

CASE HUK-COBURG-ALLGEMEINE VERSICHERUNG II: ARE WE SHIFTING THE COURSE ON OVERRIDING MANDATORY PROVISIONS?

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Abstract: *The presented article addresses the issue of overriding mandatory provisions, with a focus on a comparative analysis of the doctrinal discourse in private international law and the rulings of the Court of Justice of the European Union in the case of HUK-COBURG-Allgemeine Versicherung II. The issue of overriding mandatory provisions within the context of conflict-of-laws solutions in the Rome I and Rome II Regulations is highly complex. These regulations provide for certain forms of moderation in the application of foreign law through the active enforcement of overriding mandatory provisions, which may not necessarily be confined to the lex fori. It is within the discretion of individual states to determine which provisions within their legal system are considered absolutely cogent and non-derogable. In its judgment in the case of HUK-COBURG-Allgemeine Versicherung II, the Court of Justice examined the interpretation of provisions concerning overriding mandatory norms under the Rome II Regulation, which governs the general framework for determining the applicable law for non-contractual obligations within the Union acquis. While the Court's conclusions on the central issue may not have been surprising to some, the aim of this article is to explore whether the Court's approach to the application of overriding mandatory provisions deviated from or even exceeded the traditional doctrinal understanding in private international law.*

Keywords: *overriding mandatory provisions, conflict-of-law norm, private international law*

INTRODUCTION

Private international law has become an increasingly significant area of legal practice, primarily due to the growing prevalence of cross-border private law relationships. At the European Union (hereinafter referred to as the “EU” or the “Union”) level, a comprehensive body of legal instruments has been developed in this field, encompassing not only secondary Union legislation but also international treaties concluded by the Union. It is now possible to speak of the establishment of a cohesive framework for Union international private and procedural law, which operates uniformly across the judicial area of Member States and is founded on mutual trust in the administration of justice.

In addition to Union law, the private international law frameworks of individual Member States continue to coexist, particularly in matters outside the scope of Union regulations and international treaties. Despite the ongoing convergence of legal systems within the EU, significant divergences persist, particularly in the regulation of private international law. One such area of disparity concerns the availability of protective mechanism of overriding mandatory provisions, which affects the consequences of applying foreign law. Although some Member States do not incorporate such mechanism into their national legal systems, they are firmly embedded in key Union

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instruments, notably the Rome I¹ and Rome II² Regulations, which provide the general conflict-of-laws framework for determining the applicable law in contractual and non-contractual obligations in civil and commercial matters within the EU.

Although both Regulations must be interpreted in harmony to ensure consistency and avoid contradictions,³ discrepancies exist with respect to the protective mechanism of overriding mandatory provisions. These differences do not stem from an inconsistent interpretation of the concept of overriding mandatory provisions, but rather from the potential to activate such provisions outside the *lex fori*, particularly within the context of the Rome I Regulation. The case law of the Court of Justice of the European Union (hereinafter referred to as the “Court” or “CJEU”) on this issue remains somewhat sparse, primarily because it is for each Member State to designate national provisions as overriding mandatory norms.

This paper seeks to identify the key outcomes of the judgment in *HUK-COBURG-Allgemeine Versicherung II*,⁴ which addresses the application of overriding mandatory provisions under the Rome II Regulation and clarifies the scope of Article 16 of Rome II in its practical implementation by the courts of Member States. Since preliminary rulings are binding not only on the referring courts but also provide a binding interpretation of the relevant provisions for all Member States, we argue that the judgment’s significance extends across the entire EU, irrespective of whether national laws parallel the mechanism for overriding mandatory provisions.

The judgment is pivotal not only for its clarification of the interpretation of overriding mandatory provisions within the framework of the Rome II Regulation, but also because, in our view, the Court of Justice has revised approach to the application of this mechanism. This shift is not confined to the Rome II Regulation but also carries broader implications for the general theory of overriding mandatory provisions. The objective of this article is to analyse the judgment in *HUK-COBURG-Allgemeine Versicherung II* and assess its potential impact on the practical application of overriding mandatory provisions within the EU legal framework.

I. INTRODUCTION TO THE MECHANISM OF OVERRIDING MANDATORY PROVISIONS UNDER THE ROME II

Overriding mandatory provisions serve as an active protective mechanism in private international law, whereby the court hearing the case moderates, to some extent, the scope of application of the applicable law by preferentially applying a provision of the *lex fori* that holds unique significance due to its overriding mandatory character.⁵ The Rome II

¹ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177, 4.7.2008, p. 6–16. (hereinafter referred to as “the Rome I”).

² Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199, 31.7.2007, p. 40–49. (hereinafter referred to as “the Rome II”).

³ Recital 7 of Preamble to the Rome I.

⁴ Judgment of the Court of 5 September 2024, *HUK-COBURG-Allgemeine Versicherung II*, C-86/23, EU:C:2024:689.

⁵ Article 16 of the Rome II: “Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.”

Regulation governs the determination of the law applicable to non-contractual obligations in civil and commercial matters, provided that its temporal, territorial, and material scope are fulfilled. While the Rome II Regulation does not define overriding mandatory provisions explicitly, this definition can be inferred from the Rome I Regulation. According to Article 9(1) of the Rome I Regulation: “Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.” These norms are generally not explicitly identified in the laws of the Member States, and thus it falls to the court hearing the case to assess, in light of all the circumstances, whether to give priority to such a provision in a particular case. Some scholars indicate that in purely domestic cases, mandatory norms and overriding mandatory norms do not significantly differ in their binding effect. However, the introduction of a foreign element complicates their application and legal implications.⁶ Guidance on identifying the applicable overriding mandatory provision in the case at hand can be found in the scholarly work of Prof. Bělohávek, who advocates for a structured analytical approach by addressing the following inquiries: What is the underlying purpose of the provision, and what specific interest does it seek to protect? Can this interest be classified as one of public concern, and would the non-application of the provision result in an infringement of that interest?⁷ Moreover, the Court of Justice, in its jurisdiction over the extent to which States moderate the scope of the applicable law through overriding mandatory provisions, has clarified several practical aspects of the definition in question.

In the landmark judgment in *Arblade* case, the Court clarified that this “term must be understood as applying to national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance there with by all persons present on the national territory of that Member State and all legal relationships within that State”⁸ The application of these provisions is a matter of course, whereby the court does not have to examine the content of the applicable law and its consequences, but automatically enforces the norm which is the overriding mandatory provision in the particular case under consideration.⁹

We define overriding mandatory provisions as a subcategory of mandatory rules,¹⁰ specifically as absolutely cogent norms. The classification does not depend on the legal field to which the provision belongs, but rather on whether it protects a public interest that meets the requirements set out in the Rome II Regulation.¹¹ It is precisely through

⁶ PAUKNEROVÁ, M., ROZEHNALOVÁ, N., ZAVADILOVÁ, M. et al. *Zákon o mezinárodním právu soukromém. Komentář [Private International Law Act. Commentary]*. Praha: Wolters Kluwer ČR, 2013, p. 32.

⁷ BĚLOHLÁVEK, A. J. *Rome Convention Rome I Regulation*. USA: Juris, 2010. p. 1474.

⁸ Judgment of the Court of 23 November 1999, *Arblade*, C-369/96, EU:C:1999:575, paragraph 30.

⁹ Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (“ROME II”), COM/2003/0427 final – COD 2003/0168.

¹⁰ Recital 37 of Preamble to the Rome I.

¹¹ PAUKNEROVÁ, M., ROZEHNALOVÁ, N., ZAVADILOVÁ, M. et al. *Zákon o mezinárodním právu soukromém. Komentář [Private International Law Act. Commentary]*. pp. 33–34.

the provision on overriding mandatory rules that the public interest permeates private law relationships with a foreign element.¹²

A closely related mechanism is the public policy exception, but this requires the court to first assess the implications and effects of the foreign applicable law, and then the court will assess that the foreign law provision in question should not be applied to protect the public policy of the forum. A number of Member States' legal systems are only familiar with this passive protective mechanism and consider it sufficient to correct the consequences of the foreign law, based on which they consider the overriding mandatory provisions to be obsolete. This was the position adopted by countries such as Italy and Austria when incorporating the provision on overriding mandatory rules into the EU regulation.¹³

Where the provisions on overriding mandatory rules in Rome I and Rome II diverge is in the possibility of activating the mechanism with respect to norms other than the overriding mandatory norms of *lex fori*. Although the European Commission originally sought to harmonise the legal framework in both regulations,¹⁴ the final version of the Rome II does not provide for the application of norms other than those of *lex fori* as overriding mandatory rules.

In the interest of ensuring legal certainty within the European judicial area, the Court of Justice does not interpret the provision on overriding mandatory rules expansively, nor does it expand the selection of additional norms from other states within the conflict-of-laws framework at the expense of predictability in determining the applicable law. In principle, however, we would see no reason not to extend the conclusions of the *Nikiforidis* case to Rome II for all other overriding mandatory rules that can be taken into account as a “matter of fact”.¹⁵ Nevertheless, the grounds on this issue are, as several authors point out, rather poor and would certainly welcome a more in-depth analysis by the Court of Justice.¹⁶ At the same time, the overriding mandatory norms of the *lex causae* cannot be overlooked, but they are enforced, in our view, not through the mechanism of overriding mandatory norms but by virtue of being part of the *lex causae*.

In the scholarly literature, experts often debate which norms should be afforded this special significance and provide practical examples to suggest which norms should be considered in such cases. However, no exhaustive list of these norms exists within the legal systems of the States. In the landmark *Unamar* judgment, the Court emphasised that it is the responsibility of the forum “in the course of its assessment of whether the national law which it proposes to substitute for that expressly chosen by the parties to the contract is a ‘mandatory rule’, to take account not only of the exact terms of that law, but

¹² ROZEHNALOVÁ, N. et al. *Nariadení Řím I a Nariadení Řím II. Komentář. [Rome I and Rome II Regulations. Commentary]*. Praha: Wolters Kluwer ČR, 2021, p. 490.

¹³ DICKINSON, A. *The Rome II Regulation. The law applicable to non-contractual obligations*. New York: Oxford University Press, 2008, p. 631.

¹⁴ Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (“ROME II”), COM/2003/0427 final – COD 2003/0168.

¹⁵ Judgment of the Court of 18 October 2016, *Nikiforidis*, C-135/15, EU:C:2016:774, paragraph 51.

¹⁶ KRONENBERG, A. Foreign overriding mandatory provisions under the Regulation (EC) No 593/2008 (Rome I Regulation). Judgment of the European Court of Justice of 18 October 2016, case C-135/15. *Cuadernos de Derecho Transnacional*. Vol. 10, No. 2, p. 882.

also of its general structure and of all the circumstances in which that law was adopted in order to determine whether it is mandatory in nature in so far as it appears that the legislature adopted it in order to protect an interest judged to be essential by the Member State concerned.¹⁷

The *conditio sine qua non* for the use of this protective mechanism is clearly the protection of the public interest, while the Regulation itself refers in its preamble to the application of the mechanism only in exceptional cases.¹⁸ As we have already mentioned, it is settled case-law of the Court of Justice that Article 16 of the Rome II on overriding mandatory norms must be interpreted restrictively.¹⁹

A. Fuchs effectively suggests, in the context of Rome II, how to identify overriding mandatory provisions through two key criteria: the criterion of interest and the criterion of imperative nature. As is evident from the aforementioned, the criterion of interest takes into account the provision in broad connotations, examining the objectives, interpretation, wording of the provision, and the intent of the legislator, all in relation to the specific case under examination.²⁰

The protection of individual interests alone would not be sufficient to activate the mechanism, although even in the case of these norms, it is essential to consider the potential cascading effects. This is because distinguishing between private interests and, ultimately, public interests may not always be straightforward. In this regard, Magnus and Mankowski point out that, in the context of non-contractual obligations, the fundamental value could indeed be the protection of private interests, such as those of a specific category of injured parties, for example, in the context of shifting the burden of proof or setting a minimum level of compensation.²¹ We would like to add, however, that the aim of the provisions in the Rome II Regulation and the Brussels I bis Regulation²² regarding non-contractual liability is not to protect the weaker party, even though, in certain disputes, such as the one addressed in the analysed judgment of the Court of Justice, it may seem at first glance that the injured party is in a position of factually weaker party. However, these provisions should not be viewed through that lens.

Courts adjudicating the case thus face the difficult task of balancing regulatory interests and determining the extent of protection for such interests in relation to the case at hand. In this regard, Magnus and Mankowski recommend that the forum, even when an apparently private interest is being pursued by a provision, should, in the second step, examine whether the norm simultaneously serves to protect a general public interest of the state, and for this purpose, they recommend conducting a proportionality test *in con-*

¹⁷ Judgment of the Court of 17 October 2013, *Unamar*, C-184/12, EU:C:2013:663, paragraph 50.

¹⁸ Recital 32 of Preamble to the Rome II.

¹⁹ Judgment of the Court of 31 January 2019, *Da Silva Martins*, C149/18, EU:C:2019:84, paragraph 29.

²⁰ FUCHS, A. In: Peter Huber (ed.). *Rome II Regulation. Pocket Commentary*. Munich: Sellier. European Law Publishers, 2011, pp. 355–356.

²¹ MAGNUS, U., MANKONWSKI, P. *European Commentaries on Private International Law ECPIL. Commentary. Rome II Regulation*. Köln: Sellier. European Law Publishers, 2019, p. 554.

²² Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351, 20.12.2012, pp. 1–32.

creto in the specific case.²³ Some authors even suggest that, although a norm must meet the criterion of imperativeness, it cannot be ruled out that such a norm must necessarily be a written norm.²⁴

II. PRELIMINARY RULING IN CASE *HUK-COBURG-ALLGEMEINE VERSICHERUNG II*

Given the absence and the inherent impossibility of providing an exhaustive enumeration of provisions that can be considered overriding mandatory, courts dealing with private law matters involving a foreign element occasionally encounter difficulties in identifying these norms. In such cases, they turn to the CJEU to delineate the scope of the application of provisions concerning overriding mandatory norms, article 16 in case of the Rome II. This paper focuses on the judgment in the case *HUK-COBURG-Allgemeine Versicherung II*, where the preliminary ruling was referred by Bulgarian courts in a case involving Bulgarian nationals and a German insurance company concerning compensation for non-material damage following the death of the plaintiffs' daughter in a traffic accident in Germany. The individual responsible for the accident was insured based on compulsory civil liability with the German insurance company, HUK-COBURG. The plaintiffs sought compensation for non-material damage amounting to approximately €125,000 each before the Bulgarian courts, while the German insurance company had paid them approximately €2,500 each. The first-instance Bulgarian court partially upheld their claim, awarding each plaintiff €50,000 in compensation. However, the appellate court overturned this judgment, arguing that the plaintiffs had failed to prove that the pain and suffering were caused by pathological damage, a requirement under the applicable German law for the establishment of a claim for non-material damage. The plaintiffs exercised the option to file an appeal with the Supreme Court of Cassation, which subsequently initiated a preliminary ruling procedure before the Court of Justice of the European Union. The Supreme Court of Cassation of Bulgaria explains that Bulgarian law provides for the calculation of compensation for non-material damage based on equity, and that, based on available national case law, it is possible to estimate the amount of such compensation. Therefore, the court referred the following preliminary question to the Court of Justice: "Must Article 16 of [the Rome II Regulation] be interpreted as meaning that a rule of national law, such as that at issue in the main proceedings, which provides for the application of a fundamental principle of the law of the Member State, such as the principle of fairness, in the determination of compensation for non-material damage in cases where the death of a close person has occurred as a result of a tort or delict, may be regarded as an overriding mandatory provision within the meaning of that article?"²⁵

²³ MAGNUS, U., MANKONWSKI, P. *European Commentaries on Private International Law ECPIL. Commentary. Rome II Regulation*. p. 554.

²⁴ HÜßTEGE, R., MANSEL, H. P. *BGB, Band 6: Rom-Verordnungen*. Baden-Baden: Nomos Verlagsgesellschaft, 2019, p. 208.

²⁵ Judgment of the Court of 5 September 2024, *HUK-COBURG-Allgemeine Versicherung II*, C-86/23, EU:C:2024:689, paragraphs 16-25.

To begin, we would like to add a few remarks regarding the determination of the applicable law under the Rome II Regulation. Through the provisions of Rome II, the applicable law is determined in cases falling within its scope. The Regulation allows for the possibility of choice of law in matters of civil torts, though this option will not typically be the most common method for determining the applicable law in non-contractual obligations. The general rule for determining the applicable law is set out in Article 4, which establishes that, in the case of non-contractual obligations arising from a civil tort, the law of the country where the damage occurred will be the applicable law. In our case, this would refer to the country where the accident took place. Article 4 also clarifies that it is irrelevant in which country the indirect consequences of such an event occurred. An exception to this general rule may be made where there is a manifestly closer connection with another country, although the situation in the case at hand would not fall under such an escape clause.²⁶ As regards the scope of the applicable law determined by the conflict-of-laws rule, this includes the question of existence, the nature and the assessment of damage or the remedy claimed²⁷ and other questions referred to in Article 15 of Rome II.

With regard to the case under analysis, it has previously been determined by the Court of Justice that, even in the event of discrepancies between national legal systems on this matter “the damage related to the death of a person in such an accident which took place in the Member State of the court seised and sustained by the close relatives of that person who reside in another Member State, must be classified as ‘indirect consequences’ of that accident”²⁸ and therefore not as direct damage. The wording of the general conflict-of-law rule and the conflict-of-law criteria contained therein reflect the requirement of legal certainty and materialise the compromise between the interests of the parties.²⁹

The legal basis for the decision of the Bulgarian court were the relevant provisions of the German Civil Code (BGB) in conjunction with the provisions of the German Road Traffic Act. While these provisions do establish an obligation to compensate for non-material damage suffered by indirectly affected victims, such as the plaintiffs in the case at hand, this obligation arises only in exceptional circumstances, namely where pain and suffering have led to health damage for the indirectly affected victim. Similarly, under both German and Bulgarian law, the criteria for determining compensation are not explicitly set out in the norm and must be extracted from the national case law of both countries. The appellate court, based on this, rejected the claim, stating that it had not been demonstrated that the pain and suffering caused pathological damage to the plaintiffs’ health, as required by German law.³⁰ The plaintiffs attempted to argue by asserting the application of the Bulgarian overriding mandatory norm, as the *lex fori*, which they considered to be the provision of their Obligations and Contracts Act, Article 52: “Compensation for non-material damage shall be determined by the court on the basis of fair-

²⁶ Art. 4 of the Rome II.

²⁷ Art. 15(c) of the Rome II.

²⁸ Judgment of the Court of 10 December 2015, *Lazar*, C-350/14, EU:C:2015:802, paragraph 30.

²⁹ Opinion of Advocate General Szpunar delivered on 14 March 2024, *HUK-COBURG-Allgemeine Versicherung II*, C-86/23, EU:C:2024:242, paragraph 38.

³⁰ *Ibid.*, paragraphs 16,17.

ness...” Based on available case law, it can be presumed that the amount of compensation for non-material damage would be around €61,000.³¹ In light of the theoretical considerations outlined in the previous section of this paper, it cannot be conclusively ruled out that the cited provision may satisfy the conditions required to trigger the mechanism of overriding mandatory norms. This, presumably, is also the rationale behind the decision of the Supreme Court of Cassation of Bulgaria to refer a preliminary question to the Court of Justice of the European Union.

III. THE COURT OF JUSTICE OF THE EUROPEAN UNION’S DECISION: LEGAL IMPLICATIONS

In its judgment, the Court of Justice of the European Union recalled at the outset that the objective pursued by the adoption of the regulation is to create legal certainty, promote the predictability of judicial decisions, and ensure an appropriate balance between the interests of the parties. The availability of the mechanism of overriding mandatory provisions was not questioned; however, the Court established the condition of a necessary close connection with the forum state,³² a condition that has been the subject of long-standing academic debate. Although the regulation *per se* does not mention the condition of a close connection, Advocate General M. Szpunar, referring to the writings of qualified experts on the matter, stated that “that silence must not be interpreted as meaning that overriding mandatory provisions can be applied without taking account of the existence of a close link with the country of the *lex fori*.” He also rightly emphasizes the potential impact of *forum shopping* if such a connection with the relevant country were not required.³³ The Court of Justice, while also referring to the conclusions of the aforementioned judgments, emphasised the need to assess whether the provision in question is intended to protect an interest that the Member State “considers to be essential”. Furthermore, it must be examined whether respect for that provision is regarded by the Member State as crucial for safeguarding those interests.³⁴ In this particular instance, it is important to acknowledge that, within the context of the public policy reservation mechanism, the Regulation itself stipulates in the preambular part that the application of a specific provision of the *lex causae*, “which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (*ordre public*) of the forum.”³⁵ In the case of overriding mandatory provisions, the preamble is more succinct. Nevertheless, it is precisely in the forum’s decision to recognise the overriding mandatory nature of a particular norm that

³¹ Judgment of the Court of 5 September 2024, *HUK-COBURG-Allgemeine Versicherung II*, C-86/23, EU:C:2024:689, paragraphs 10, 24.

³² *Ibid.*, paragraphs 31–33.

³³ Opinion of Advocate General Szpunar delivered on 14 March 2024, *HUK-COBURG-Allgemeine Versicherung II*, C-86/23, EU:C:2024:242, paragraphs 51–53.

³⁴ Judgment of the Court of 5 September 2024, *HUK-COBURG-Allgemeine Versicherung II*, C-86/23, EU:C:2024:689, paragraph 41.

³⁵ Recital 32 of Preamble to the Rome II.

state sovereignty is reflected.³⁶ In this particular context, the Advocate General, in reference to the existing case law, asserts the potential for an interaction between collective interests and individual interests. “Thus, in the field of tort law, the rules that a Member State establishes in order to protect a category of persons who have sustained damage, by modifying, in particular, the burden of proof or by establishing a minimum threshold for compensation, could have the principal objective to restore the balance between the competing interests of private parties. Indirectly, they could therefore also contribute to safeguarding the social and economic order of the Member State by reducing the impact of accidents on public resources”³⁷ The Court of Justice has determined that the application of this provision must be regarded as indispensable to safeguarding the fundamental interests involved in the case in question.³⁸ This leads us to the proportionality test. The Court goes on to posit that if the interest in question can also be protected by the application of applicable law determined by a conflict of law rule, the proportionality test would be difficult to pass.³⁹ This conclusion will be returned to later in the article.

In this context, German law provides for the possibility of fair compensation for similar damage, which appears to align with the principle of equity. On the other hand, it cannot be disputed that, although this protection appears to be identical in formal terms, significant disparities arise in practice, as evidenced by the case law of different states, particularly in terms of the amount of non-material damage awarded. The maximum amount under German law would be approximately €5,000, while under Bulgarian law it would be around €61,000. Since German law requires that a civil tort result in pathological damage in order to claim compensation for non-material harm, this represents a fundamentally different approach to the right to compensation in these legal systems.⁴⁰ The Court made reference to the Advocate General’s Opinion, in which M. Szpunar stated that “the mere fact that, by applying the *lex fori*, there would be a different outcome with regard to the amount of compensation from that which would have been reached by applying the *lex causae* is not sufficient to conclude that the Bulgarian provision at issue may be classified as an ‘overriding mandatory provision’ within the meaning of Article 16 of the Rome II Regulation, provided that the application of the *lex causae* is compatible with considerations of justice.”⁴¹ It is for the forum to assess whether the application of the applicable law makes it possible to achieve the objective of protecting the public interest protected by the national provision under analysis.⁴²

As we have already mentioned, the *sine qua non* condition is the protection of the public interest, which may, in practice, also arise within the chain of consequences. Therefo-

³⁶ DICKINSON, A. *The Rome II Regulation. The law applicable to non-contractual obligations*. p. 632.

³⁷ Opinion of Advocate General Szpunar delivered on 14 March 2024, *HUK-COBURG-Allgemeine Versicherung II*, C-86/23, EU:C:2024:242, paragraph 60.

³⁸ Judgment of the Court of 5 September 2024, *HUK-COBURG-Allgemeine Versicherung II*, C-86/23, EU:C:2024:689, paragraph 42.

³⁹ *Ibid.*, paragraph 43.

⁴⁰ *Ibid.*, paragraphs 49, 51.

⁴¹ Opinion of Advocate General Szpunar delivered on 14 March 2024, *HUK-COBURG-Allgemeine Versicherung II*, C-86/23, EU:C:2024:242, paragraph 32.

⁴² Judgment of the Court of 5 September 2024, *HUK-COBURG-Allgemeine Versicherung II*, C-86/23, EU:C:2024:689, paragraph 54.

re, *a priori*, in light of the preamble, it cannot be excluded that norms primarily aimed at protecting individual interests may also possess an overriding mandatory nature.⁴³ This will be permissible in situations where the protection of the individual interests of a particular category of persons also corresponds to a significant public interest of the forum state.⁴⁴ Some authors therefore explicitly state in the scholarly literature that this could involve provisions prescribing nominal rules for compensation in specific cases.⁴⁵

In this context, the Court stated that the relevant provision of Bulgarian law could qualify as an overriding mandatory rule, but only if it were justified by particularly important reasons reflecting a public interest that Bulgarian law deems essential to protect. The national court emphasised that the principle of equity is a fundamental principle of Bulgarian law and falls under public policy.⁴⁶ However, it must be noted that not every provision falling under public policy necessarily has to possess an imperative character for the purposes of Article 16 of Rome II. Moreover, the issue is further complicated by the fact, also mentioned by the Advocate General, that Bulgarian case law appears inconsistent on this matter, which could raise doubts regarding the overriding mandatory nature of the principle in question.⁴⁷ In this context, the Court ruled that the national provision under scrutiny “cannot be regarded as an ‘overriding mandatory provision’... unless, where the legal situation in question has sufficiently close links with the Member State of the forum, the court before which the case has been brought finds, on the basis of a detailed analysis of the wording, general scheme, objectives and the context in which that national provision was adopted, that respect for it is regarded as crucial in the legal order of the Member State, on the ground that it pursues an objective of safeguarding an essential public interest that cannot be achieved by the application of the” applicable law.⁴⁸

The Court of Justice essentially stated that the provision stipulating that compensation for non-material damage, as in the case at hand, should be determined by the court based on equity *per se* cannot be regarded as an overriding mandatory norm. Nevertheless, from our perspective, the Court of Justice appropriately refrained from interfering with the competence of Member States to determine which norms they consider to be overriding mandatory to such an extent that it would have been necessary to further clarify that, in the case of a close connection, and taking into account all the conditions previously outlined, a court could, in principle, enforce such an overriding mandatory norm, but exclusively upon the fulfillment of all the stipulated conditions, as the provision *per se* cannot be deemed an overriding mandatory norm. Therefore, courts in Member States

⁴³ Ibid., paragraph 45. Recital 32 of Preamble to the Rome II.

⁴⁴ Judgment of the Court of 5 September 2024, *HUK-COBURG-Allgemeine Versicherung II*, C-86/23, EU:C:2024:689, paragraph 46.

⁴⁵ MAGNUS, U., MANKONWSKI, P. *European Commentaries on Private International Law ECPL. Commentary. Rome II Regulation*. p. 556.

⁴⁶ Judgment of the Court of 5 September 2024, *HUK-COBURG-Allgemeine Versicherung II*, C-86/23, EU:C:2024:689, paragraph 47.

⁴⁷ Opinion of Advocate General Szpunar delivered on 14 March 2024, *HUK-COBURG-Allgemeine Versicherung II*, C-86/23, EU:C:2024:242, paragraph 65.

⁴⁸ Judgment of the Court of 5 September 2024, *HUK-COBURG-Allgemeine Versicherung II*, C-86/23, EU:C:2024:689, paragraph 57.

still retain a somewhat limited ability to moderate the content of foreign law by conducting an in-depth analysis of the relevant domestic legal provision and meeting cumulatively all the conditions for the enforcement of the norm as overriding. This option remains available to them, even though, absent the present judgment, the interpretation of Article 16 had already been restrictive; in light of the judgment, the possibilities for the courts of the Member States are now even more narrowly circumscribed.

IV. SHIFTING THE APPROACH TO THE APPLICATION OF OVERRIDING MANDATORY NORMS?

The most surprising aspect of the Court of Justice's ruling in the Coburg case was, in our view, the application of the overriding mandatory norms mechanism. The Court declared that this mechanism cannot be invoked in cases where the objective of protecting the relevant interest can be achieved through the application of the applicable law.⁴⁹ In the context of the case, it was noted that German law also provides for the possibility of fair compensation, suggesting a common foundation based on the principle of equity in both legal systems. Therefore, a differing result from the application of the *lex causae* cannot, *per se*, justify the activation of the overriding mandatory norms mechanism.⁵⁰ Perhaps the most surprising element is the Court's conclusion that it is for the forum to determine whether the application of the *lex causae* allows for the achievement of the objective of protecting the relevant public interest, which is safeguarded by the provision of the *lex fori*, and which the court wishes to attribute an overriding mandatory nature.⁵¹

Despite the fact that this approach aligns perfectly with a rational arrangement and effectively allows for the activation of overriding mandatory norms only in those areas where it is truly necessary, we believe that there has been a certain form of excess in terms of how the mechanism should be applied according to doctrinal discourse and finally also in light of the previous case law, such as in the cited *Arblade* case. As is evident from the very definition of overriding mandatory norms in Regulation Rome I, these norms should be applied in every situation to which they pertain, regardless of the *lex causae*.⁵² Similarly, authoritative legal commentators largely agree that whenever the scope of an overriding mandatory norm is met, the norm will be enforced as a defensive mechanism, without examining the effects of the foreign law norm.⁵³

From the perspective of judicial procedure, we argue that the mechanism of overriding mandatory norms should be enforced as a priority, and this should occur even before examining the applicable law. This approach affirms the fundamentally coercive nature of this norm, which possesses an inalienable character. While the Court of Justice's reasoning may appear to follow a logical trajectory, namely, questioning why we would protect an interest with an overriding mandatory norm of the *lex fori* when the same interest is already protected by the *lex causae*, the very nature of this mecha-

⁴⁹ *Ibid.*, paragraph 43.

⁵⁰ *Ibid.*, paragraphs 49, 50.

⁵¹ *Ibid.*, paragraph 53.

⁵² Art. 9(1) of the Rome I.

⁵³ BĚLOHLÁVEK, A. J. *Rome Convention Rome I Regulation*. p. 1483.

nism is designed to ensure that an overriding mandatory norm should always retain its imperative character.

Thus, if we accept the alternative approach, we risk fundamentally altering the procedural course from the perspective of the court. In light of this judgment, the court should first identify the applicable law, then assess how this law protects the relevant public interest, and only subsequently decide on the necessity of enforcing the overriding mandatory norm. This approach would place us in a situation where the forum of the same state might apply the overriding mandatory norm of the *lex fori* in one case, where the public interest is not similarly protected by the *lex causae*, but in another case, this norm would not have an overriding mandatory character, as the *lex causae* equally (or at least similarly?) protects the relevant public interest. Thus, the application of overriding mandatory norms would be relegated to a secondary position, after the examination of the applicable law, bringing it closer to a different mechanism, namely that of public policy exceptions.

We permit ourselves to be mildly critical of the Court's decision, which, in our view, alters the course of applying overriding mandatory norms. Suddenly, the same norm of the *lex fori* could be overriding in one case and non-overriding in another, depending on the applicable law. The question arises as to why the court did not instead utilise the protective mechanism of the public policy exception in this case. In the context of public policy exceptions, some authors even argue that, unlike an overriding mandatory norm, such an exception may not necessarily involve a binding norm.⁵⁴ In essence, the court here engaged in identifying the consequences of applying the foreign applicable law and compared these consequences with those that would result from the application of Bulgarian law, a procedure that is typical for the activation of the public policy exception mechanism.

From our perspective, in the case of overriding mandatory norms, the court, according to general legal theory, should not have examined the content of German law. It should have prioritised, regardless of its consequences, the application of the Bulgarian overriding mandatory norm, provided such a norm existed. Ultimately, however, it turned out that such a norm did not exist. Bulgarian courts have indicated that the principle of equity enshrined in the relevant law falls within Bulgaria's public policy, and in conclusion, we also express the view that if the court, despite the conclusions reached by the Court of Justice, had determined that the enforcement of the norm was necessary, it should have considered the possibility of achieving this result through the non-application of the German norm, which, under Bulgarian law, conflicts with the forum's public policy.

CONCLUSION

The presented article examines the implications of the ruling in case *HUK-COBURG-Allgemeine Versicherung II* on the definition of overriding mandatory provisions. The article aims not only to identify the key findings of the judgment and highlight its significant

⁵⁴ *Ibid.*, p. 1483.

contribution to legal practice, but also to explore the manner in which the course of utilising the protective mechanism of overriding mandatory provisions is evolving within the general doctrinal framework.

The Court of Justice deliberated on the scope of the application of Article 16 of Regulation Rome II in relation to a national provision that mandates that non-pecuniary damages must be determined by the court in accordance with the principle of equity, with the content of this provision being further developed through the case law of the relevant national courts. The Court relied on well-established facts, including the necessity of a public interest that must be safeguarded in the context of the case, proportionality tests, and enriched the existing case law with the declared requirement for a close connection with the forum state when activating *lex fori* overriding mandatory norms. These conclusions are of immense importance, especially in the context of the procedural aspect of forum shopping, which is continuously evolving within the European judicial space.

In light of all circumstances, the Court of Justice clarified that the provision concerning the principle of equity, as outlined in the relevant national law, cannot be *per se* considered an overriding mandatory provision under Article 16 of Regulation Rome II. However, it left certain discretion to the Member States, likely with the intention of preserving sovereignty in determining the norms they consider to be overriding mandatory provisions. The Court emphasised that national courts must conduct a thorough analysis in each individual case, *in concreto*, concerning the relevant domestic legal provision.

In addition to the well-known elements, such as the assessment of the norm's mandatory character, the necessity of protecting the public interest, and so forth, the Court of Justice, from our perspective, ventured into a certain form of excess in the general application of this mechanism by establishing the necessity to assess whether the public interest in question can also be adequately protected by the application of the applicable law. This, in our view, represents a departure from established theory regarding the application of overriding mandatory provisions. Although this approach is logically understandable and could contribute positively to increasing predictability and legal certainty in private-law relationships with a foreign element, the literature on overriding mandatory provisions treats this cautiously, as private international law doctrine operates on the premise that the content of foreign applicable law need not be examined when determining the applicability of an overriding mandatory norm, and that the *lex fori* overriding mandatory provision will prevail regardless of the content of the applicable foreign law whenever its scope is triggered. If the contrary is accepted, the overriding mandatory provision might be considered overriding mandatory in one case but not in another, leading to confusion. Therefore, the Court of Justice has effectively altered its course in the application of overriding mandatory provisions, and, from the perspective of the Court, it now places their consideration after the determination and examination of the consequences of the applicable law, thus approaching the mechanism of the public policy exception. Thus, we can conclude that, in terms of the substantive aspects of the mechanism, no excess has occurred. However, regarding its application, there has been a significant deviation from the long-established principles in scholarly doctrinal writings. Moreover, in our view, the Court of Justice has, to a certain extent, blurred the distinction between the application of overriding mandatory provisions and the public

policy exception, at least with respect to the manner in which these mechanisms are applied.

Hence, it remains an open question whether, in the context of comparing the effects of applying foreign law, the public policy exception might be more appropriate in the situation at hand in the case at issue. The public policy exception, in theoretical terms, requires an analysis of the consequences of applying foreign law, which differs from the application of overriding mandatory provisions.

In conclusion, we deem it necessary to express support for submitting preliminary questions regarding overriding mandatory provisions, as these are rarely explicitly identified as overriding mandatory provisions within the legal systems of Member States. Therefore, any clarification of the scope of application of such provisions by the Court of Justice could significantly assist national courts in resolving disputes with a foreign element and in potentially correcting the effects of applying foreign applicable law.