as possible by timely lifetime-donations. It is true that corresponding donations will have to be taken into account in the context of a claim to supplement the compulsory portion pursuant to Section 2325 BGB. However, with the increasing lapse of time since the donation, these will be included in the calculation of the claim to a supplementary compulsory portion in an increasingly smaller amount, until after ten years they are no longer taken into account at all. According to the jurisdiction of the BGH, however, the beginning of the time limit can be impeded by the fact that the donor essentially continues to use the object of the donation (in particular within the framework of reserved usufructuary rights), which must be taken into account.[49] Between spouses, the time limit according to Section 2325 para 3 sentence 3 BGB does not begin prior to the dissolution of the marriage. In the case to be decided by the BGH, the testator might have done well to transfer a larger part of his assets to the non-profit limited liability company as early as possible also taking advantage of existing tax benefits.

At a glance

In its judgement of 29 June 2022, the German Federal Court of Justice (*Bundesgerichtshof*, *BGH*) affirmed that the application of English inheritance law to the estate of a testator living in Germany is to be seen as an infringement of German ordre public, insofar as children of the testator are thereby deprived of their entitlement to a compulsory portion which, according to the case law of the Federal Constitutional Court (*Bundesverfassungsgericht*, *BVerfG*), cannot be withdrawn and is not dependent on need (BVerfG, decision of 19 April 2005 – 1 BvR 1644/00) and there is a sufficient domestic connection. This can only be accepted to a limited extent.

At least for the decided case of the complete exclusion of children from participation in the estate, the BGH must be agreed with in the result. Due to the special constitutional anchoring of the right to a compulsory portion, Germany differs precisely from the legal systems of Austria, Italy and France, whose highest courts have so far rejected a violation of ordre public under their own law. Here, however, a more detailed discussion of the scope of the BVerfG's jurisdiction would have been required, which cannot be applied without restriction to foreign matters, in particular against the background of the significance of the EU Succession Regulation.

The BGH cannot be followed insofar as its decision gives the impression that every

49 BGH, judgement of 27 April 1994 – IV ZR 132/93, NJW 1994, 1791.

shortfall of the foreign law behind the German law on compulsory portions constitutes a violation of German ordre public. Rather, the minimum degree of participation in the estate required by German ordre public must be determined in each concrete individual case, which does not have to correspond to the regular (i.e. non-constitutional) German law on compulsory portions. Only if the concrete application of foreign law falls short of this minimum there is a violation of ordre public. In contrast, an abstract examination of the applicable foreign law as to its compatibility with German law, as (at least additionally) undertaken by the BGH, is not permitted. The gap created by the breach of ordre public is then filled by a result that just meets the minimum requirements of German ordre public.

In practice, the choice of foreign law to avoid or reduce the compulsory portion will only be possible to a very limited extent in the future or will be associated with considerable risks, so that – at least if there is a strong domestic connection – other possibilities of limiting the compulsory portion, such as the waiver of the compulsory portion or transfers by way of anticipated inheritance, must be used in addition or as an alternative.