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OVERRIDING MANDATORY RULES IN EU PRIVATE INTERNATIONAL LAW: SOME DOUBTS AND TENTATIVE ANSWERS FROM THE PERSPECTIVE OF THE SLOVAK PRIVATE INTERNATIONAL LAW SYSTEM / Dominika Moravcová

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Abstract: *As a result of the increasing incidence of private law relationships with a foreign element, courts hearing cases are frequently obliged to apply foreign law. The interference of foreign law is liable to produce effects that may conflict with the public interest of the lex fori. Precisely for this reason, we consider it essential to be aware of the available protective mechanisms through which the court can protect the public interest, not only of the lex fori, but even, under certain circumstances, of the public interest of the foreign legal order. The present article deals with the mechanism of overriding mandatory provisions in private international law in order to identify the requirements for the activation of the selected mechanism in the Slovak courts' application practice. Given that this mechanism is not covered by the Slovak Act on International Private and Procedural Law, the article deals mainly with the rules enshrined in the Rome I Regulation. The first part of the present article deals with the definition of overriding mandatory provisions, the application in private international law, and the historical perspectives in the light of the so-called Rome Convention. Subsequently, the article focuses on the classification of overriding mandatory provisions and their impact within the limits relevant to Slovak courts.*

Keywords: *Overriding Mandatory Provisions; Public Interest; the Rome I Regulation; International Private Law*

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1. INTRODUCTION

Private-law relationships with cross-border elements are increasingly encountered in practice due to the influence of integration processes worldwide. Several key issues are addressed in private international law concerning the resolution of disputes arising from these relationships. Among the most fundamental ones is the determination of the applicable law. In private law relationships with a foreign, cross-border, or international element, it is not unusual for the court hearing the case to apply

the law of another State rather than its own, referred to as the *lex fori* in the case under consideration.

In the field of harmonisation of private law, the European Union (hereinafter referred to as "*the EU*") has very limited powers, with certain exceptions such as consumer protection. There is an increasing degree of convergence of laws among the EU Member States, and disparities between different areas of private law are gradually narrowing. However, there are areas, such as family law, where the differences in legal systems, even within the EU Member States, are more significant. From a global perspective, the differences between countries around the world are much more considerable; different legal systems may rest on different bases. Therefore, courts hearing cases within the EU Member States may often find themselves in a situation where, in relationships with a foreign element, they have to apply the foreign law of a country whose legal system and framework differ significantly from the legal basis on which our legal system stands.

In order to protect the domestic legal order, private international law has developed a number of protective mechanisms, which can also limit to a certain extent the autonomy of the will of the parties, as materialised in the choice of applicable law. One of these mechanisms is the so-called "overriding mandatory rules." This instrument is enshrined in the private international law rules of the several EU Member States. Despite the fact that the Slovak legal order does not recognise this mechanism, the relevance of overriding mandatory norms for the courts of the Slovak Republic has increased with the accession of the Slovak Republic to the EU, as the key sources of private international law of the Union incorporate it.

The aim of the present article is to define, at the outset, which norms can be considered as overriding mandatory rules in the context of private international law in contractual and non-contractual obligations, and to identify the requirements for the activation of the protective mechanism of overriding mandatory norms by the Slovak courts. In the first part of the article, we will discuss the theoretical definition of the institute and present the regulation of the mechanism in the framework of the Union's private international law. Subsequently, we will define the scope of the EU legislation and, in light of the key case law of the Court of Justice of the EU (hereinafter referred to as "*the Court of Justice*"), identify the requirements and possibilities for activating the selected protective mechanism in practice in order to limit the consequences of the application of the applicable law and protect the *lex fori*, while ensuring legal certainty in the European judicial area. The uniqueness of the chosen mechanism lies in the potential application of an overriding mandatory norm other than the *lex fori*. In the last part, therefore, we will focus on the classification of overriding mandatory provisions that must or could be applied by the national courts hearing the case.

2. KEY PROTECTIVE MECHANISMS IN SLOVAK PRIVATE INTERNATIONAL LAW

Private international law rules afford courts hearing a case a variety of mechanisms, particularly aimed at safeguarding public interest and the foundational principles upon which their legal order is built. Setting aside provisions designed to protect the weaker party, the Slovak Act on Private International Law and Rules of Procedure[1] recognises only the public policy reservation among these mechanisms. The Act on Private International Law grants courts the discretion to refrain from applying the

[1] Act No. 97/1963 Coll, on Private International Law and Rules of Procedure (hereinafter referred to as the "*Act on Private International Law*").

law of a foreign state if it conflicts with essential principles of the social and state structure of the Slovak Republic and its legal order, which must be maintained without exception.[2] Here, the reservation of public policy serves as a protective mechanism with a defensive character (Csach, Gregová Širicová and Júdová, 2018, p. 167). Protection is implemented by refraining from applying the relevant part of foreign law in the given case if it would contravene the public policy of *lex fori*. This mechanism is activated only after the applicable law has been determined and its content and effects analysed. It should be noted that, in this manner, the forum can only safeguard the public policy of its own legal system.

The presented article focuses on the protective mechanism of overriding mandatory norms. Initially, we define the mechanism of public policy reservation, as some authors also characterise overriding mandatory norms as "*active public policy reservation*" (Štefanková and Sumková, 2017, p. 125). While the public policy reservation defensively protects the *lex fori*, overriding mandatory norms are offensive in nature and can therefore be regarded as an active protective mechanism, unlike the reservation. These mechanisms complement each other in a very appropriate manner, which, in our view, should be reflected in a potential amendment of the Act on Private International Law. Directly incorporating the mechanism of overriding mandatory norms into the Act would align the options available to courts under Slovak legislation with those derived from the EU *acquis*.

In our opinion, overriding mandatory norms cannot be termed as an active form of public policy; rather, they constitute an active protective mechanism. While overriding mandatory norms share certain features with the public policy reservation, they cannot be considered in its active form. Both mechanisms allow for some form of deviation from the application of the chosen norm of the applicable law, and both require a public interest justification to protect the important interests of the *lex fori* (though not exclusively the *lex fori* in the case of overriding mandatory norms). It is not excluded that, in both cases, the same norm could be protected by these mechanisms, but the definition, scope, and manner of activation of the mechanisms differ in practice. Prof. Bělohlávek highlights the key differences. In the case of overriding mandatory norms, it must be a binding norm, whereas in the case of a public policy reservation, this is not necessary. The fundamental difference lies in the role of courts. In the case of a public policy reservation, the court hearing the case compares the regulation of applicable law with the *lex fori*, and what is decisive are the consequences of applying the foreign norm that would occur after its application. In the case of an overriding mandatory norm, the court does not have to take the foreign law into account at all; if the case under consideration falls within the scope of the overriding mandatory norm, it will apply it directly without examining the effects of the foreign law norm (Bělohlávek, 2010, p. 1483). It is precisely in the enforcement of the overriding mandatory norm, irrespective of the content of the foreign applicable law, that the offensive character of mandatory norms lies. The applicable law will still be the substantive law of the State determined by the conflict of laws rule or choice, but regardless of its content, a particular norm, the overriding mandatory norm, will take precedence. Another difference is the possible applicability of a foreign overriding mandatory norm, not only the *lex fori*, which will be discussed in more depth in this article. As stated by Z. Kučera, the reservation is a sufficient mechanism of protection against unacceptable consequences of the application of the *lex causae*. Overriding mandatory norms have a narrower meaning in the sense that they are always applied only to specific

[2] Section 36 of the Act on Private International Law.

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issues, whereas in the case of reservation, the principles of the social organisation, which have a rather more general impact, dominate (Kučera, 2009, p. 239).

Even without a legal basis in Slovak legislation, it is conceivable under the Act on Private International Law that the courts would make use of this mechanism. Basically, there is the possibility to protect an exclusively overriding mandatory *lex fori* norm through a public policy reservation and to enforce it by not applying a particular norm of applicable law through a reservation.

The Slovak courts, like all courts of the EU Member States, have fully embraced the possibility of activating the mechanism of overriding mandatory norms through accession to the EU. By making the Convention on the law applicable to contractual obligations[3] (hereinafter referred to as "*the Rome Convention*") binding on the Slovak Republic, Article 7 enabled the courts hearing the case to consider both the overriding mandatory norms of the *lex fori* and those of another state based on the close connection between the relationship under consideration and the state concerned. In the case of the rules of a third State, the application of which would extend beyond the borders of the state, the court was to consider their nature and purpose, as well as the consequences of their application or nonapplication.[4] Presumably, the rather wide margin of appreciation for judicial discretion and the vagueness of the wording prompted a number of states to make a reservation to this international treaty, precisely at Article 7. With the Convention being an international treaty, states could limit the effects of selected provisions through reservations. For instance, the United Kingdom, Germany, Luxembourg, and Ireland have entered a reservation to the provision in question, but only concerning the overriding mandatory norms of a third state, not regarding *lex fori* norms (European Council and Council of the EU, n.d.). One objective of this legislation was to restrict the autonomy of the parties when choosing the applicable law. If the contract had a close connection with a particular state, the parties' intention, as manifested in the choice of applicable law, should not restrict the application of the provisions of the law of that state, which are of a special nature.[5] Simultaneously, the Rome Convention, in selecting the applicable law for the protection of the weaker party, introduced the concept of the impossibility of derogating from the overriding mandatory rules of the country whose law would be applicable in the absence of a choice. Under the current Rome I[6] regime, the term "overriding mandatory norms" is replaced by the protection of mandatory provisions in this formulation of the protection of the weaker party, thus expanding the scope of protection.

In the current decision-making practice, the legal basis of the mechanism for Slovak courts is the Rome I Regulation, which replaced the Rome Convention among the Member States, with the exception of Denmark. The Regulation establishes a general regime for determining the law applicable to contractual obligations in civil and commercial matters. The Regulation is an act of EU secondary law and is directly applicable in all Member States.[7] The nature of the Rome I Regulation is therefore different from the Convention, which is an international treaty. Regarding the interrelation

[3] Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (OJ L 266, 9.10.1980, pp. 1–19).
[4] Art. 7 of the Rome Convention.
[5] Report on the Convention on the law applicable to contractual obligations by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I (Ú. v. ES C 282, 31.10.1980, pp. 1 – 50).
[6] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (OJ L 177, 4.7.2008, pp. 6–16) (hereinafter referred to as "the Rome I Regulation").
[7] Art. 288 of the Consolidated version of the Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012, pp. 47–390).

between Rome I and the Convention, it should be noted that the Convention remains in force for contracts concluded before the relevant date, that is, 17th December 2009.[8] Although the Rome I Regulation applies only to contracts concluded after that date, in light of the case law of the Court of Justice, if the contractual relationship has been changed by mutual consent of the parties after that date to such an extent that it must be regarded as if a new contract had been concluded, the court hearing the case may bring the contract within the temporal scope of the Rome I Regulation.[9] We believe that it is very rare today to come across a contract in practice that has not been substantially modified in the last 15 years. Therefore, with each passing year, the relevance of the Convention for the Member States, with the exception of Denmark, is decreasing.

3. THE SCOPE OF THE ROME I REGULATION FOR THE ACTIVATION OF THE OVERRIDING MANDATORY PROVISIONS MECHANISM

The Rome I Regulation has fully extended the possibility of utilising the protective mechanism of overriding mandatory provisions to the courts of those Member States where national provisions of private international law do not include such an institute. Since the conflict-of-law rules have been adopted in the form of a regulation, the opportunity for Member States to enter any reservation is absent. In this article, we address an institute not yet known in the Slovak Act on Private International Law, and therefore we find it necessary for practice to identify the conditions under which national courts may activate the overriding mandatory norms through the Rome I Regulation and to attempt to identify which norms may be attributed such a special nature. The Regulation is an act of secondary Union law and takes precedence in application over the national Act on Private International Law, provided that its scope of application is fulfilled. As mentioned above, with regard to its temporal application, it applies only to contracts concluded after 17 December 2009. However, even a substantial change to a contract after the relevant date may fulfil the temporal scope of Rome I. The personal scope of the Regulation is not defined; it applies *erga omnes*. The territorial scope extends to all Member States except Denmark, where the Convention continues to apply. The substantive scope, *ratione materiae*, is the most extensive. A positive definition is found in Article 1, which states that the Regulation applies to contractual obligations in civil and commercial matters with a foreign element. This is followed by a negative definition that excludes certain matters from the scope of application, such as tax, customs, administrative matters, personal status, obligations arising out of family relationships, and others.[10] In such matters, in the absence of harmonised legislation in the form of a *lex specialis* regulation, and lacking the scope of an international treaty, we will apply the Act on Private International Law, which does not recognise the mechanism of overriding mandatory provisions. Therefore, this protective mechanism can only be activated by a national court if the scope of the Rome I Regulation is fulfilled and the Regulation does not exclude its use. Consequently, it can be used whenever its scope is applicable, irrespective of the presence of a weaker party, the existence of a choice of applicable law, and so on.

[8] Art. 28 of the Rome I Regulation.
[9] CJEU, judgment of 18 October 2016, Nikiforidis, C-135/15, ECLI:EU:C:2016:774, para. 39.
[10] Art. 1 of the Rome I Regulation.

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4. DETERMINING OVERRIDING MANDATORY NORMS

The specific definition of overriding mandatory provisions can be found directly in Article 9(1) of Rome I: *"Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country to safeguard 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."* Although a definition is provided directly in the regulation, it is necessary to address this concept practically so that the court can identify which norm can be given an overriding mandatory nature. These norms are also referred to in the literature as absolutely peremptory norms or absolutely mandatory norms (Kučera, 2009, p. 238), and the term itself implies that they are overriding precedential mandatory norms. In purely domestic situations, there is no significant difference between mandatory and overriding mandatory norms in terms of binding force. It is the foreign element that introduces potential complications into the issue (Pauknerová, Rozehnalová and Zavadilová et. al., 2013, p. 32). The Rome I Regulation specifies in its recitals that mandatory overriding rules cannot be equated with the concept of the *"expression 'provisions which cannot be derogated from by agreement' and should be construed more restrictively."*[11] It is therefore a subcategory of mandatory rules that are required to be enforced irrespective of the applicable law that the forum must apply (Csach, Gregová Širicová and Júdová, 2018, pp. 58-59). Granting a norm a mandatory character requires some justification. The protection of the public interest is cited, but also the protection of a party's interests, legal certainty, etc. (Csach, 2007, p.108). Every overriding mandatory norm is a mandatory norm, but not every mandatory norm will be an overriding mandatory norm. With the exception of the protection of the weaker party, mandatory norms can be displaced by the choice of applicable law, whereas overriding mandatory norms cannot (Rozehnalová et al., 2021, p. 168). Overriding mandatory norms can encompass both public law norms, which serve the substantial legitimate interests of society, and private law norms, which should be aimed exclusively at protecting a particular essential public interest.[12] It is the public law overriding mandatory norms, capable of triggering private law consequences and regulating the relationship between the state and a private person, that are more likely to be enforced in private law relations with a foreign element. These norms impose an obligation on one or both parties, not in the context of their relationship with each other, but an obligation arising from the public interest. These include competition rules, financial standards regulating capital markets and payments (Rozehnalová et al., 2021, pp. 166-167), foreign trade regulations, the protection of cultural property, and so on (Pauknerová, 2021, pp. 4-5). States are increasingly inclined to regulate public, social, and economic policy objectives precisely through the adoption of public law norms that affect contracts concluded between parties in private law relationships (Ellger, 2012). Overriding mandatory norms are essentially provisions that, according to the state issuing them, are beyond the control of the contracting parties. It is even irrelevant whether the provision belongs to (mandatory) written law or unwritten law, or whether it is to be assigned to private or public law (Hüßtege and Mansel, 2019, p. 208). In the legal order of the Slovak Republic, it is only rarely explicitly expressed which norm is to be considered overriding mandatory for the purposes of private international law (Csach, Gregová Širicová and Júdová, 2018, p. 59). In our view, the fact that these norms are not usually explicitly identified is mainly because

[11] Recital 37 of the preamble to the Rome I Regulation.
[12] Judgment of the Regional Court in Prešov of 24.10.2017, file no. 10Co/56/2016.

it is the court hearing the case that should determine whether, in the particular case under consideration, the norm in question is an overriding mandatory norm and it should be enforced. The overriding mandatory character of a norm may also be established by relevant case law (Kučera, 2009, p. 238).

Decision-making practice has developed a tendency to associate overriding mandatory provisions precisely with the protection of consumers and employees, which, in our view, is not correct in the light of the Rome I Regulation. Also, in the decision-making of Slovak courts, the notion of overriding mandatory norms is often used in connection with the protection of the weaker party.[13] We believe that it is precisely on the basis of the original provisions of the Rome Convention that it has become customary to use this mechanism to protect the weaker party. Under the Rome Convention and the corresponding case law, the mechanism of overriding mandatory norms was explicitly linked to the choice of applicable law in consumer and individual employment contracts. The Convention and the continuity of the Court's interpretative *material* may cause confusion here. It is necessary to move away from established practice because the Rome I Regulation addresses the analysed mechanisms differently from the Convention. The Rome I Regulation provides in Articles 8(1) and 6(2) that, in the choice of applicable law in consumer and individual employment contracts, protection afforded to weaker party cannot be derogated from by provisions that cannot be derogated from by agreement under the law that would be applicable in the absence of choice. It is a different mechanism of protection since it refers to mandatory norms, and, as we have said, overriding mandatory norms is a subcategory thereof. In the Rome Convention, the protection of the weaker party provided for the impossibility of derogating by choice from overriding mandatory, not mandatory, provisions.[14] The change in the Rome I Regulation has extended protection of the employee and the consumer to all mandatory rules, but only rules of that law which would be applicable in the case of contracts with a weaker party. Naturally, it is not excluded that the mechanism of overriding mandatory rules could be used cumulatively in these disputes, but it must be an overriding mandatory rule, not every mandatory rule protecting the weaker party. If it were a mandatory rule of law that would be applicable in the absence of a choice, the court would be obliged to take into account all mandatory rules of that law. As mentioned above, the provisions concerning the choice of applicable law when protecting the weaker party refer exclusively to the mandatory rules of the country whose law would be applicable in the absence of a choice, which may not be the *lex fori* in each situation. If the court deems it necessary to enforce a rule of a specific nature of a law other than that which would be applicable in the absence of a choice, it may enforce only overriding mandatory rules and not all mandatory rules, exclusively on the legal basis of Article 9 of the Rome I. In addition to the considerations set out above, the protection under consumer and employment contracts for the choice of applicable law is taxative,[15] whereas the mechanism of overriding mandatory rules is largely discretionary, and the court must assess which rules are considered overriding mandatory and which it must enforce in a specific case. The court should then apply the overriding mandatory provision by specific reference and should also indicate what its legal consequences are (Hüßtege and Mansel, 2019, p. 212).

[13] E.g., Judgment of the Regional Court in Prešov of 24.10.2017, file no. 10Co/56/2016, Judgment of the Regional Court in Bratislava of 16.06.2016, file no. 3CoPr/6/2015, Judgment of the Regional Court in Nitra of 15.10.2020, file no. 9Co/225/2019.

[14] Art. 5(2) and 6(1) of the Rome Convention.

[15] CJEU, judgment of 14 September 2023, Diamond Resorts Europe and Others, C-632/21, ECLI:EU:C:2023:671, para. 76.

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We are of the opinion that the change introduced by Rome I in the protection of the weaker party also stems from the case law of the Court of Justice per se, which, despite the fact that the Rome Convention contained terminologically overriding mandatory norms for individual employment contracts and consumer contracts, treated them in its case law as mandatory norms for the purpose of protecting the weaker party.[16] Perhaps this practice was one of the reasons why a change in the wording of Rome I was required, in order to clearly distinguish the institute of overriding mandatory rules from the taxative protection of the weaker party in the choice of applicable law. We consider it necessary to move away from the previously established conflation of overriding mandatory provisions with those designed to compensate for the *de facto* weaker party's position in a private law relationship. Similarly, the key *Arblade*[17] judgment, which laid the basis for the definition of overriding mandatory norms, was also concerned with individual employment contracts and mandatory norms of the Union law. However, the Rome Convention was in force at that time and although continuity of interpretation is ensured, it cannot be accepted in this case, since the wording of the provision in question has changed. Rome I clearly distinguished this in the preamble and thus increased the protection of the weaker party in the choice of applicable law, since overriding mandatory rules is a narrower concept than provisions which cannot be derogated from by agreement, mandatory provisions. According to the case law of the Court of Justice, mandatory rules are rules which, although they cannot be circumvented in a domestic contract, may be *"circumvented in an international contract, through the choice of the law that is to govern the contract."*[18] The strength of the parties' autonomy of will, which can be materialised in the choice of applicable law, cannot therefore be limited by all mandatory rules. A *per se* mandatory norm, with the exception of consumer and individual employment contracts, is not capable of limiting the autonomy of the will of the parties; an overriding mandatory norm is.

We consider it necessary to move away from associating overriding mandatory norms to a large extent precisely with the protection of the weaker party. It is already apparent from the foregoing that the legislator of the Union's legislation had an interest in ensuring that, in protecting the weaker party, all the mandatory provisions of the law which would be applicable in the absence of a choice should be enforced, and that overriding mandatory provisions should have a special significance in relation to them, as the most important rules intended to protect the special and general interests of the states, in such a way that they will affect the formation, implementation, and termination of private law relationships with a foreign element (Štefanková and Sumková, 2017, p. 124). As the Regulation does not restrict the mechanism of overriding mandatory provisions, it can also be activated in the case of consumer and individual employment contracts in parallel alongside the choice of applicable law protection mechanism.

Overriding mandatory provisions must be used exceptionally so as not to unduly interfere with the autonomy of the parties' will. It is therefore necessary to view the mechanism of the overriding mandatory norm from a broader perspective. In private law relationships with a foreign element falling within the scope of Rome I, a choice of law clause is often present, which underscores the autonomy of the parties' will as one of the

[16] E.g., CJEU, judgment of 12 September 2013, Schlecker, C-64/12, ECLI:EU:C:2013:55, or Judgment of the Court of 15 December 2011, CJEU, judgment of 15 December 2011, Voogsgeerd, C-384/10, ECLI:EU:C:2011:842.

[17] CJEU, judgment of 23 November 1999, Arblade, C-369/96, ECLI:EU:C:1999:575.

[18] Opinion of Advocate General Campos Sánchez-Bordona delivered on 22 April 2021, *SC Gruber Logistics*, C-152/20, EU:C:2021:323, para. 67.

principles of both private law and the Rome regime as a whole.[19] The court hearing the case must respect this choice and limit it only by a protective mechanism if necessary. The overriding mandatory provisions must therefore be interpreted strictly[20] and restrictively,[21] as they constitute, in practice, a weakening of the fundamental principle of contractual freedom in cases where the applicable law has been determined by choice.[22] A restrictive interpretation is necessary precisely to give effect to contractual autonomy (Hüßtege and Mansel, 2019, p. 208). However, the mechanism is also available in cases where the applicable law has been determined by a conflict-of-laws rule.

Experts agree that distinguishing norms based on whether they protect the public interest or the interest of the individual for the purpose of determining their overriding mandatory nature is not straightforward in practice (Lysina, Haťapka, Burdová et al., 2023, p. 134). Assistance in determining the overriding mandatory provision in the case under consideration is found in the book of Prof. Bělohlávek (2010, p. 1474), who recommends answering the following questions: What is the purpose of the norm and the object of the protected interest? Can we define this interest as a public interest, and would failure to apply such a norm violate the interest in question? Some guidance can also be found in the works of other authors. R. Hüßtege and H.P. Mansel define basically three requirements for the existence of an overriding mandatory norm: It must be a mandatory norm protecting the public interest, and at the same time, the protection of the public interest must be so significant that the norm claims to be enforced regardless of the applicable law (Hüßtege and Mansel, 2019, p. 208). Accordingly, the interest of the individual, even if they were the weaker party, cannot automatically be classified as a public interest. In both German and Austrian practice, the general interest is emphasised in consumer protection in the context of overriding mandatory rules. For example, German case law also considers consumer credit provisions to protect the interests of the individual (Bříza et al., 2014, p. 22). In our view, it is precisely for this reason that weaker parties have received greater protection in Rome I for all mandatory provisions of otherwise applicable law, and the Slovak courts should also shift their practice in the area of overriding mandatory rules away from the protection of the weaker party.

If we compare this with the Czech Republic, the Czech Act on International Private Law[23] reflects to a large extent the EU legislation and regulates the mechanism of overriding mandatory provisions. Very similarly to Slovak national legislation, the Czech legislation does not clearly define which norms are all to be considered overriding mandatory. Among these norms, there are a number of administrative regulations, and financial law regulations which, for example, require official permits as a condition for concluding a certain contract, and so on. In the context of the protection of the weaker party, the authors of the commentary on the Czech legislation have made it clear that an overriding mandatory norm must be more than just a norm that compensates for the *de facto* weaker position of the consumer or employee. It must be a norm that is linked to the protection of the public interest (Bříza et al., 2014, p. 21). This is based on the jurisprudence of the Supreme Court of the Czech Republic, which refused to consider the provision of its Labour Code concerning termination of employment as an overriding mandatory norm and called for a truly exceptional use of the mechanism. In that context,

[19] CJEU, judgment of 18 October 2016, Nikiforidis, C-135/15, ECLI:EU:C:2016:774, para. 42, 43.
[20] CJEU, judgment of 17 October 2013, Unamar, C-184/12, ECLI:EU:C:2013:663, para. 49.
[21] CJEU, judgment of 18 October 2016, Nikiforidis, C-135/15, ECLI:EU:C:2016:774, para. 44.
[22] Opinion of Advocate General Saugmandsgaard Øe delivered on 21 April 2016, *New Valmar*, C-15/15, EU:C:2016:291, para. 26.
[23] Act No. 91/2012 Coll. on Private International Law.

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a fundamental and irreplaceable social importance of the subject matter of such legislation is required.[24] Overriding mandatory norms may therefore include some of the norms intended to protect the weaker party, but they must simultaneously be norms protecting the public interest. We are of the opinion that the objective of balancing the position of the weaker party is not in itself sufficient to activate the mechanism of mandatory norms through Rome I. Overriding mandatory provisions are norms whose observance is imposed on all persons within the territory of a given state and on all legal relations within that state.[25] The subject matter of regulation is thus territorially and personally defined in these norms, and they are enforced compulsorily within this scope. The scope of competence need not necessarily be explicitly stated; it may follow from the very purpose of the norm (Kučera, 2009, pp. 237-238). Thus, if we were to provide guidance, we would rely on the recommendations of the aforementioned authors, as well as on the definition provided by the Rome I Regulation itself. Additionally, some authors suggest examining whether the regulation to which the norm belongs imposes criminal sanctions for its violation and for the breach of the interest protected by the norm, and whether individuals can be prosecuted under this regulation (Bříza et al., 2014, p. 22). However, in the case of overriding mandatory norms, we believe that both criminal and administrative sanctions should be taken into consideration. Therefore, we extend this consideration to both areas. However, this is just one of the guidelines that can assist the court in determining the qualification of these norms. Not all norms of criminal and administrative law automatically qualify as overriding mandatory norms, and the absence of a sanction does not necessarily exclude a norm from being considered overriding mandatory in certain circumstances (Ellger, 2012). Equally, norms whose breach may result in the impossibility of performance or render performance unlawful could be considered as overriding mandatory (Hüßtege and Mansel, 2019, p. 204). It is essential to bear in mind that each situation must be considered individually. Only the court hearing the case is privy to all the circumstances and facts, and therefore, despite the outlined guidelines, it remains for the court to decide whether a particular overriding mandatory provision must be enforced in a specific case. In the following section, we will analyse the possibilities of utilising overriding mandatory provisions considering their origin, as the Rome I Regulation also permits the application of an overriding mandatory provision from another legal order, not solely the *lex fori.*

5. CLASSIFICATION OF OVERRIDING MANDATORY PROVISIONS

Private law relationships with a foreign element may be influenced by overriding mandatory provisions from more than one legal order (Štefanková and Sumková, 2017, p. 125). The Rome I Regulation permits courts hearing a case to apply, in addition to the overriding mandatory rules of the *lex fori*, the rules of *"the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful."*[26] The application of overriding mandatory rules of the forum does not pose a complication for the courts hearing the case, although, as noted, the explicit designation of a rule as overriding mandatory is sporadic in the Slovak legal order. The wording in Rome I does not determine their application, but we can infer from the very nature of these norms being overriding that the court hearing the case has a duty to apply them in situations

[24] Judgment of the Czech Supreme Court of 8 December 2008, file no. stamp 21 Cdo 4196/2007.
[25] CJEU, judgment of 19 June 2008, Commission v Luxembourg, C-319/06, ECLI:EU:C:2008:350, para. 29.
[26] Art. 9(3) of the Rome I Regulation.

where it deems it necessary to do so. The application of the foreign applicable law should not conflict with the overriding mandatory *lex fori* provision (Basedow, 2013, p. 25). It is always up to the courts to determine which overriding mandatory norm is relevant to a particular relationship and whether it should be enforced. The court hearing the case is naturally the most familiar with the overriding mandatory norms of the forum, so some preference for their application may be presumed. It is essential to always bear in mind the autonomy of the parties' will as a fundamental principle of private law relationships. Therefore, it is not possible to systematically consider *lex fori* rules as overriding mandatory norms, except for those that protect an exceptionally important public interest.[27] Regarding the *lex fori* overriding mandatory norms, a question of forum shopping arises. The wording of the Regulation makes it clear that Rome I does not restrict the application of the overriding mandatory provisions of the law of the forum state.[28] These norms are automatically enforced, and the court hearing the case is naturally most familiar with them. Therefore, there is room for discretion for the party to choose before the court of which State to initiate proceedings. The issue of overriding mandatory norms thus penetrates into the procedural aspect of contractual relations. The Brussels I bis Regulation,[29] through which we also determine the jurisdiction of the courts in civil and commercial matters with a foreign element, regulates the possibility and the requirements for the choice of jurisdiction in Articles 25 and 26. Naturally, if we know that the court seized of the matter will enforce the overriding *lex fori* rule, it is possible to assume that the choice would establish the jurisdiction of the forum according to the most favourable regulation of the overriding mandatory provisions. We recommend that this aspect also be taken into account when negotiating prorogation clauses because by establishing the jurisdiction of the forum, we also activate the overriding mandatory norms of the law of the chosen forum. It should be noted that if a party realises only after the dispute has arisen the potential of a particular legislation because of its overriding mandatory provisions, with the exception of the rules on exclusive jurisdiction, we would recommend taking advantage of the option provided for in Article 26 of the Brussels I bis Regulation and trying to establish jurisdiction of the preferred forum through a so-called tacit choice of jurisdiction.[30]

The whole issue takes on a new procedural dimension in light of recent case law of the Court of Justice. In the *Inkreal* judgment, the Court of Justice declared that a clause prorogating the jurisdiction of a foreign forum as the only foreign element in the relationship under consideration is sufficient to fulfil the scope of Brussels I bis, even if the contract in question has no other connection with that other Member State.[31] Thus, should the parties agree, in cases that do not extend beyond the borders of one State, that the courts of another Member State will have jurisdiction to adjudicate their dispute, they thereby activate the overriding mandatory rules of the chosen state. Consequently, the relationship between the procedural level and the applicable law remains questionable. If, in purely domestic cases, the choice of the foreign applicable law were

[27] CJEU, judgment of 17 October 2013, Unamar, C-184/12, ECLI:EU:C:2013:663, para 35.
[28] Art. 9(2) of the Rome I Regulation.
[29] 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 (OJ L 351, 20.12.2012, pp. 1–32) (hereinafter referred to as "the Brussels I bis Regulation").
[30] Art. 26(1) of the Brussels I bis Regulation: *„Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 24."*
[31] CJEU, judgment of 8 February 2024, Inkreal, C- 566/22, ECLI:EU:C:2024:123, para. 39.

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made, the choice would not affect the application of the mandatory provisions of the law of that country.[32] However, in addition to these, the overriding mandatory rules of the forum country in question would be enforced through the choice of forum, which in practice could lead to some potential conflict. We therefore consider that Article 3(3) of Rome I would not apply in this case, as the chosen forum would be another element located in that chosen country and thus the situation would not fall within the scope of that provision. It will be interesting to see, from our point of view in general, how the jurisprudence develops after the *Inkreal* judgment.

In the case of overriding mandatory *lex fori* rules, it is essential to mention that the courts of the Member States are bound by the EU *acquis*. In light of the judgment *Costa v. ENEL*, the EU legal order is part of the legal orders of the Member States,[33] and it is therefore always necessary to take into account the overriding mandatory rules arising from the EU *acquis*, which are part of the *lex fori* for the courts of the Member States. Therefore, these rules are therefore not specifically mentioned in the regulation. Consequently, the Slovak courts must apply the overriding mandatory norms of EU law in each case as norms of the forum. Similarly, in *Ingmar* case, the Court confirmed that such norms may also arise, for example, from EU directives transposed by Member States into their national legal orders.[34] If the scope of a national overriding mandatory norm was simultaneously given and the applicable law were to apply a norm which also incorporates overriding mandatory provisions of the EU acquis, it would not be possible to enforce a national norm of a Member State in preference to a norm of EU law.[35] This stems from the principle of the primacy of EU law, which the courts have no discretion to apply in this case. In intra-EU cases, that argument is irrelevant, since the overriding mandatory norms of the EU acquis are also norms of the Member States, of which EU law is part of their legal systems. Nor can the overriding mandatory norms of international law be disregarded.

As mentioned above, the Rome I Regulation allows the application of an overriding mandatory provision of a legal order other than the *lex fori.* The courts are free to activate an overriding mandatory provision of the law of the country in which the obligations *"arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to these provisions, we shall have regard to their nature and purpose and to the consequences of their application or nonapplication."*[36] As we can see, the previously criticised vague formulation has been modified in Rome I, allowing the consideration, alongside *lex fori* norms, exclusively of the overriding mandatory norm of the country connected with the performance of the obligation arising from the contract in question. The court hearing the case must be able to identify those norms before activating the protective mechanism in relation to them. We consider this to be one of the most difficult aspects of judicial decision-making, as it requires becoming fully familiar with the content of foreign law, which may not always be straightforward. Additionally, the Slovak Act on Private International Law, in section 53, limits to a certain extent the principle of *iura novit curia* in proceedings with a foreign element. If acquainted with the content of that foreign law, the court must then identify whether the certain norm is an overriding mandatory norm, not merely in the light of the *lex fori*, but in the context of the legal order to which it belongs. Since most of these norms are not explicitly designated

[32] Art. 3(3) of the Rome I Regulation.
[33] CJEU, judgment of 15 July 1964, Costa/E.N.E.L., C-6/64, ECLI:EU:C:1964:66.
[34] CJEU, judgment of 9 November 2000, Ingmar GB, C-381/98, ECLI:EU:C:2000:605.
[35] CJEU, judgment of 17 October 2013, Unamar, C-184/12, ECLI:EU:C:2013:663, para. 35.
[36] Art. 9(3) of the Rome I Regulation.

as overriding mandatory, the court faces the challenging task of assessing this within the framework of the foreign legal order and often relying on relevant case law. The court hearing the case must consider not only the wording of the provision, but also the general system, the circumstances of the adoption of the provision in question, and the overall teleology.[37] To qualify a norm as overriding mandatory, it must meet a number of objective criteria, and the court is then obligated to provide reasons for applying the norm in question.[38]

The court does not take into account the application of overriding mandatory provisions other than the *lex fori ex officio*; it has discretion whether to give effect to such a provision in the light of the relationship, purpose, and nature of the provision. It should also take into account the consequences of its application or non-application. Some authors have pointed out that there are a number of unresolved issues in the courts' application practice in this case which should be clarified by the Court of Justice, since the status quo in this category of overriding norms does not, to a certain extent, satisfy the requirement of legal certainty (Hüßtege and Mansel, 2019, p. 215). With a *lex fori* overriding mandatory provision, enforcement occurs automatically if the norm has fulfilled its scope, whereas with a provision from another country's legal order, it is always at the discretion of the forum. Under the Slovak Act on Private International Law, section 53(1), the Slovak court has a number of options for ascertaining the content of the foreign law and may also impose an obligation on the parties to the proceedings. By analogy, therefore, we believe that the court hearing the case would rather exceptionally examine *ex officio* the content of the foreign law that is not applicable and identify whether there is a certain overriding mandatory norm in that law that could affect the private law relationship in question. The court hearing the case is not obliged to enforce those norms; it is merely an option that, in our view, would rather be exercised by the court at the initiative of one of the parties. Naturally, the courts have a difficult task on their shoulders in examining the content of the foreign law itself, which is the applicable law. The applicable law need not be the law of the country in which the obligations were to be performed, since Rome I also operates with different connecting factors.

Under the Rome I Regulation, the court hearing the case has the possibility to make use of the protective mechanism of overriding mandatory rules in relation to two categories of such provisions. In addition to the overriding norms of the forum and the overriding norms according to the performance of obligations, the overriding norms of the applicable law, the *lex causae,* are also relevant for the decision of the courts. The doctrine supports the application of overriding mandatory norms of *lex causae* before Slovak courts (Lysina, Haťapka, Burdová et al., 2023, p. 138). We fully agree with Advocate General Szpunart, who stated that the question of the permissibility of the application of the overriding mandatory rules of *lex causae* does not arise at all since they belong to the legal system on which the decision must be based.[39] We therefore prioritise their application on the grounds that they are part of the applicable law. Likewise, Z. Kučera states that these norms are part of the *lex causae* and are used on the basis of the reference of the conflict of laws norm (Kučera, 2009, p. 241). Naturally, a court applying foreign applicable law cannot be fully aware of all the rules of that law. To determine the content, courts focus exclusively on the norm they need to apply to the case. But that

[37] CJEU, judgment of 17 October 2013, Unamar, C-184/12, ECLI:EU:C:2013:663, para. 50.
[38] Opinion of Advocate General Saugmandsgaard Øe delivered on 21 April 2016, *New Valmar*, C-15/15, EU:C:2016:291, para. 28.
[39] Opinion of Advocate General Szpunar delivered on 20 April 2016, *Nikiforidis*, C- 135/15, EU:C:2016:281, para. 76.

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norm is part of the applicable law and cannot be seen in a vacuum. The court has the rather difficult task of familiarising itself with the content of the foreign law to the extent that it needs to know it before applying it, and therefore the courts cannot always be expected to be able to identify all the relevant overriding mandatory norms as well as the relevant case law of that law. If a party believes that a particular overriding norm of foreign law should be enforced, it is recommended that it submit both the full context and any relevant case law for the court's consideration.

Thus, the court hearing the case has a number of options to consider regarding the overriding mandatory rules. Firstly, the rules in the applicable law, which it must apply by virtue of being part of the applicable law. Under the Rome I mechanism, it applies the overriding mandatory *lex fori* norm and it may also apply the norm of the place of performance of the obligation, and it is up to the court which norm it applies as a matter of priority with a view to comparing them. In practical terms, then, let us imagine that the court hearing the case must first identify the applicable law and familiarise itself with its content to the extent necessary for its application to the relationship under consideration. At the same time, it should be familiar with the overriding mandatory rules of that applicable law. Consideration of the overriding mandatory norms of the forum, which can be considered a relatively simple task, is added to this difficult task. Because of their knowledge of the content of their own legislation, the courts are likely to prefer to enforce precisely the *lex fori* norm. It is, indeed, necessary to qualify this norm objectively. We consider that, having dealt with the applicable law and the overriding mandatory provisions of the *lex fori*, the courts would only very rarely, on their own initiative, also examine the legal order according to the place of performance of the obligations, to the extent that, in the light of that law, they would be able to identify its relevant overriding mandatory provisions. Moreover, the place of performance of the obligations must be interpreted autonomously and, in the case of multiple obligations, it is necessary to determine that place for each of them separately. If the court concludes that there are multiple places of performance, we are faced with a situation where it is possible to enforce the overriding mandatory provisions of more than one State, which further complicates the court's task (Hüßtege and Mansel, 2019, p. 216). If a party is aware of the existence of such provisions and believes that they should be enforced in a given case, we recommend that the parties inform the court. Assuming that the court could apply the overriding mandatory rules of the *lex fori, lex causae*, and the rules of another legal order, the Rome I Regulation implies a de facto priority of the rules of the *lex fori* in the event of a conflict. The hierarchy in the application of the other norms cannot be clearly defined, and we agree that the court in this case would have to weigh the interests protected by each norm in light of all the circumstances of the case (Hüßtege and Mansel, 2019, p. 218).

For the whole issue of overriding mandatory provisions not to be simple, the courts hearing the case must also take into account the overriding mandatory provisions of other jurisdictions in the cases under consideration. From our point of view, the judgment of the Court of Justice in the *Nikiforidis* case has given a completely new dimension to the issue of overriding mandatory norms in private law relationships with a foreign element. In its judgment, the Court of Justice also allows the overriding mandatory norms of a State other than the *lex fori* or the State in which the obligations were to be performed or were performed to be taken into account. However, this cannot be to the detriment of ensuring legal certainty in the European judicial area. The overriding mandatory provisions of another State may be taken into account only as a matter of fact, insofar as the substantive rule of the law applicable to the contract under the Rome I Regulation would so provide. Rome I does not harmonise the substantive rules of

contract law, only the conflict-of-law rules.[40] Therefore, it is essential for the court hearing the case to examine the applicable law to the extent necessary to determine whether this is possible under the law of the state concerned. In the application of the substantive applicable law determined on the basis of the Rome I regime, those rules can only form part of a subsidiary premise of a factual nature and must be excluded from the normative premise (Kronenberg, 2022). We find a very interesting judgment on overriding mandatory provisions in German case law. This concerned the Kuwait Uniform Act on the Boycott of Israel, the provisions of which Germany did not recognise as an overriding mandatory norm within the meaning of Article 9(3) of Rome I. The mere existence of that norm and its effects constituted a real obstacle to performance in the case of an air transport of an Israeli citizen scheduled to make a stopover in Kuwait. The same applied to the absence of travel documents required by Kuwait.[41] The omission of these norms, which have a factual character as they result from the operation of a foreign overriding mandatory provision, would be capable of undermining the effectiveness of the substantive provisions (Kronenberg, 2022).

Reflecting on the operation of foreign overriding mandatory provisions as a factual circumstance, we cannot speak of a new obligation as defined by the Court in *Nikiforidis*. In our view, the operation and consideration of these norms as a matter of fact is a logical prerequisite for the effective resolution of a case with a foreign element. Again we see that the court must be sufficiently familiar with the applicable law to assess whether that substantive law permits the consideration of such norms. If it does, it has the further difficult task of identifying the overriding mandatory provisions of other legal orders that are so relevant to the facts of the case that it is necessary to take them into account. In this case, however, we will not fall within the regime of Article 9 of Rome I because that possibility will have a legal basis in the substantive rules of the applicable law, and it is only permissible to take account of the norm as a factual circumstance and not as an overriding mandatory provision within the meaning of the Rome Rules.

6. SPECIFICS OF THE ANALYSED PROTECTIVE MECHANISM FOR NON-CONTRACTUAL OBLIGATIONS

Regarding the chosen protective mechanism, it should be noted that overriding mandatory provisions have been integrated into the general regime for determining the applicable law, covering both contractual and non-contractual obligations governed by the Rome II Regulation.[42] Even for non-contractual obligations, compliance with the Regulation's scope is a prerequisite. The territorial scope applies to all Member States except Denmark, while the personal scope is not defined as in Rome I. Temporal scope is relevant to events giving rise to the damage occurring after January 11, 2009.[43] The substantive scope is also the most extensive here; it must be a non-contractual obligation in civil and commercial matters with a foreign element. At the same time, selected areas are excluded, e.g., non-contractual obligations arising from family relationships, tax, customs, administrative matters and others.[44] Once the scope of the Regulation has been

[40] CJEU, judgment of 18 October 2016, Nikiforidis, C-135/15, ECLI:EU:C:2016:774, para. 46, 51, 52.
[41] OLG Frankfurt 16. Zivilsenat, 25.09.2018, ECLI:DE:OLGHE:2018:0925.16U209.17.00, 2022. Available at: https://www.rv.hessenrecht.hessen.de/bshe/document/LARE190019717/part/K (accessed on 01.05.2024).
[42] 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 (OJ L 199, 31/07/2007, pp. 40–49) (hereinafter referred to as "the Rome II Regulation").
[43] Art. 31,32 of the Rome II Regulation.
[44] Art. 1 of the Rome II Regulation.

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fulfilled, the mechanism of overriding mandatory provisions can be activated for all non-contractual obligations covered by the Rome II Regulation. However, the options available to the courts in non-contractual obligations are considerably limited compared to those under the Rome I Regulation. The absence of a specific definition of mandatory rules might seem problematic at first glance. Nevertheless this lack of definition does not pose a practical obstacle, as the Regulations aim to ensure uniformity of interpretation.[45] Therefore, the interpretation and definition relating to Rome I can be applied by analogy for mandatory rules under Rome II. The concepts are functionally identical across the Regulations, and the interpretation given by the Court of Justice to mandatory rules under Rome I can similarly be applied to mandatory rules under Rome II.[46]

Under Rome II, similar to Rome I, the mechanism is not limited and applies regardless of whether there has been a choice of applicable law and irrespective of what gave rise to the non-contractual obligation, provided that the scope of the Regulation is fulfilled. Naturally, the choice of applicable law in non-contractual obligations is less common than in contractual obligations. When classifying a norm as overriding mandatory, the court must equally consider the systematic nature, objectives, and circumstances of adoption in the legal order to which the norm belongs.[47]

The most significant difference between the regulations is the obligation of the court under Rome II to apply exclusively the overriding mandatory provisions of the *lex fori* and the impossibility of applying others. The European Commission has attempted, but without success, to include other overriding mandatory provisions besides the *lex fori* in the Rome II Regulation (Rozehnalová et al., 2021, p. 492). For the courts of the Member States, this means that they will enforce their own and, of course, the Union's overriding mandatory provisions. We would add here that, although the regulation does not provide for the enforcement of other overriding mandatory rules, the court hearing the case must still take into account rules of the *lex causae*, as they form part of the applicable law. In addition to the above, it will also apply to Rome II that the court may also take into account an overriding mandatory norm of another state, but only as a factual circumstance relevant to the decision, provided that the substantive rules of the applicable law allow for this possibility.

The regulation further provides, in Article 17, that the court hearing the case must take into account the safety rules in force at the place and time when the event giving rise to liability occurred.[48] Safety rules constitute a special category of provisions which, from our point of view, cannot be equated with overriding mandatory provisions, and the nature of this mechanism is typical only of non-contractual obligations in private law relationships. These include, in particular, traffic rules, provisions aimed at ensuring the safety of buildings, and the like. It can be concluded that these are norms which should be applied directly and could form another sub-category of mandatory norms and could be largely identical to the selected overriding mandatory provisions, but according to experts, the court considers them only as a factual circumstance (Lysina, Haťapka, Burdová et al., 2023, p. 139).

Within the context of the overriding mandatory provisions of the Rome II Regulation, the Bulgarian court initiated the preliminary ruling procedure. The question raised is essentially whether the fundamental principle of the *lex fori*, which is the principle of fairness in determining compensation for non-pecuniary damage in the event of the

[45] Recital 7 of the preamble to the Rome II Regulation.
[46] CJEU, judgment of 31 January 2019, Da Silva Martins, C-149/18, EECLI:U:C:2019:84, para. 28.
[47] Ibid., para 31.
[48] Art. 17 of the Rome II Regulation.

death of close relatives as a result of a criminal offence, can also be regarded as an overriding mandatory rule within the meaning of Rome II.[49] It will be interesting to see how the Court of Justice will deal with the question raised, since the principle is not clearly defined in Bulgarian law and its content, as well as the method of determining the amount of compensation for nonpecuniary damage, is established only in the case law of national courts. On the other hand, the absence of a definition of overriding mandatory rules in the Rome II Regulation and the rather vague wording in the Rome I Regulation makes it impossible to rule out the possibility that they might also encompass principles of that legal order. The only certainty is that it must be a legally binding provision. Some writers have even clarified that an overriding mandatory norm does not necessarily pertain only to the written law (Hüßtege and Mansel, 2019, p. 208). Nevertheless, if the Court of Justice were to hold that there may also be a principle that is only further defined in the case law of the state concerned, that conclusion would be relevant to the entire general regime for determining the applicable law under the Rome I and Rome II Regulations.

7. CONCLUSION

The aim of this article was to define which norms can be considered overriding mandatory in the context of private international law for contractual and non-contractual obligations, and to identify the possibilities for national courts, especially Slovak courts, to utilise the protective mechanism of overriding mandatory provisions when adjudicating private law disputes with a foreign element. While the Slovak Act on Private International Law does not explicitly recognise the mechanism of overriding mandatory provisions, it is conceivable that this possibility could be opened through acceptance of *renvoi* to foreign applicable law. Despite the absence of such a mechanism in Slovak legislation, Slovak courts still have the option to rely on the public policy reservation, albeit limited to protecting the *lex fori*. Although these mechanisms share several common features, we believe it would be advisable to incorporate the mechanism of overriding mandatory provisions into the Slovak Act on Private International Law, particularly considering the differences in features highlighted in the article.

Under the Rome I Regulation, the courts of the Member States are fully empowered to activate the mechanism of overriding mandatory provisions. As demonstrated in this article, the origins of the current regime traced back to the Rome Convention, which, in addition to the explicitly mentioned mechanism, also associated overriding mandatory norms with the protection of the weaker party. It was not possible to deviate by choice from the overriding mandatory norms of the law that would apply in the absence of choice. While the general mechanism was vaguely defined in the original Convention, the formulation provided by the Rome I Regulation offered a relatively clearer legal basis for overriding mandatory provisions. Specifically, the protection of the weaker party in cases of choice replaced overriding mandatory provisions with mandatory ones, thereby extending broader protection to the weaker party. The general mechanism of the overriding mandatory rule was introduced for both *lex fori* provisions and the provisions of the law of the state in which the obligations under the contract were performed or are to be performed. If different obligations under the contract had such distinct places, the application of the overriding mandatory provisions of more than one legal order would also come into play.

[49] Reference for a preliminary ruling, *HUK-COBURG-Allgemeine Versicherung*, C-86/23.

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In the decision-making practice of Slovak courts, we observe that this mechanism is largely associated with the protection of the weaker party. From our perspective, this association originates directly from the original provisions outlined in the Convention, which is why we have dedicated significant attention to it in the article. However, it's important to note that not every mandatory provision protecting the weaker party can be considered an overriding mandatory norm. As demonstrated, courts should depart from the traditional practice of applying overriding mandatory norms solely in the context of weaker parties. Any provision, whether in public or private law, that is legally binding, serves the public interest, and, considering all circumstances of the case at hand, must be applied regardless of the applicable law, can qualify as an overriding mandatory norm.

To preserve the autonomy of parties' will and ensure legal certainty within the European judicial area, it is imperative to interpret the concept of overriding mandatory norms restrictively and activate the mechanism only in strictly justified cases. Enforcing an overriding mandatory norm entails the risk that the *lex causae* may be displaced, potentially distorting the outcome with politically motivated national rules from another State (Hüßtege and Mansel, 2019, p. 204). While the Rome I Regulation permits the application of the overriding mandatory rule of the *lex fori* and the law of the State where obligations are performed, the case law of the Court of Justice also allows for the consideration of an overriding mandatory rule of another state, but only as a factual circumstance, if permitted by the substantive rules of the applicable law. Additionally, the overriding mandatory rules of the *lex causae* must be taken into account, as they form part of the applicable law. In the EU context, the prioritised application of the overriding mandatory norms of the EU *acquis*, which are integrated into the legal orders of the Member States and considered part of the *lex fori* by the courts, must not be overlooked.

The scope for non-contractual obligations is limited under the Rome II Regulation, which exclusively allows for the application of overriding mandatory *lex fori* rules. Additionally, the court considers the overriding mandatory provisions of the *lex causae*, not as part of a protective mechanism, but to be integral to the applicable law that the court is obligated to apply. However, we believe that even in non-contractual obligations, courts may consider the overriding mandatory provisions of other legal orders as a relevant factual circumstance, provided that the substantive rules of the applicable law permit such consideration.

However, it ultimately falls on the court hearing the case to determine whether a norm qualifies as overriding mandatory, considering the objectives of the legal order to which it belongs. Moreover, the court must decide which overriding mandatory norm to enforce when multiple such norms are involved. These norms are often not explicitly delineated in legal orders, highlighting the discretionary power of courts in activating this mechanism, while considering all the circumstances of the case. As previously mentioned, courts face a challenging task, particularly when assessing the overriding mandatory norms of a foreign legal order. Additionally, the principle of *iura novit curia* has certain limitations in private international law. Therefore, if the parties are aware of the existence of a foreign overriding mandatory norm relevant to their relationship, they should propose its consideration to the court. Ultimately, it is within the court's discretion whether to enforce the norm as an overriding mandatory provision.

Considering that numerous Member States' legal systems incorporate this mechanism, and the fact it is also enshrined in Union regulations formulated within the framework of judicial cooperation in civil and commercial matters, the Slovak Republic ought to contemplate integrating the protective mechanism of overriding mandatory norms into the text of its Act on Private International Law. This incorporation, particularly

concerning the overriding mandatory norms of the *lex fori*, would gradually serve to harmonise the options available under both national and EU legislation.

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