„Krytyka Prawa", tom 17, nr 14/2025, s. 256–272, ISSN 2080-1084, e-ISSN 2450-7938, © 2025 Author.

DOMINIKA MORAVCOVÁ[1]

Navigating the Nexus: The Doctrinal Significance of Close Connection in the Enforcement of (Not Only) Overriding Mandatory Norms[2]

Submitted: 28.08.2025. Accepted: 20.10.2025

Abstract

The incidence of private law relationships involving a foreign element is increasing within the European Union due to various factors. This article examines the concept of a *nexus* as a tacit requirement for activating the protective mechanism of *lex fori* overriding mandatory provisions under the Rome I and Rome II Regulations. It further explores the analogous application of these findings to another mechanism – the *ordre public* exception.

Keywords: overriding mandatory provisions, *ordre public*, *lex fori*, *lex causae*.

[1] Dominika Moravcová, PhD – Trnava University in Trnava Faculty of Law, Department of Civil and Commercial Law (Slovakia), e-mail: dominika.moravcova@truni.sk; ORCID: 0000-0003-0936-6749.

[2] Co-funded by the European Union (Project: 101238560 — HRPEU — ERASMUS-JMO-2025-HEI-TCH-RSCH). The views and opinions expressed during the event are solely those of the author and do not necessarily reflect the positions of the European Union or the European Education and Culture Executive Agency. Neither the European Union nor the grant provider can be held responsible for them.

„Krytyka Prawa", tom 17, nr 4/2025, s. 256–272, ISSN 2080-1084, e-ISSN 2450-7938, © 2025 Author.

DOMINIKA MORAVCOVÁ

Poruszanie się w złożonej sieci powiązań: Doktrynalne znaczenie bliskiego związku przy egzekwowaniu (nie tylko) bezwzględnie obowiązujących norm[3]

Streszczenie

Częstotliwość występowania stosunków prywatnoprawnych z elementem obcym w Unii Europejskiej rośnie pod wpływem różnych czynników. Artykuł analizuje pojęcie powiązania jako milczącego warunku uruchomienia mechanizmu ochronnego przepisów wymuszających swoje zastosowanie *lex fori* w ramach rozporządzeń Rzym I i Rzym II. Następnie rozważa możliwość analogicznego zastosowania tych wniosków w odniesieniu do innego mechanizmu – zastrzeżenia *ordre public*.

Słowa kluczowe: przepisy wymuszające swoje zastosowanie, *ordre public, lex fori, lex causae.*

[3] The research in this article has not been supported financially by any institution.

 DOI: 10.7206/kp.2080-1084.824

Introduction

The incidence of private law relationships with a foreign element before courts in the European union (hereinafter referred to as "the EU") is increasing, not only as a result of the exercise of internal market freedoms, but also due to additional factors such as migration flows in certain Member States and cross-border relations involving individuals from Ukraine. When adjudicating private law disputes with a foreign element, courts in EU Member States frequently apply foreign law, while *lex fori* usually governs procedural matters – if so required by the conflict-of-law rules. Courts applying foreign law have several corrective mechanisms at their disposal to moderate its effects. Among these protective mechanisms are overriding mandatory provisions and the *ordre public* exception. Some Member States do not recognise the concept of overriding mandatory provisions within their domestic private international law frameworks and rely solely on the *ordre public* exception. Nevertheless, this mechanism remains relevant across the EU, as it is explicitly incorporated into key instruments governing the determination of applicable law in civil and commercial matters – namely, the Rome I[4] and Rome II Regulations.[5] Some scholars refer to overriding mandatory provisions as *active public policy*;[6] however, this article maintains that their distinct legal operation warrants differentiation from *ordre public*.

The objective of this article is to identify the necessary conditions for the application of the *lex fori* overriding mandatory provisions mechanism when foreign *lex causae* is applied, with particular emphasis on the requirement of a connection to the legal order of the forum. While the necessity of such a connection does not explicitly arise from the provisions of Article 9 of the Rome I Regulation or Article 16 of the Rome II Regulation, it has been a subject of academic debate, and the Court of Justice of the European Union (hereinafter referred to as the "Court of Justice") has provided guidance on this issue through its case law. A secondary

---

4 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").

5 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").

6 N. Štefanková, M. Sumková, *Medzinárodné právo súkromné*, Aleš Černek, Plzeň 2017.

objective is to examine this question in relation to *ordre public*, with the aim of determining whether parallels exist in their respective applications.

In terms of methodology, this article employs a dogmatic approach, characterised by an analysis of the relevant provisions of the selected Regulations. It also makes use of a comparative method, both in relation to the protective mechanisms themselves and to the views of scholars from different jurisdictions. Prior to the drafting stage, the method of feature inventory and abstraction was employed to distil the most significant findings for further analysis. The inductive method is likewise applied to formulate the basic premises on which the discussion is built. In interpreting individual provisions of the European Union's legal instruments, an evolutionary and purposive (teleological) approach is adopted.

The Tension Between Overriding Mandatory Norms and Party Autonomy: A Brief Overview

Overriding mandatory provisions serve as a corrective mechanism mitigating the effects of applying foreign law. They constitute an active protective instrument ensuring the direct enforcement of overriding mandatory provision with priority over the foreign *lex causae*, whether chosen by the parties or determined through conflict-of-law rules. While the Rome Convention primarily associated these provisions with the protection of weaker parties, the current legal framework under the Rome I and Rome II Regulations does not confine their application to specific types of legal relationships. Instead, it provides for their universal applicability whenever the conditions for their invocation are fulfilled.

The definition of overriding mandatory provisions is set out explicitly in 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." To ensure coherence, this definition should apply equally to both Rome I and Rome II Regulations.

These norms are of an absolutely mandatory nature and take precedence over party autonomy, including the parties' choice of a foreign governing law, as they cannot be derogated from by agreement. Scholars often classify them as predominantly public law norms, the violation of which may give rise to administrative or criminal liability. They may affect the validity of a contract or its specific provisions, render performance impossible or unlawful, impose additional obligations, or

 DOI: 10.7206/kp.2080-1084.824

modify the timeframe for performance.[7] However, it must also be recognised that such norms may belong to the sphere of private law, which can play a crucial role in safeguarding public interests.[8]

Provisions of this kind are rarely designated explicitly within a legal system as possessing an overriding mandatory or absolutely peremptory character. In certain jurisdictions, examples include foreign exchange regulations, rules on the notification of security transfers of rights, selected insolvency provisions establishing priority rights over claims,[9] publicity requirement for certain contracts,[10] competition law provisions, and others. The EU's general regime for determining applicable law permits the enforcement of *lex fori* overriding mandatory norms, those of the place of performance in contractual obligations,[11] and, in certain circumstances, also norms of another country with a sufficiently close connection, where their consideration is necessary as a matter of fact.[12]

This article focuses exclusively on the requirement of a close connection in the enforcement of the forum's overriding mandatory provisions. Consequently, the subsequent analysis pertains solely to this research question. Article 9(2) of the Rome I Regulation states: "Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum." Although the Regulation itself is silent on this point, these *lex fori* norms apply whenever both their material and territorial scopes of application are fulfilled.[13] According to N. Rozehnalová et al., the forum is obliged, once the scope of an overriding mandatory provision is met, to apply it unconditionally wherever it forms part of the forum's legal system.[14] However, it is necessary to add here that courts enjoy considerable discretion in determining whether to enforce an overriding mandatory rule. This is because the court must decide whether a given rule qualifies as overriding mandatory – a classification seldom explicit in national legal systems – and whether it applies to the case at hand. Therefore, rather than asserting that the forum is bound to

---

7 N. Rozehnalová *et al.*, *Nařízení Řím I a Nařízení Řím II. Komentář*, Praha, 2021, p. 167.

8 While we believe that protecting an individual, such as a weaker party, is insufficient without safeguarding the public interest, some authors note that certain jurisdictions grant overriding mandatory status even to norms solely protecting the weaker party (see: J. Kuipers, S. *Migliorini*, *Qu'est-ce que sont les lois de police? Une querelle franco-allemande apres la communautarisation de la Convention de Rome*, „European Review of Private Law" 2011, 19(2), pp. 187–207.

9 A.J. Bělohlávek, *Rome Convention Rome I Regulation*, USA, 2010, p. 1345.

10 E.g. Slovakia (§ 771c of Act No. 513/1991 Coll. Commercial Code).

11 Art. 9(3) of the Rome I.

12 CJEU, judgment of 18 October 2016, *Nikiforidis*, C-135/15, ECLI:EU:C:2016:77, para. 55.

13 See e.g. M.A. Zachariasiewicz, M. Zachariasiewicz, *Modern Changes in the Conflict-of-Laws Methodology: The Blending of the Savignian Multilateralism, the American Unilateralism, and the Recognition of Legal Relationships*, „Problemy Prawa Prywatnego Międzynarodowego" 2025, 75.

14 N. Rozehnalová *et al.*, *op. cit.*, p. 175.

apply such a rule, it is more accurate to argue that the forum is *entitled*, alongside the applicable law governing the obligation, to apply the *lex fori* overriding mandatory provision on a preferential basis.[15]

This article examines certain aspects of the judgment in *HUK-COBURG-Allgemeine Versicherung II*, arising from a request for a preliminary ruling submitted by the Bulgarian courts in a dispute between Bulgarian nationals and a German insurance company concerning compensation for non-material damage following the death of the claimants' daughter in a traffic accident in Germany. The driver responsible for the accident was insured under compulsory civil liability insurance with HUK-COBURG. While the claimants sought compensation of approximately €125,000 each before the Bulgarian courts, the German insurer had previously awarded them approximately €2,500 each. At first instance, the Bulgarian court partially upheld the claims, awarding €50,000 to each claimant. The appellate court, however, set aside that judgment, holding that the claimants had not demonstrated the existence of pathological harm, which under German law constitutes a prerequisite for the recognition of non-material damage. The claimants lodged an appeal before the Supreme Court of Cassation, which subsequently referred a request for a preliminary ruling to the Court of Justice. The Supreme Court of Cassation observed that Bulgarian law provides for the assessment of compensation for non-material damage on the basis of equity and that established national case law permits the judicial estimation of such compensation. Against this background, the Bulgarian court submitted the following question: "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?"[16]

The Court of Justice ruled that the provision on overriding mandatory rules within the meaning of the Rome II Regulation "must be interpreted as meaning that a national provision under which compensation for non-material damage

[15] Maultzsch [in:] *Ibidem*. It should further be noted that the application of forum overriding mandatory rules may be constrained by "constitutional" limitations inherent in the primacy of EU law. In other words, the enforcement of *lex fori* overriding mandatory provisions may be precluded where such enforcement would give rise to an infringement of EU norms – in particular, the fundamental freedoms enshrined in the Treaties. See: M.A. Zachariasiewicz, M. Zachariasiewicz, *op. cit*.

[16] CJEU, judgment of 5 September 2024, *HUK-COBURG-Allgemeine Versicherung II*, C-86/23, ECLI:EU:C:2024:689. paras 16-25.

 DOI: 10.7206/kp.2080-1084.824

suffered by the close family members of a person who died in a road traffic accident is determined by the court on the basis of fairness cannot be regarded as an 'overriding mandatory provision', within the meaning of that article, 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 law designated pursuant to Article 4 of that regulation."[17]

In the *HUK-COBURG* case, we find more than a mere answer to the specific question under consideration. The judgment raises questions concerning the method of applying the overriding mandatory provision mechanism. Private international law doctrine has consistently emphasised the enforcement of overriding mandatory provisions irrespective of the content and effects of the *lex causae*.[18] The traditional method of application prioritised the immediate enforcement of such provisions, followed by the application of the *lex causae*. In *HUK-COBURG*, however, the Court redefined the approach, requiring the forum to first assess whether *lex causae* sufficiently safeguards the public interest. If it does, the application of the overriding mandatory provision may be superfluous, thereby aligning its function more closely with the *ordre public* exception and blurring the traditional distinction between the two mechanisms.[19]

Adjudication of the Connection Requirement for Lex Fori Overriding Mandatory Rules

A literal interpretation of the Rome I and Rome II Regulations does not impose a requirement of a *nexus* with the forum for the activation of *lex fori* overriding mandatory norms, although the necessity of such a connection remains a matter of scholarly debate. Notably, scholars such as Rozehnalová and Bělohlávek do not explicitly address this requirement, merely concurring that the enforcement of an overriding mandatory provision depends on the fulfilment of its territorial scope.[20]

17 *Ibidem*, para 57.

18 A.J. Bělohlávek, *Římská úmluva, Nařízení Řím I. Komentář (II. díl)*, Praha, 2010, p. 1335.

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

20 A.J. Bělohlávek, *op. cit.*, p. 1335, N. Rozehnalová *et al.*, *op. cit.*, p. 175.

We concur with the view expressed by German scholars, according to which the application of a peremptory *lex fori* norm is not automatic and presupposes a certain connection between the case and the forum state.[21] This requirement is directly linked to the territorial application of such norms in cases tied to the territory of the forum.[22] As Magnus and Mankowski observe, the obligation to enforce an overriding mandatory *lex fori* provision exists in a number of European jurisdictions, yet the Regulations themselves neither specify a substantial connection requirement with the forum nor imply the contrary through their silence.[23] The Court of Justice has repeatedly advocated a restrictive interpretation of this mechanism,[24] since its application circumvents the conflict-of-law rule and the parties' choice of applicable law. We endorse this position, emphasising the necessity of assessing the forum's connection before enforcing an overriding mandatory provision. Magnus and Mankowski derive this from international law and from the "limitation of a state's jurisdiction to situations having a genuine connection with that state," which in practice may lead to the forum's rejection of overriding mandatory provisions.[25]

However, we incline towards a slightly different foundation for this requirement – namely, the scope of the norm itself. Even those authors who do not explicitly address the need for a connection acknowledge that a norm should be enforced only when its scope of application is met. For instance, consider a provision requiring publicity for a contract. If neither the contract nor the parties have any connection with the forum state, should such a norm be regarded as applicable merely to satisfy the formal criteria for enforcement? Similarly, in the case of a provision addressing the invalidity of anti-competition clauses or requiring minimum standards for certain products, does it make sense to enforce such a rule? Even if it constitutes a mandatory norm derived from EU law, situations may arise where parties outside the EU, by virtue of the Brussels I bis Regulation,[26] choose the jurisdiction of an EU court, yet no substantive connection exists between the contract and the forum state or the EU itself. In such circumstances, can the forum's overriding mandatory

---

21 T. Szabados, *Overriding mandatory provisions in the autonomous private international law of the EU Member states – General report*, „ELTE Law Journal" 2020, 1, p. 25.

22 *Ibidem*, p. 12.

23 U. Magnus, P. Mankowski, *Commentary, Rome II Regulation*, Koln, 2019, p. 564.

24 CJEU, judgment of 17 October 2013, *Unamar*, C-184/12, ECLI:EU:C:2013:663, para. 49. CJEU, judgment of 18 October 2016, *Nikiforidis*, C-135/15, ECLI:EU:C:2016:77, para. 44.

25 U. Magnus, P. Mankowski, *op. cit.,* p. 564.

26 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").

 DOI: 10.7206/kp.2080-1084.824

norm be considered to have a valid scope of application to the relationship in question?

Although the Giuliano and Lagarde Report does not explicitly address this issue, it does state that the objective is to safeguard *lex fori* rules possessing this specific, absolutely mandatory character "in the situation whatever the law applicable to the contract may be."[27] The phrase "in the situation" may also be interpreted as meaning that, within the specific context and relationship at hand, the norm must qualify as overriding mandatory. Some scholars describe this as a requirement for the norm to be enforceable *in concreto*,[28] which significantly supports the notion that the connection between the norm and the forum state – and the intensity of that connection – may be a decisive factor.

From a teleological perspective, therefore, the existence of a connection appears necessary. While some scholars cite national court decisions where the forum's overriding mandatory norm was applied without a close link to the country,[29] German doctrine has consistently emphasised the need for such a nexus from the outset. The limitation of the *lex causae* through this mechanism should interfere as little as possible with party autonomy while maintaining at least a potential impact on the obligation under review.[30] Although this condition cannot be derived explicitly from a literal interpretation, it can be inferred implicitly from the principle that the *lex causae* should be respected and applied, and that the overriding mandatory norms of the *lex fori* should not be enforced in the absence of an objective link between the case and the forum's legal order. Without such a limitation, these norms could be applied in an uncontrolled and arbitrary manner.[31]

We fully endorse this interpretation, particularly in view of developments within the European judicial area. In the *Inkreal* case,[32] the Court held that parties may choose the forum of a foreign state even in purely domestic disputes under Article 25 of the Brussels I bis Regulation. A literal interpretation of this provision, combined with the absence of any connection requirement, would imply that parties could also select the overriding mandatory norms of the chosen forum, potentially undermining the application of the otherwise governing law to the contractual relationship. Such a choice affects not only the applicable law, but also the forum's jurisdiction – and may trigger the enforcement of *lex fori* overriding

27 M. Giuliano, P. Lagarde, Report on the Convention on the law applicable to contractual obligations (Ú. v. ES C 282, 31.10.1980, pp. 1–50).

28 R. Ellger, *Overriding Mandatory Provisions*, Max-EuP 2012.

29 A. Dickinson, *The Rome II Regulation*, New York 2008, p. 632.

30 R. Hüßtege, H. P. Mansel, *BGB, Band 6: Rom-Verordnungen*, Baden 2019, p. 209.

31 *Ibidem*, pp. 210–211.

32 CJEU, judgment of 8 February 2024, *Inkreal*, C- 566/22, EU:C:2024:123.

mandatory norms and other protective mechanisms, particularly *ordre public*, which will be addressed in the following section.

Some experts go further, arguing that the connection with the forum state must be sufficiently strong.[33] It should be noted that, in substantive terms, the mere fact that the forum is located within a particular state does not, by itself, constitute a sufficient connection. In this context, it is also proposed that the greater the public interest at stake – including constitutional values, the less stringent the requirement of a connection with domestic law should be,[34] a position with which we fully agree.

However, since the requirement of a connection has been explicitly addressed only within certain national doctrines in Europe, it may be said that this issue was not fully clarified in the context of the application of the Rome Regulations. This led to divergent approaches to the mechanism within the European judicial area, and it was not an *acte clair* issue. A uniform interpretation of overriding mandatory provisions is crucial, as their application – potentially in conflict with the expectations of the parties – must remain strictly necessary to uphold legal certainty. The Court of Justice has now definitively resolved this question.

HUK-COBURG: Necessity of Connection Confirmed

The Court of Justice is the sole authority competent to provide a definitive interpretation of EU legal sources, with the objective of ensuring their uniform application. The preliminary ruling procedure constitutes one of the principal mechanisms through which the Court ensures the consistent interpretation and application of EU law across Member States. The provisions concerning the overriding mandatory mechanism under the Rome Regulations are particularly noteworthy in this respect, as they highlight the desirability of interpretative guidance given the potential divergences among Member States regarding their practical application.

In *HUK-COBURG*, the Court addressed the operation of overriding mandatory provisions under the Rome II Regulation. The present discussion focuses exclusively on the requirement of a close connection for the application of *lex fori* overriding mandatory provisions, interpreting the ruling specifically through this analytical lens. Despite the Court having addressed overriding mandatory provisions on multiple occasions, it had not previously been called upon to deliberate explicitly on the issue of a close connection to the forum state. This lacuna in the Court's

[33] R. Hüßtege, H.P. Mansel, *op. cit.*, p. 211. See also: H. Fazilatfar, *Public policy norms and choice-of-law methodology adjustments in international arbitration*, „Carolina Journal of International Law and Business" 2022, 18(2).

[34] *Ibidem*.

 DOI: 10.7206/kp.2080-1084.824

jurisprudence, as we concede, had been subtly shaped by divergent national practices within Member States.

Advocate General M. Szpunar's Opinion provides a particularly insightful analysis of the issue of close connection and the activation of overriding mandatory *lex fori* norms under the Rome II Regulation. He confirms that the existence of a close connection with the forum state cannot be excluded either from the Court's case law or from the wording of the Regulation itself. Furthermore, he observes that certain provisions cannot be endowed with an overriding mandatory character *a priori*, since such a qualification may in in some cases depend on the factual circumstances that generate the necessary links to the forum state. Drawing upon earlier doctrinal perspectives, he underlines that this "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*."

Subsequently, and somewhat perplexingly from our perspective, he stated that in cases where the relevant provisions do not safeguard either the public interest or the interests of the state, the mechanism should be employed only where the forum can demonstrate a compelling justification for addressing the situation at hand. We perceive a degree of ambiguity here: since these norms are by definition applicable solely in matters concerning the protection of public interests, his assertion could be extended to a broader principle. The Advocate General also emphasised – consistent with the argument advanced in this article – the potential of this mechanism to counteract *forum shopping*.[35] In this respect, the Court took the opportunity to provide definitive clarification on the issue of close connection in relation to *lex fori* overriding mandatory provisions. The Court stated that in order to justify the use of this mechanism, "it is necessary for the legal situation submitted for examination by the national court to have sufficiently close links with the Member State of the forum." It is for the court hearing the case to determine whether such a connection with the forum state exists. A forum applying foreign law must therefore examine the relevant links and may find that a sufficiently close connection with the forum state is lacking.[36] It may thus be implicitly inferred that the connection between the legal relationship and the forum state cannot be arbitrary: the mere fact that the forum is situated within a given state is insufficient, and the link must be objective. Given that the Rome Regulations must be interpreted in a mutually consistent manner, these conclusions apply equally when considering the enforcement of *lex fori* overriding mandatory norms under both instruments.

---

35 Opinion of AG Szpunar delivered on 14 March 2024, *HUK-COBURG-Allgemeine Versicherung II*, C-86/23, EU:C:2024:242, paras 50-53.

36 CJEU Judgment of 5 September 2024, *HUK-COBURG-Allgemeine Versicherung II*, C-86/23, EU:C:2024:689, paras 33-35.

A national court must therefore adopt a clear methodological approach: first, to determine whether the provision in question possesses an overriding mandatory character; second, to assess its applicability to the factual situation; and third, to conduct a connection test. The most appropriate approach appears to involve evaluating the relative strength of the ties to the *lex causae* and to the *lex fori*, followed by an assessment of whether the connection to the latter is sufficiently strong to justify the application of this exceptional mechanism. Where any relevant connection exists, the national court, in accordance with *HUK-COBURG*, should also assess whether the *lex causae* provides equivalent protection of the underlying public interest. Given the ongoing convergence of legal systems across EU Member States, it may be assumed that significant disparities will be more likely to arise in cases involving *lex causae* from non-EU jurisdictions. Nevertheless, if the *lex causae* ensures a comparable level of protection, the reasoning in the *HUK-COBURG* judgment suggests that the need to apply the forum's overriding mandatory rule ceases to exist.[37]

The conclusions of the Court of Justice are authoritative, reflecting its evolutionary interpretation of the Rome Regulations – especially following the *Inkreal* ruling, which introduced a form of "free movement of proceedings" within the Brussels I bis regime through *prorogatio fori*. This development significantly broadened the scope of the European judicial area, creating a corresponding need for safeguards against the arbitrary application of overriding mandatory norms in the absence of a genuine connection. The Court did not, however, clarify whether a case must be more closely connected to the forum state than to the state whose law is otherwise applicable.[38] We consider that this discretion was deliberately left to the national courts, whose task it remains to determine, in light of all relevant circumstances, whether the provision should be enforced. In our view, the greater the fundamental interest that a norm seeks to protect, the weaker the connection to the forum state that should be required.

The Role of Nexus in Ordre Public

The public policy exception – *ordre public* – functions as a passive protective mechanism. Dickinson aptly describes it as *a shield rather than a sword*.[39] This mechanism safeguards the *lex fori* by enabling the court to refuse the application of the *lex causae*. I n essence, it grants the court exceptional discretion to disapply the otherwise

37 *Ibidem*.

38 G. Cuniberti, *CJEU Adds Requirements for Application of Overriding Mandatory Provisions*, EAPIL blog, 2024.

39 A. Dickinson, *op. cit*., p. 631.

 DOI: 10.7206/kp.2080-1084.824

applicable law if its effects would be fundamentally unacceptable within the domestic legal order.[40] By contrast, overriding mandatory provisions operate actively: they extend the reach of the *lex fori* and impose its application, going beyond the merely cassatory effects of *ordre public*.[41]

Ordre public remains a fundamental doctrine within EU jurisdictions, even in those where overriding mandatory norms are not formally regulated. A state cannot afford to open its courts unconditionally to legislation from around the world without retaining the ability to reject foreign law that would disrupt the *ordre public* of the forum.[42] The provision in question pertains specifically to foreign law, which must be manifestly incompatible with the forum's *ordre public*.[43] We fully align with the view that courts should exercise particular caution when invoking this mechanism. Judge Burrough's famous warning from 1824, often cited in this context, remains resonant: "I protest arguing too strongly upon public policy. It is a very unruly horse, and once you get astride it, you never know where it will carry you."[44]

It is well established that such protective mechanisms, which moderate the application of foreign law, should be employed only exceptionally.[45] At the present stage of European judicial integration, *ordre public* has limited practical significance in intra-EU cases. Doctrinal examples typically concern irreconcilable disparities in family law or comparable areas. Yet even in such contexts, *ordre public* operates under broader EU constraints, as the Court of Justice has often restricted its use in light of fundamental rights and freedoms and the free movement of persons,[46] all of which are enshrined in EU primary law at the apex of the European Union's legal order. Consequently, like overriding mandatory provisions, *ordre public* plays a diminished role in intra-EU matters, acquiring real importance primarily where the *lex causae* originates from a third country whose legal standards diverge fundamentally from those of Europe.

The Rome I Regulation permits rejection of a foreign law provision only if its application would be manifestly incompatible with the *ordre public* of the forum state – a formulation mirrored in Rome II.[47] However, neither Regulation explicitly

---

40 M. Pauknerová, *et al.*, *Zákon o mezinárodním právu soukromém*. Komentář, Praha 2013, p. 38.

41 R. Hüßtege, H.P. Mansel, *op. cit.*, p. 206.

42 K. Murphy, *The Traditional View of Public Policy and Ordre Public in Private International Law*, "The Georgia Journal of International and Comparative Law" 1981, 591, p. 596.

43 M. Giuliano, P. Lagarde, *op. cit.*

44 K. Murphy, *op. cit.*, p. 592.

45 R. Hüßtege, H.P. Mansel, *op. cit.*, p. 283.

46 See: CJEU Judgment of 4 October 2024, *Mirin*, C- 4/23, EU:C:2024:845.

47 Art. 21 of the Rome I, art. 26 of the Rome II.

conditions the use of this mechanism on a connection with the forum. The question therefore arises: can the reasoning from *HUK-COBURG* be applied by analogy to the *ordre public* exception?

In the first step, a court adjudicating a private law relationship with a foreign element must determine whether applying the foreign *lex causae* would contravene the *ordre public* of the forum. The central difficulty lies in assessing whether the domestic *ordre public* is genuinely engaged.[48] Extensive scholarly discourse – especially within German legal doctrine – has explored the requirement of sufficient connection. *Ordre public* is well established in the national frameworks of private international and procedural law across the EU; hence, it is understandable that courts, even when applying the Rome Regulations, may adhere to the adopted national practice in this regard.

Some scholars argue that Article 21 of Rome I, and by analogy Article 26 of Rome II, implicitly contain an unwritten element: the need for a sufficient connection with the *lex fori*. However, they also acknowledge that under an autonomous interpretation of the Regulations this requirement might be considered obsolete.[49] Yet, drawing on *HUK-COBURG*, where the Court favoured a close-connection test for overriding mandatory rules, an analogous approach to *ordre public* appears both likely and logical. Hüßtege and Mansel argue that a *nexus* with the forum state should exist, although its necessity depends on the gravity of the *ordre public* infringement. They emphasise the relativity of *ordre public*, noting that nationality – or the mere fact that proceedings are conducted in the state of the forum – does not in itself constitute a sufficient connection.[50] We fully endorse this view. If a case exhibits no *nexus* to the forum state or its legal order, invocation of the *ordre public* exception may be unnecessary, mirroring the reasoning applied to overriding mandatory norms. However, the necessity of activating the mechanism depends on the seriousness of the infringement. Where a failure to invoke *ordre public* would result in a decision conflicting with fundamental rights protected by the Constitution, the European Convention on Human Rights, or the common principles of all Member States, the forum may still justifiably apply this mechanism despite the absence of a close connection. Conversely, in matters concerning "less fundamental" guarantees – those that do not form part of the core of *ordre public* – a court may appropriately refrain from invoking the exception if neither the legal consequences nor the underlying relationship bears any link to the forum state.

---

48 R. Hüßtege, H.P. Mansel, *op. cit*., p. 284.

49 *Ibidem*. See also S. Sánchez Lorenzo, *Choice of Law and Overriding Mandatory Rules in International Contracts after Rome I*, „Yearbook of Private International Law" 2010, 12, pp. 67–91.

50 *Ibidem*.

 DOI: 10.7206/kp.2080-1084.824

The question of what constitutes a sufficient *nexus* remains open. We take the view that a party's nationality alone cannot ordinarily be regarded as a sufficient connection, though this point remains subject to debate. In certain fields – particularly those concerning personal status – nationality continues to serve as a relevant connecting factor in the legal systems of several Member States and could, in that specific context, establish the necessary link. However, within the framework of the Rome Regulations, nationality is subordinated to the criterion of habitual residence, which aims to reflect factual circumstances rather than formal registration. Consequently, under these Regulations, nationality alone appears to be an inadequate basis for satisfying the *nexus* requirement.

Concluding Remarks

This article has examined the protective mechanisms of overriding mandatory provisions and *ordre public*, which operate within the European judicial space under the Rome I and Rome II Regulations to mitigate the effects of applying foreign law. The primary objective was to identify the prerequisites for invoking *lex fori* overriding mandatory norms when applying a foreign *lex causae*, with particular emphasis on the necessity of a connection to the law of the forum. A secondary aim was to analyse this issue in relation to *ordre public*, to determine whether a parallel approach may be discerned.

The activation of *lex fori* overriding mandatory provisions, contingent upon a *nexus* with the forum's legal order, has been the subject of extensive debate. This debate has encompassed not only the nature of the mechanism, but also its practical interpretation, revealing significant divergences among Member States. In its recent *HUK-COBURG* ruling, the Court of Justice interpreted *lex fori* overriding mandatory provisions as applicable only where the legal relationship in question demonstrates a certain connection to the *lex fori*. The precise nature and intensity of this connection remain within the discretion of national courts adjudicating private law disputes with a foreign element.

We maintain that such a connection constitutes an essential prerequisite for the application of overriding mandatory norms, whose use within intra-EU cases appears to be in decline. The Court's conclusion is entirely justified: the mere selection of jurisdiction under the Brussels I bis Regulation in favour of a forum with no genuine connection does not entitle the parties to invoke the overriding mandatory norms of that forum. This interpretation preserves the necessary separation between procedural and substantive legal considerations. If opportunities for litigating domestic disputes abroad are to be broadened, it is proportionately

necessary to limit the strategic selection of forum norms intended to circumvent domestic overriding mandatory provisions. An evolutionary interpretation of the Regulations demands precisely such clarification.

In the final part of this article, we considered whether the requirement of a sufficient connection should also be applicable to the *ordre public* exception. Although the necessity of such a *nexus* is widely discussed in scholarly writings across various jurisdictions, it is not explicitly mandated by the wording of the Rome Regulations. This, once again, calls for an evolutionary and teleological interpretation of these instruments. We concur with the view that an implicit normative foundation for such a connection may also be derived in the context of *ordre public*. However, the degree and intensity of that connection should be assessed proportionally to the gravity of the *ordre public* concerns at stake.

A court seised of the matter therefore faces the complex task of determining whether the *ordre public* of the forum is affected at all – a question most likely to arise in cases exhibiting a tangible *nexus* with the forum state. Whether the Court of Justice would confirm the existence of such a requirement in a preliminary ruling – and to what extent – remains speculative. Nevertheless, based on the interpretative analysis presented herein, we argue that the Court could recognise an implicit prerequisite for invoking *ordre public* under the Rome Regulations, particularly in intra-EU cases. Given the absence of *acte clair*, it would be highly desirable for this question to be referred for a preliminary ruling, thereby ensuring comprehensive clarification by the Court of Justice.

References

Bělohlávek A.J., *Římská úmluva, Nařízení Řím I. Komentář (II. díl)*, Praha 2010.

Bělohlávek A.J., *Rome Convention Rome I Regulation*, USA, 2010.

Cuniberti G., *CJEU Adds Requirements for Application of Overriding Mandatory Provisions*, EAPIL blog, 2024. Available from: https://eapil.org/2024/09/05/cjeu-adds-requirements-for-application-of-overriding-mandatory-provisions/

Dickinson A., *The Rome II Regulation*, New York 2008.

Ellger R., *Overriding Mandatory Provisions*, Max-EuP 2012. Available from: https://max- eup 2012.mpipriv.de/index.php/Overriding_Mandatory_Provisions

Fazilatfar H., *Public policy norms and choice-of-law methodology adjustments in international arbitration*, "Carolina Journal of International Law and Business" 2022, 18(2).

Giuliano M., Lagarde P., *Report on the Convention on the law applicable to contractual obligations* (Ú. v. ES C 282, 31.10.1980, pp. 1–50).

Hüßtege R., Mansel H.P., *BGB, Band 6: Rom-Verordnungen*, Baden 2019.

 DOI: 10.7206/kp.2080-1084.824

Kuipers J., Migliorini S., *Qu'est-ce que sont les lois de police? Une querelle franco-allemande apres la communautarisation de la Convention de Rome*, "European Review of Private Law" 2011, 19(2).
Magnus U., Mankowski P., *Commentary, Rome II Regulation*, Koln 2019.
Murphy K., *The Traditional View of Public Policy and Ordre Public in Private International Law*, "The Georgia Journal of International and Comparative Law" 1981, 591.
Pauknerová M., *et al*., *Zákon o mezinárodním právu soukromém. Komentář*, Praha 2013.
Rozehnalová N. *et al*., *Nařízení Řím I a Nařízení Řím II. Komentář*, Praha 2021.
Sánchez Lorenzo S., *Choice of Law and Overriding Mandatory Rules in International Contracts after Rome I*, "Yearbook of Private International Law" 2010, 12, pp. 67–91.
Szabados T., *Overriding mandatory provisions in the autonomous private international law of the EU Member states – General report*, "ELTE Law Journal" 2020, 1.
Štefanková N., Sumková M., *Medzinárodné právo súkromné*, Aleš Černek, Plzeň 2017.
Zachariasiewicz M.A., Zachariasiewicz M., *Modern Changes in the Conflict-of-Laws Methodology: The Blending of the Savignian Multilateralism, the American Unilateralism, and the Recognition of Legal Relationships*, "Problemy Prawa Prywatnego Międzynarodowego" 2025, 39–108. https://doi.org/10.31261/PPPM.2024.35.02

Legal Acts

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).
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).
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).
Slovakia (§ 771c of Act No. 513/1991 Coll. Commercial Code).

Case law

CJEU, judgment of 17 October 2013, *Unamar*, C-184/12, ECLI:EU:C:2013:663.
CJEU, judgment of 18 October 2016, *Nikiforidis*, C-135/15, ECLI:EU:C:2016:77.
CJEU, judgment of 8 February 2024, *Inkreal*, C- 566/22, ECLI:EU:C:2024:123.
CJEU Judgment of 5 September 2024, *HUK-COBURG-Allgemeine Versicherung II*, C-86/23, EU:C:2024:689.
CJEU Judgment of 4 October 2024, *Mirin*, C- 4/23, EU:C:2024:845.
Opinion of AG Szpunar delivered on 14 March 2024, *HUK-COBURG-Allgemeine Versicherung II*, C-86/23, EU:C:2024:242.