Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 14 March 2024[1]

Case C-86/23

E.N.I.,
Y.K.I.
v
HUK-COBURG-Allgemeine Versicherung AG

(Request for a preliminary ruling from the Varhoven kasatsionen sad (Supreme Court of Cassation, Bulgaria))

(Reference for a preliminary ruling – Judicial cooperation in civil matters – Law applicable to non-contractual obligations – Regulation (EC) No 864/2007 – Overriding mandatory provisions – Civil liability insurance for motor vehicles – Road traffic accident – Rights to compensation for damage paid to the family members of the deceased person – Principle of fairness for the purpose of compensation for non-material damage – Assessment criteria)

I. Introduction

1. This request for a preliminary ruling from the Varhoven kasatsionen sad (Supreme Court of Cassation, Bulgaria) raises the question of the law applicable to a claim for compensation submitted by private individuals, who are Bulgarian nationals, in accordance with compulsory insurance against civil liability in respect of the use of motor vehicles, against an insurance company for non-material damage caused by the death of their daughter in a road traffic accident in Germany.

2. That question relates to the classic problem of 'overriding mandatory provisions' and the interest presented by it is twofold from the point of view of the European Union's international private law. It provides the Court with the opportunity, first, to determine the scope of the concept of 'overriding mandatory provisions', within the meaning of Article 16 of Regulation (EC) No 864/2007,[2] and, secondly, to determine the criteria for classifying rules safeguarding individual rights and freedoms as 'overriding mandatory provisions' within the meaning of that article, the latter giving rise to intense debates in academic legal circles.

[1] Original language: French.

[2] Regulation of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ 2007 L 199, p. 40) ('the Rome II Regulation').

II. Legal context

A. European Union law

1. The Rome II Regulation

3. Article 4 of the Rome II Regulation, which appears under the heading 'General rule', provides in paragraph 1 thereof:

'Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.'

4. Article 16 of that regulation, entitled 'Overriding mandatory provisions', provides:

'Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.'

2. Regulation (EC) No 593/2008

5. Article 9 of Regulation No 593/2008,[3] entitled 'Overriding mandatory provisions', provides, in paragraphs 1 and 2 thereof:

'1. 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.

2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.'

B. Bulgarian law

6. Liability in tort under Bulgarian law is governed by Articles 45 to 54 of the zakon za zadalzheniyata i dogovorite (Law on obligations and contracts)[4] ('the ZZD').

7. Article 45 of the ZZD provides:

'(1) Any person who causes harm to another shall compensate such harm.

(2) In all cases of unlawful action, wrongdoing shall be presumed unless proved otherwise.'

[3] Regulation of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6) ('the Rome I Regulation').

[4] DV No 275 of 22 November 1950.

8. Article 52 of the ZZD provides:

'Compensation for non-material damage shall be determined by the court giving judgment on the basis of fair criteria.'

C. German law

9. Under the title 'Non-material damage', Paragraph 253 of the Bürgerliches Gesetzbuch (German Civil Code) ('the BGB'), in the version applicable to the dispute in the main proceedings, is worded as follows:

'(1) Money may be sought as compensation for non-material damage only in the cases specified by law.

(2) Where damages are to be paid on account of bodily injury, damage to health, freedom or sexual self-determination, fair compensation in monetary terms for non-material damage may also be sought.'

10. Paragraph 823 of the BGB, entitled 'Obligation to make good damage', provides in subparagraph 1 thereof:

'A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or other right of another person is liable to pay compensation to the other party for the damage arising from this.'

11. Under the title 'Direct right of action', Paragraph 115 of the Gesetz über den Versicherungsvertrag (Law on insurance contracts) of 23 November 2007,[5] in the version applicable to the dispute in the main proceedings, provides, in paragraph 1:

'The third party may also assert his or her right to compensation against the insurer

1. in the case of civil liability insurance, for the enforcement of an insurance obligation under the Law on compulsory insurance …

…

The right arises from the insurer's obligations in respect of the insurance relationship and, in the absence of any obligation, from Paragraph 117(1) to (4). The insurer must pay monetary compensation. The insurer and the policyholder liable to pay compensation for damage shall be jointly and severally liable.'

[5] BGBl. 2007 I, p. 2631.

III. The facts of the case in the main proceedings, the question referred for a preliminary ruling and the proceedings before the Court

12. On 27 July 2014, the daughter of E.N.I and Y.K.I, the applicants in the main proceedings who are Bulgarian nationals, died in a road traffic accident in Germany. The person responsible for the accident was insured under a civil liability insurance contract with HUK-COBURG-Allgemeine Versicherung AG ('HUK-COBURG'), a German insurance company.

13. On 25 July 2017, the applicants in the main proceedings brought a claim before the Sofiyski gradski sad (Sofia City Court, Bulgaria) against HUK-COBURG for payment of 250 000 Bulgarian leva (BGN) (approximately EUR 125 000) for each parent as compensation for non-material damage suffered as a result of the death of their daughter.

14. On 27 September 2017, HUK-COBURG paid an amount of EUR 2 500 as compensation to each parent for the damage caused by the death of their daughter.

15. By judgment of 23 December 2019, the Sofiyski gradski sad (Sofia City Court) upheld in part the claim by granting each parent compensation of BGN 100 000 (approximately EUR 50 000), from which it deducted the compensation of approximately EUR 2 500 already paid by the insurer.

16. The Sofiyski gradski sad (Sofia City Court) held that German tort law was applicable, which provides for a right to compensation for non-material damage suffered by indirectly affected victims such as the applicants in the main proceedings only in special situations, namely where the pain and suffering endured led to damage to the health of the indirectly affected victims. That court considered that compensation should be paid for the pain and suffering endured by the parents, in particular on account of the fact that they had suffered a severe emotional crisis which led to an acute stress reaction, and because for approximately one year after the death of their daughter they suffered from depression, agitation, tension, emotional instability, sleep disorders, loss of appetite and emotional alienation. To justify the amount awarded, the Sofiyski gradski sad (Sofia City Court) stated that the principle of fair compensation for non-material damage is enshrined in both Bulgarian law (Article 52 of the ZZD) and German law (Paragraph 253(2) of the BGB). The criteria for assessing compensation are not, however, laid down by either Bulgarian or German law, but are derived from the case-law of both countries.

17. The Sofiyski Apelativen sad (Sofia Court of Appeal, Bulgaria) set aside the judgment of the court at first instance. It dismissed the parents' claim in its entirety, taking the view that they had not established that the pain and suffering endured had led to pathological damage to their health which is a prerequisite pursuant to the applicable German law for the right to compensation for non-material damage. Furthermore, it was held that the parents' argument that Article 52 of the ZZD should be applicable, pursuant to Article 16 of the Rome II Regulation, instead of the German law, which is applicable under Article 4(1) of that regulation, was unfounded. According to that court, the amount paid by HUK-COBURG did not constitute an acknowledgement of the parents' claims. The parents were not entitled to that sum which, by virtue of its amount, corresponded to the 'fair compensation' provided for in Paragraph 253(2) of the BGB for non-material damage.

18. The parents brought an appeal on a point of law against that judgment before the Varhoven kasatsionen sad (Supreme Court of Cassation), the referring court.

19. That court observes, first of all, that the applicable German law in the present case, namely Paragraph 253(2) and Paragraph 823 of the BGB, read in conjunction with point 1 of the first subparagraph of Paragraph 115(1) of the Law on Insurance Contracts, pursuant to Article 4(1) of the Rome II Regulation, is identical to that at issue in the case giving rise to the judgment in *HUK-COBURG-Allgemeine Versicherung*,[6] which concerned the same road traffic accident as that at issue in the present case.

20. Next, the Varhoven kasatsionen sad (Supreme Court of Cassation) notes that, in that judgment, the Court considered, first, that the German legislation at issue fell within the scope of the substantive national civil liability law, to which Directive 2009/103/EC[7] refers, and provided for an objective criterion which makes it possible to identify the non-material damage which may be the subject of compensation granted to a close family member of the victim of a road traffic accident. Second, the Court considered that Directive 2009/103 did not preclude national legislation imposing binding criteria for the determination of the non-material damage which may be the subject of compensation.

21. Lastly, the referring court observes that, unlike the German legislation at issue in the present case, under which compensation for non-material damage is subject to three conditions, namely that (i) the victim has suffered damage to his or her own health, (ii) that person is a close family member of the direct victim and (iii) there is a causal relationship between the fault committed by the person responsible for the accident and that injury, Article 52 of the ZZD provides that compensation for non-material damage is to be determined by the court giving judgment on the basis of fair criteria. According to the referring court, it is apparent from binding case-law of the Varhoven sad (Supreme Court, Bulgaria) and the Varhoven kasatsionen sad (Supreme Court of Cassation) that, under Bulgarian law, compensation is payable for all mental pain and suffering endured by parents on the death of their child as a result of an unlawfully and culpably caused road traffic accident. It is not necessary for the harm to have resulted indirectly in pathological damage to the health of the victim. It states that the amount of damages depends on the specific circumstances established in the case in question, but the amount usually awarded for the non-material damage to parents for the death of their child in a road traffic accident at the time of the accident in 2014 amounts to BGN 120 000 (approximately EUR 61 000), whereas under German law, the maximum award is approximately EUR 5 000. It considers that even if the parents' claim was to be regarded as well founded and they had provided proof of the existence of pathological damage, the maximum amount of compensation due would be EUR 5 000.

22. The referring court, referring to the judgment in *Da Silva Martins*[8] in which the Court held that a national court must determine, on the basis of a detailed analysis, whether a provision of national law is of such importance in the national legal order that it justifies a departure from the applicable law, designated pursuant to Article 4 of the Rome II Regulation, asks whether Article 52 ZZD may be regarded as such a provision, on the ground that the principle of fairness is a fundamental principle of Bulgarian law and a part of Bulgarian public policy. It states that national case-law is contradictory with regard to that question.

6 Judgment of 15 December 2022 (C-577/21, EU:C:2022:992) ('the judgment in *HUK-COBURG I*').

7 Directive of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability (OJ 2009 L 263, p. 11).

8 Judgment of 31 January 2019 (C-149/18, EU:C:2019:84) ('the judgment in *Da Silva Martins*').

23. In those circumstances, the Varhoven kasatsionen sad (Supreme Court of Cassation) decided, by decision of 7 February 2023, received at the Court on 15 February 2023, to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'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?'

24. Written observations were submitted to the Court by the defendant in the main proceedings, the Czech and German Governments, as well as by the European Commission. The Court decided not to hold a hearing in the present case.

IV. Analysis

A. Preliminary observations

25. Before examining the legal issue raised by the referring court, it would be useful to make the following clarifications and observations with regard to the context of the present case. I note, however, that it is settled case-law that the referring court alone has jurisdiction to find and assess the facts in the case before it.[9]

26. As regards, in the first place, the special features of the present case, it is apparent from the order for reference that the claim submitted by the applicants in the main proceedings against HUK-COBURG for compensation, in accordance with compulsory insurance against civil liability in respect of the use of motor vehicles, for the non-material damage suffered by them as a result of the death of their daughter in a road traffic accident concerns the same road traffic accident as that at issue in the case giving rise to the judgment in *HUK-COBURG I*.

27. In that case, the issue in the main proceedings concerned the two children of the same direct victim as the victim in the present case and HUK-COBURG with regard to payment of compensation by the latter, in accordance with compulsory insurance against civil liability in respect of the use of motor vehicles, for the non-material damage suffered by them as a result of the death of their mother. The claim was submitted by the children, represented by their father.[10] The applicable German law (*lex causae*) in that case under Article 4 of the Rome II Regulation was, as in the present case, Paragraph 253(2) and Paragraph 823(1) of the BGB, read in conjunction with point 1 of the first subparagraph of Paragraph 115 of the Law on Insurance Contracts.

28. So far as concerns, in the second place, the German law applicable under Article 4 of the Rome II Regulation, it is apparent from the information provided by the referring court, referring to the judgment in *HUK-COBURG I*, that compensation for non-material damage suffered by

[9] See, inter alia, judgment of 20 October 2022, *Ekofrukt* (C-362/21, EU:C:2022:815, paragraph 26 and the case-law cited).

[10] It is apparent from paragraphs 16 to 18 of the judgment in *HUK-COBURG I* that the father, who was insured with HUK-COBURG, on the basis of compulsory insurance against civil liability, caused the accident. He was driving his vehicle in a state of intoxication, while the mother was on the right in the front passenger seat and was not wearing her seatbelt.

indirect victims of a road traffic accident is subject to three conditions.[11] With regard to the condition that the victim has suffered damage to his or her own health, it is apparent from that judgment that, under German law, as interpreted by the Bundesgerichtshof (Federal Court of Justice, Germany), injuries to mental health can only be considered to be harm to health if they are part of a *pathological condition* and go *beyond the health problems* to which persons concerned are generally exposed in the event of the death or serious injury of a close family member.[12]

29. The referring court states that Bulgarian law (*lex fori*) provides, on the contrary, that compensation for non-material damage is determined by the *court giving judgment on the basis of fair criteria*. That court points out that, under Bulgarian law, compensation is payable for all mental pain and suffering endured by parents on the death of their child as a result of an unlawfully and culpably caused road traffic accident. It is not necessary for the harm to have resulted indirectly in pathological damage to the health of the victim.[13]

30. In that regard, I note that the referring court seems to consider that, unlike Bulgarian legislation, the applicable German legislation applicable to determine compensation for non-material damage is not based on the principle of fairness.[14] Although it is not for the Court, in the context of a reference for a preliminary ruling, to rule on the interpretation of provisions of national law or to decide whether the referring court's interpretation of such provisions is correct,[15] it should be noted that, contrary to what HUK-COBURG and the Commission state, it is not apparent from Paragraph 253(2) of the BGB that that provision is based on the principle of fairness, but it simply provides for the possibility to claim 'fair compensation', which it is for the referring court to verify.[16]

31. In the present case, however, it is clear that the application of German legislation under Article 4 of the Rome II Regulation would lead to a different outcome with regard to the amount of compensation, in so far as that legislation makes compensation for non-material damage conditional on the close family members having suffered damage to their health.[17] As is apparent from the order for reference, the parents of the direct victim have not established such damage and, consequently, are not entitled to such compensation.[18]

32. In that regard, I should point out that it goes without saying that the mere fact that, by applying the *lex fori*, there would be a different outcome with regard to the amount of compensation from that which would have been reached by applying the *lex causae* is not sufficient to conclude that the Bulgarian provision at issue may be classified as an 'overriding mandatory provision' within the meaning of Article 16 of the Rome II Regulation, provided that the application of the *lex causae* is compatible with considerations of justice. In other words, that difference – namely the fact that the amount of compensation for damage suffered by the parents

11 See point 21 of this Opinion.

12 Judgment in *HUK-COBURG I* (paragraph 46). The German legislature eliminated that requirement by means of Paragraph 844(3) of the BGB; see BGB1 2017 I, p. 2421.

13 See point 21 of this Opinion.

14 See point 21 of this Opinion.

15 See, inter alia, judgment of 15 June 2023, *Bank M. (Consequences of the annulment of the contract)* (C-520/21, EU:C:2023:478, paragraph 52).

16 I also note that it is apparent from the order for reference that, with regard to the reasons given for the amount awarded at first instance, the Sofiyski gradski sad (Sofia City Court) stated that a principle of fair compensation for non-material damage is enshrined in both Bulgarian law, pursuant to Article 52 of the ZZD, and German law, pursuant to Paragraph 253 of the BGB. See point 16 of this Opinion.

17 See points 9 and 21 of this Opinion.

18 See point 17 of this Opinion.

is lower simply because their daughter died in a road traffic accident in Germany and not in Bulgaria – does not allow such a classification to be made unless that difference arises from the protection, in particular, of a fundamental right justifying the application of the *lex fori*.

33. Furthermore, I observe, as is apparent from the information from the referring court, that the case-law of the Bulgarian courts is contradictory as to whether Article 52 of the ZZD constitutes an overriding mandatory provision within the meaning of Article 16 of the Rome II Regulation, leading, in the main proceedings, to the exclusion of German law. I will return to this point later. [19]

34. That being said, I will now analyse the question referred for a preliminary ruling by the referring court.

B. The question referred

35. By its single question, the referring court asks, in essence, whether a provision of national law which provides, as a criterion for determining compensation for non-material damage suffered by close family members of a person who died as a result of a road traffic accident, for the application of a fundamental principle of the law of a Member State, such as the principle of fairness, may be regarded as an overriding mandatory provision within the meaning of Article 16 of the Rome II Regulation.

36. HUK-COBURG, the Czech and German Governments and the Commission consider that the question referred for a preliminary ruling should be answered in the negative. HUK-COBURG argues, in particular, that the application of a provision of national law designated by the Rome II Regulation may be refused under Article 16 of that regulation only if such application is manifestly incompatible with the public policy of the forum. The German Government submits that, in principle, the national law providing that compensation for non-material damage is to be determined on the basis of principles of fairness does not meet the conditions for the application of that provision. As for the Czech Government, referring to the judgment in *Da Silva Martins*, it points out that the approach according to which a provision of national law may be regarded as an overriding mandatory provision, within the meaning of Article 16 of the Rome II Regulation, for the sole reason that it is based on or refers to fundamental principles of that law does not correspond to the exceptional nature of overriding mandatory provisions and constitutes an easy means of circumventing the application of the law designated under that regulation. The Commission notes that the identification of an overriding mandatory provision, within the meaning of Article 16 of that regulation, must be in accordance with the criteria established by the Court, in particular, in the judgments in *Unamar* [20] and *Da Silva Martins*.

37. In order to give a useful answer to the question referred for a preliminary ruling, I will first make some brief remarks on the relationship between Article 4 and Article 16 of the Rome II Regulation (section 1). I will analyse, secondly, the Court's case-law concerning the concept of 'overriding mandatory provisions', within the meaning of Article 16 of that regulation (section 2), underlining, thirdly, the importance of taking into account sufficiently close links with the country of the *lex fori* in the application of that provision (section 3) before determining, fourthly and lastly, the criteria making it possible to classify the rules safeguarding individual rights and freedoms as 'overriding mandatory provisions', within the meaning of that provision (section 4).

[19] See point 65 of this Opinion.

[20] Judgment of 17 October 2013 (C-184/12, EU:C:2013:663) ('the judgment in *Unamar*').

1. Brief remarks on the relationship between Article 4 and Article 16 of the Rome II Regulation

38. As a preliminary point, I note that it is apparent from recital 1 of the Rome II Regulation that it contributes to maintaining and developing an area of freedom, security and justice. To that end, the regulation provides for two conflict-of-law rules: (i) the general rule of connection provided for in Article 4 thereof,[21] which appears under Chapter II, entitled 'Torts/Delicts'; and (ii) the rule introducing freedom of will provided for in Article 14 thereof, which appears under Chapter IV, entitled 'Freedom of choice'.[22] With regard to the first provision, I note that the wording of the general rule of connection laid down therein was guided by the requirements of legal certainty and by the commitment to reaching a compromise between the conflicting interests of the parties.[23] I will return to those objectives later.[24]

39. Article 16 of the Rome II Regulation, entitled 'Overriding mandatory provisions', which appears under Chapter V, entitled 'Common rules', provides that 'nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation'. Accordingly, while Article 4 of that regulation designates the law of the country in which the damage occurs (*lex loci damni*), Article 16 provides for a derogation from the application of the law designated by that criterion of connection to apply a mandatory provision of the law of the forum. That derogation from the conflict-of-law rule is, however, of an exceptional nature, which implies that its application must be duly justified, 'the observation [of that derogation being] necessary to safeguard political, social and economic organisation'.[25]

40. In that context, the legal question raised by the present case is therefore whether it is possible to reject the law which is applicable under Article 4 of the Rome II Regulation to a non-contractual obligation arising out of a tort/delict in order to apply, in accordance with Article 16 of that regulation, the provisions of the law of the forum 'in a situation where they are mandatory'.

41. The relationship between those two provisions by means of the definition of the concept of 'overriding mandatory provisions' is the subject of settled case-law of the Court, established by the judgments in *Unamar*, *ERGO Insurance and Gjensidige Baltic*[26] and *Da Silva Martins*.

[21] In that regard, recital 14 of the Rome II Regulation states that '[that] Regulation provides for a general rule but also for specific rules and, in certain provisions, for an "escape clause" which allows a departure from these rules where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country. This set of rules thus creates a flexible framework of conflict-of-law rules'. See, also, footnote 37 to this Opinion.

[22] So far as concerns Article 14 of the Rome II Regulation, see Pacuła, K., *Wybór prawa a ochrona osób trzecich na tle rozporządzenia Rzym II*, Wolters Kluwer, Warsaw, 2024.

[23] See Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ('Rome II') (COM(2003) 427 final), p. 12, and recital 16 of the Rome II Regulation. See, in particular, Francq, S., 'Le règlement Rome II concernant la loi applicable aux obligations non contractuelles. Entre droit communautaire et droit international privé', *Journal de droit européen*, 2008, pp. 289 to 296.

[24] See, in that regard, point 47 of this Opinion.

[25] See Francescakis, P., 'Quelques précisions sur les lois d'application immédiate et leurs rapports avec les règles de conflits de lois', *Revue critique de droit international privé*, 1966, p. 1 et seq. For a contrary view on overriding mandatory provisions, see, in particular, Heuzé, V., 'Un avatar du pragmatisme juridique: la théorie des lois de police', *Revue critique de droit international privé*, No 1, 2020, pp. 31 to 60.

[26] Judgment of 21 January 2016 (C-359/14 and C-475/14, EU:C:2016:40) ('the judgment in *ERGO Insurance and Gjensidige Baltic*').

2. The Court's case-law concerning the definition of 'overriding mandatory provisions', within the meaning of Article 16 of the Rome II Regulation

42. In the case giving rise to the judgment in *ERGO Insurance and Gjensidige Baltic*, the referring courts asked, inter alia, how to interpret the Rome I and Rome II Regulations in order to determine the law or laws applicable to an action for indemnity brought by the insurer of a tractor unit, which compensated the victim of an accident caused by the driver of that vehicle against the insurer of the trailer which, at the time of the accident, was coupled to that vehicle. In that context, the Court pointed out that, as regards the respective scopes of the Rome I and Rome II Regulations, the concepts of 'contractual obligation' and 'non-contractual obligation' set out therein must be interpreted independently, by reference to the scheme and purpose of those regulations. As is clear from recital 7 of those regulations, account should also be taken of the *aim of consistency* in the reciprocal application of those regulations. [27]

43. In the judgment in *Da Silva Martins* [28] in which the Court interpreted Article 16 of the Rome II Regulation for the first time, it first of all held, pursuant to paragraph 43 of the judgment in *ERGO Insurance and Gjensidige Baltic*, that the requirement for consistency in the application of the Rome I and Rome II Regulations supports the harmonisation wherever possible of the interpretation of the *concepts used by those two regulations which are, in functional terms, identical*. It must therefore be held that, irrespective of the fact that certain language versions of the Rome II Regulation use different terminology compared to the Rome I Regulation, 'dispositions impératives dérogatoires' ('overriding mandatory provisions'), within the meaning of Article 16 of the Rome II Regulation, falls within the definition of 'lois de police' ('overriding mandatory provisions'), within the meaning of Article 9 of the Rome I Regulation, so that the Court's interpretation of the latter concept also applies to 'dispositions impératives dérogatoires' ('overriding mandatory provisions') within the meaning of Article 16 of the Rome II Regulation. [29] I note that Article 9(1) of the Rome I Regulation defines overriding mandatory provisions as 'provisions the respect for which is regarded as crucial by a country for safeguarding its public

[27] Judgment in *ERGO Insurance and Gjensidige Baltic* (paragraph 43). Recital 7 of the Rome II Regulation states that 'the substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [(OJ 2001 L 12, p. 1; 'the Brussels I Regulation')] and the instruments dealing with the law applicable to contractual obligations'. I take the view that recital 7 of the Rome I Regulation and recital 7 of the Rome II Regulation constitute the basis of the notion according to which the concepts used by the EU legislature in order to determine the scope of those two regulations, of the Brussels I Regulation (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 2012 L 351, p. 1) (Brussels IA) and the provisions thereof, should be interpreted consistently; see Szpunar, M., 'Droit international privé de l'Union: cohérence des champs d'application et/ou des solutions?', *Revue critique de droit international privé*, 2018, p. 573.

[28] In the case giving rise to that judgment, the dispute in the main proceedings was between the Portuguese victim and a Spanish insurance company concerning the determination of the law applicable to an obligation to pay compensation arising as the result of a car accident that occurred in Spain. Spanish legislation provided for a limitation period of one year, whereas Portuguese legislation provided for a limitation period of three years. The referring court sought clarification, in particular, as to whether Portuguese legislation 'transposing [Directive 2009/103] into national law – which provides that the law of the contracting State … in which the accident occurred is replaced by Portuguese law "where it provides better cover" – is mandatory, within the meaning of Article 16 of the Rome II Regulation'. Judgment in *Da Silva Martins* (paragraph 21).

[29] Judgment in *Da Silva Martins* (paragraph 28). The absence of a definition of 'overriding mandatory provisions' in the Rome II Regulation can most probably be explained by the fact that the wording of Article 16 of that regulation was based on Article 7(2) of the Convention on the Law Applicable to Contractual Obligations opened for signature in Rome on 19 June 1980 (OJ 1980 L 266, p. 1) ('the Rome Convention'), since the Rome I Regulation was adopted after the Rome II Regulation. That gap was filled shortly after by Article 9 of the Rome I Regulation; see, in that regard, Ho-Dac, M., 'L'arrêt da Silva Martins de la Cour de justice de l'Union européenne, expression des "rapports de méthodes" dans l'ordre juridique européen', *Revue trimestrielle de droit européen*, No 4, 2019, pp. 869 to 882, in particular paragraph 10. Certain academic commentators have described as 'awkward' the expression 'dispositions impératives dérogatoires' used in Article 16 of the Rome II Regulation in the French-language version instead of the traditional formulation 'lois de police' used in recital 32 of that regulation; see Francq, S. and Jault-Seseke, F., 'Les lois de police, une approche de droit comparé', *Le règlement communautaire Rome I et le choix de lois dans les contrats internationaux*, Corneloup and Joubert (ed), Lexis Nexis Litec, Paris, 2011, pp. 357 to 393, in particular p. 360.

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'.[30]

44. Referring to the judgment in *Unamar*,[31] the Court pointed out, secondly, that, within the framework of the Rome Convention, it had already noted that the exception relating to the existence of a 'mandatory rule' within the meaning of the legislation of the Member State concerned must be interpreted strictly.[32] In particular, with regard to that interpretation, the Court held that, in order to identify an 'overriding mandatory provision', within the meaning of Article 16 of the Rome II Regulation, the referring court must find, on the basis of a *detailed analysis* of the wording, general scheme, objectives and the context in which that provision was adopted, that it is of such importance in the national legal order that it justifies a departure from the applicable law, designated pursuant to Article 4 of that regulation.[33] More specifically, the referring court must identify *particularly important reasons*, such as a manifest infringement of the right to an effective remedy and to effective judicial protection arising from the application of the law designated as applicable under Article 4 of the Rome II Regulation.[34]

45. Consequently, the Court held that a national provision, such as that at issue in that case, which provides that the limitation period for actions seeking compensation for damage resulting from an accident is three years, cannot be considered to be an overriding mandatory provision, within the meaning of Article 16 of the Rome II Regulation, unless the court seised finds, on the basis of a detailed analysis of the wording, general scheme, objectives and the context in which that provision was adopted, that it is of such importance in the national legal order that it justifies a departure from the applicable law, designated pursuant to Article 4 of that regulation.[35]

46. That said, it should be noted that, to the extent that, as I have already stated, the application of overriding mandatory provisions, within the meaning of Article 16 of the Rome II Regulation, has the effect of departing from the application of the applicable law under that regulation by derogating from the conflict-of-law rules provided for therein, the national court must have recourse to overriding mandatory provisions, within the meaning of that provision, only as a last resort.

30 As I have already noted in my Opinion in *Nikiforidis* (C-135/15, EU:C:2016:281, point 71), that definition draws inspiration from the wording used by the Court in its judgment of 23 November 1999, *Arblade and Others* (C-369/96 and C-376/96, EU:C:1999:575, paragraph 30), where the Court considered provisions of Belgian labour law which under Belgian law were regarded as 'public-order legislation'.

31 See paragraph 49 of that judgment. By way of reminder, the Court held in that judgment that Article 3 and Article 7(2) of the Rome Convention must be interpreted as meaning that the law of a Member State of the European Union which meets the minimum protection requirements laid down by Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (OJ 1986 L 382, p. 17) and which has been chosen by the parties to a commercial agency contract may be rejected by the court of another Member State before which the case has been brought in favour of the law of the forum, owing to the mandatory nature, in the legal order of that Member State, of the rules governing the situation of self-employed commercial agents only if the court before which the case has been brought finds, on the basis of a detailed assessment, that, in the course of that transposition, the legislature of the State of the forum held it to be crucial, in the legal order concerned, to grant the commercial agent *protection going beyond that provided for by that directive*, taking account in that regard of the nature and of the objective of such mandatory provisions (paragraph 52 and operative part).

32 Judgment in *Da Silva Martins* (paragraph 29).

33 Judgment in *Da Silva Martins* (paragraph 31).

34 Judgment in *Da Silva Martins* (paragraph 34).

35 Judgment in *Da Silva Martins* (paragraph 35 and operative part).

47. In its case-law, the Court has held that, as is apparent from recitals 6,[36] 14[37] and 16[38] of the Rome II Regulation, the objective pursued by that regulation consists, inter alia, in ensuring *certainty as to the law applicable* irrespective of the country in which the action is brought, improving the *foreseeability of court decisions* and ensuring a reasonable balance between the interests of the person claimed to be liable and those of the person who has sustained damage.[39]

48. In my opinion, the Court has implicitly accepted in its case-law, with regard to the definition of 'overriding mandatory provisions', within the meaning of Article 16 of the Rome II Regulation, that classifying a national provision as an 'overriding mandatory provision' within the meaning of Article 16 is not automatic, but requires an *assessment of the specific situation* which leads to the application of the law of the forum for being regarded as crucial by a country for safeguarding its public interests.[40]

49. In that regard, not only must it result from a detailed analysis that the application of overriding mandatory provisions is necessary in the legal order concerned, but such application must also be *the most effective way of achieving the objective pursued*, namely to protect State interests. If that is not the case, and in so far as the public interests of the State may be as equally or even better protected by means of applying the law generally applicably to non-contractual obligations under Article 4 of the Rome II Regulation, the referring court should refrain from applying the derogation mechanism provided for in Article 16 of that regulation.[41]

50. Furthermore, I note an important argument for the application of Article 16 of the Rome II Regulation which is not clear from the Court's case-law, namely the importance of the existence of sufficiently close links with the country of the *lex fori*. Some rules cannot be classified a priori as 'overriding mandatory provisions', in so far as that classification depends, in some cases, on the factual circumstances resulting in sufficiently close links with the country of the forum.

3. The existence of sufficiently close links with the country of the lex fori

51. As is known, it is apparent from a reading of Article 16 of the Rome II Regulation that the EU legislature has not mentioned other conditions which should be met for the court seised to be able to apply the mandatory provisions of the law of the forum by derogating from the generally applicable law. In particular, there is no mention of the need to establish that the situation concerned presents a close link with the country of the forum, a link which would justify the

[36] Recital 6 of the Rome II Regulation states that 'the proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought'.

[37] Recital 14 of the Rome II Regulation states that 'the requirement of legal certainty and the need to do justice in individual cases are essential elements of an area of justice'. See, also, footnote 21 to this Opinion.

[38] Recital 16 of the Rome II Regulation states that 'uniform rules should enhance the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage. A connection with the country where the direct damage occurred (*lex loci damni*) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability'.

[39] Judgments of 10 December 2015, *Lazar* (C-350/14, EU:C:2015:802, paragraph 29), and of 17 May 2023, *Fonds de Garantie des Victimes des Actes de Terrorisme et d'Autres Infractions (FGTI)* (C-264/22, EU:C:2023:417, paragraph 30).

[40] On the importance for the court deciding a particular case to assess the specific situation, see my Opinion in *Nikiforidis* (C-135/15, EU:C:2016:281, point 72).

[41] Bonomi, A., 'Article 9', *Commentary on the Rome I Regulation*, Magnus, U. and Mankowski, P. (ed.), Verlag Dr. Otto Schmidt, Cologne, 2017, Vol. 22, pp. 599 to 629, in particular p. 626, paragraph 85.

exceptional application of such provisions.[42] However, as some legal writers have noted, that silence must not be interpreted as meaning that overriding mandatory provisions can be applied without taking account of the existence of a close link with the country of the *lex fori*.[43]

52. Taking into account the fact that the application of mandatory provisions derogates from the application of the generally applicable law under the Rome II Regulation, those provisions are not automatically applicable, and the national courts must first of all assess whether the situation in question has close links with the country of the forum.[44] In other words, and especially with regard to provisions which do not exclusively safeguard the public or state interest, the court may have recourse to Article 16 of that regulation only if the Member State of the forum can justify the overriding interest to govern that situation.[45]

53. Furthermore, the requirement of a close link helps to prevent *forum shopping*. That practice threatens to manifest itself especially in the circumstances at issue in the case giving rise to the judgment in *Inkreal*.[46]

54. It follows that it is not possible to qualify *in abstracto* rules as 'overriding mandatory provisions' or to say, also *in abstracto*, whether, in the present case, recourse must be had to Article 16 of the Rome II Regulation. In particular, for the purposes of applying that provision, it must follow from the circumstances taken as a whole that the situation in question presents sufficiently close links with the country of the *lex fori*.

55. That said, I still need to clarify the criteria making it possible to classify the rules safeguarding individual rights and freedoms as 'overriding mandatory provisions', within the meaning of Article 16 of the Rome II Regulation, read in conjunction with recital 32 thereof.

4. The criteria making it possible to classify the rules safeguarding individual rights and freedoms as 'overriding mandatory provisions', within the meaning of Article 16 of the Rome II Regulation

56. I note, in the first place, that the definition of 'dispositions impératives dérogatoires' (overriding mandatory provisions), within the meaning of Article 16 of the Rome II Regulation, as resulting from the definition of 'lois de police' (overriding mandatory provisions), within the meaning of Article 9 of the Rome I Regulation and the settled case-law of the Court set out above,[47] must be read in conjunction with recital 32 of the Rome II Regulation. That recital

[42] See point 39 of this Opinion.

[43] Wautelet, P., 'Article 16', *Commentary on the Rome II Regulation*, Magnus, U. and Mankowski, P. (ed.), Verlag Dr. Otto Schmidt, Cologne, 2019, Vol. 3, pp. 549 to 566, in particular paragraphs 48 and 49.

[44] See point 48 of this Opinion.

[45] On the role of proximity in the application of overriding mandatory provisions and on the case-law cited in that regard, see Nuyts, A., 'L'application des lois de police dans l'espace (Réflexions au départ du droit belge de la distribution commerciale et du droit communautaire)', *Revue critique de droit international privé*, 1999, p. 50; Bonomi, A., 'Overriding Mandatory Provisions in the Rome I Regulation on the Law Applicable to Contracts', *Yearbook of Private International Law*, Vol. X, SELP, 2008, p. 291 et seq.; and Pacuła, K., 'Przepisy wymuszające swoje zastosowanie jako instrument ochrony „strony słabszej" umowy ubezpieczenia', *Problemy Prawa Prywatnego Międzynarodowego*, Vol. 15, 2014, p. 38 et seq.

[46] As regards whether the existence of a jurisdiction clause constitutes, in itself, an international element sufficient to result in the application of Article 25(1) of the Brussels IA Regulation on prorogation of jurisdiction, see judgment of 8 February 2024, *Inkreal* (C-566/22, EU:C:2024:123, paragraph 39 and the operative part). In that judgment, the Court held that Article 25(1) of the Brussels I bis Regulation applies to an agreement conferring jurisdiction by which the parties to a contract established in the same Member State agree on the jurisdiction of courts of another Member State to settle disputes arising out of that contract, even though that contract has no other connection with that other Member State.

[47] See point 38 et seq. of this Opinion.

provides, inter alia, that 'considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions'. [48]

57. In my view, it follows from the combined reading of that case-law and of recital 32 of the Rome II Regulation that the courts of the Member States may have recourse to the derogation mechanism provided for in Article 16 of that regulation in 'exceptional circumstances' where the application of the *lex fori* is found to be 'crucial' on the basis of 'considerations of public interest'. In other words, considerations of public interest affect the application of provisions of the *lex fori* 'compliance with which is held to be crucial' by the national courts. In particular, recital 32 of that regulation states that 'the application of a provision of the law designated by [that regulation] which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (*ordre public*) of the forum'.

58. In the second place, I note that the protection envisaged by Article 16 of the Rome II Regulation does not automatically concern all public interests of a State. To fall within the scope of that provision, those interests must be so important that they affect, in particular, the political, social or economic organisation of the State concerned. [49] It is therefore important to determine whether, in the context of recital 32 of that regulation, the reference made by the EU legislature to considerations of public interest must be interpreted strictly or whether it also covers national provisions protecting individual interests. That question is the subject of intense debate between legal writers in so far as the distinction between the protection of public interests and that of individual interests is not easy to make. [50] Clarifying that distinction will make a decisive contribution to the autonomous interpretation of 'overriding mandatory provisions', within the meaning of Article 16 of that regulation. The possibility of also safeguarding individual interests should be taken into account when interpreting Article 16 of that regulation in the light of recital 32 thereof.

59. I take the view that there are two arguments supporting that interpretation.

60. A first argument is linked to the interplay of collective and individual interests. Thus, in the field of tort law, the rules that a Member State establishes in order to protect a category of persons who have sustained damage, by modifying, in particular, the burden of proof or by establishing a minimum threshold for compensation, could have the principal objective to restore the balance between the competing interests of private parties. Indirectly, they could therefore also contribute to safeguarding the social and economic order of the Member State by reducing the impact of accidents on public resources. [51]

[48] See, also, recital 37 of the Rome I Regulation. With regard to the strong correlation between overriding mandatory provisions and 'protecting public policy', see my Opinion in *Nikiforidis* (C-135/15, EU:C:2016:281, point 68 et seq.).

[49] Bonomi, A., 'Article 9', *Commentary on the Rome I Regulation*, op. cit., p. 626, paragraph 84.

[50] So far as concerns the debate among legal commentators over the interpretation of recital 32 of the Rome II Regulation, see, inter alia, Wautelet, P., 'Article 16', *Commentary on the Rome II Regulation*, op. cit., p. 554, paragraph 15; Francq, S. and Jault-Seseke, F., 'Les lois de police, une approche de droit comparé', *Le règlement communautaire Rome I et le choix de loi dans les contrats internationaux*, op. cit., pp. 360 to 371; and Pailler, L., 'Conflit de lois: CJUE, 6e ch., 31 janv. 2019, aff. C-149/18, Agostinho da Silva Martins c/Dekra Claims Services Portugal SA.', *Journal du droit international (Clunet)*, No 3, 2019, pp. 890 to 894.

[51] Wautelet, P., 'Article 16', *Commentary on the Rome II Regulation*, op. cit., p. 554, paragraphs 15 and 16.

61. A second argument to the same effect is connected with the observation that recital 32 of the Rome II Regulation refers, in particular, to provisions relating to the assessment of compensation which covers, consequently, the possibility that such compensation may be due between certain categories of natural persons. In that regard, I must point out that, even though that recital states that the application of such provisions may be regarded as being 'contrary to the public policy of the forum', without also making reference to the mechanism of overriding mandatory provisions, the same applies, in my opinion, to the latter mechanism.

62. Accordingly, I take the view that provisions aimed, above all, at safeguarding individual rights and freedoms may be classified as 'overriding', within the meaning of Article 16 of the Rome II Regulation, if, apart from the fact that such provisions reconcile individual interests, *the existence of a sufficient link with public interests held to be crucial in the legal order of the State concerned* is established.

63. In that regard, in the third place, I take the view, like the German Government, that the special protection conferred by an overriding mandatory provision should appear to be a necessary expression of fundamental legal principles.

64. It is indeed true that the rules laid down by the States to safeguard certain categories of individual rights, such as the right to claim compensation for victims of criminal offences or road traffic accidents, could be assigned, within a given national legal order, such importance that they are considered fundamental legal principles, which includes the principle of fairness.

65. In the present case, the referring court notes that the principle of fair compensation set out in Article 52 of the ZZD constitutes a fundamental principle of Bulgarian law, the principle of fairness being regarded as public policy in that State. As I have already noted, that court found, however, that the case-law of the Bulgarian courts is contradictory as to whether Article 52 of the ZZD – which would imply that not only the harm that resulted in pathological damage, but all the suffering endured, should be covered by such compensation – constitutes an overriding mandatory provision within the meaning of Article 16 of the Rome II Regulation, leading, in the dispute in the main proceedings, to the exclusion of German law.[52] The fact that the case-law of the Bulgarian courts is contradictory, as the referring court notes, leads me, at first sight to doubt the fact that the principle of fairness is a fundamental principle of the Bulgarian legal order. It is nevertheless for that court to verify it.

66. In any event, I should emphasise, in the fourth and last place, that, in the application of Article 16 of the Rome II Regulation, read in conjunction with recital 32 thereof, the possibility of having recourse to overriding mandatory provisions in order to safeguard both collective and individual interests must be viewed in the context of substantive EU law, which may constitute the applicable law under Article 4 of that regulation.

67. In the judgment in *HUK-COBURG I*, the Court considered that Directive 2009/103 does not preclude, in principle, national legislation imposing binding criteria for the determination of the non-material damage which may be the subject of compensation. It thus held that that directive does not preclude national legislation which makes compensation, *by an insurer against civil liability* in respect of the use of motor vehicles, for non-material damage suffered by close family members of victims of road traffic accidents subject to the condition that that harm entailed pathological damage to the health of such close family members.[53] Consequently, the Court

[52] See point 33 of this Opinion.

[53] Judgment in *HUK-COBURG I* (paragraph 51 and the operative part).

declared that national legislation applicable under Article 4 of the Rome II Regulation – a national provision transposing Directive 2009/103 into national law – [54] is consistent with that directive on the condition that it provides for fair compensation for non-material damage.

68. In such circumstances, where Directive 2009/103 provides for minimum amounts covered by compulsory insurance, taking into account the *lex fori*, in particular in cases where it provides for higher amounts of cover, may be considered only if the protection which is regarded as crucial for safeguarding the public interests of the State of the forum, within the meaning of Article 16 of the Rome II Regulation, is considered, within the legal order of that State, *as going beyond the minimum standards ensured by EU law*, irrespective of what is provided for by the legislation of other Member States.

69. However, as is also apparent from the judgment in *HUK-COBURG I*, *the obligation to provide* insurance cover against civil liability for damage caused to third parties by motor vehicles is distinct from the extent of the compensation to be afforded to them on the basis of the civil liability of the insured person. Whereas the former is defined and guaranteed by EU legislation, the latter is, essentially, governed by national law. The Court specifies that it is apparent from the aim of Directive 2009/103 and its wording that, like the directives which it codifies, it does not seek to harmonise the rules of the Member States governing civil liability and that, as EU law currently stands, the Member States remain free to determine the rules of civil liability applicable to road accidents. [55] Consequently, and having regard in particular to Article 1(2) of Directive 2009/103, the Court considered that, as EU law currently stands, the Member States remain, in principle, free to determine, in particular, what damage caused by motor vehicles must be compensated, the extent of the right to compensation and the persons who must be entitled to compensation. [56]

70. In the present case, the law which is applicable under Article 4 of the Rome II Regulation, and which would be set aside in favour of the law of the forum, applicable under Article 16 of that regulation, is not covered by substantive civil liability law to which Directive 2009/103 refers. [57]

V. Conclusion

71. In the light of the foregoing considerations, I propose that the Court should answer the question referred by the Varhoven kasatsionen sad (Supreme Court of Cassation, Bulgaria) as follows:

Article 16 of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)

[54] As I have already noted, the national legislation at issue in that case was the same as that at issue in the present case.

[55] Judgment in *HUK-COBURG I* (paragraphs 35 and 36). It is apparent, in particular, from paragraph 48 of that judgment that Directive 2009/103 does not require the Member States to choose a system of civil liability in particular in order to determine the extent of the victim's right to compensation on the basis of the civil liability of the insured person.

[56] Judgment in *HUK-COBURG I* (paragraph 37).

[57] In the hypothetical event that the legislation applicable under Article 4 of the Rome II Regulation is covered by Directive 2009/103, it should be noted, in order to reject its application in favour of the *lex fori*, owing to the mandatory nature, in the legal order of the forum, of the provisions thereof, on the basis of a detailed assessment, that, in the course of the transposition of Directive 2009/103, the legislature of the State of the forum held it to be crucial, in the legal order concerned, to grant close family members of a victim of a road traffic accident 'protection going beyond that provided for by the directive, taking account in that regard of the nature and of the objective of such mandatory provisions'. See, to that effect, judgments in *Unamar* (paragraphs 50 to 52) and *Da Silva Martins* (paragraph 30).

must be interpreted as precluding a national provision, such as that at issue in the main proceedings, which provides for the application of a fundamental principle of the law of a Member State, such as the principle of fairness, in the determination of compensation for non-material damage suffered by close family members of a person who died in a road traffic accident, from being regarded as an overriding mandatory provision within the meaning of that article, unless the court seised finds, on the basis of the existence of sufficiently close links with the country of the forum and a detailed analysis of the terms, general scheme, objective and context of the adoption of that directive, that it is of such importance in the national legal order that it justifies a departure from the applicable law designated pursuant to Article 4 of that regulation.