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# **Choice of the applicable law and equal treatment in the European Union**

by

Rufat Babayev

## **Abstract**

This thesis seeks to provide a different perspective to the study of the scope and functioning of the principle of equal treatment on grounds of nationality and movement laid down in Article 18 TFEU and in the Treaty free movement provisions. It examines the scope and functioning of the principle of equal treatment in the context of the determination of the law applicable to a cross-border (or inter-State) relationship. In particular, the question this thesis addresses is whether and, if yes, how the principle of equal treatment affects the choice of the law governing cross-border contractual, non-contractual or other civil law relationships in the European Union.

In this respect, it is demonstrated that the principle of equal treatment functions as an additional check on the operation of, on the one hand, the national substantive law applicable pursuant to a national or Union choice-of-law rule or chosen by private parties to a contract and, on the other hand, national and Union choice-of-law rules themselves. The national substantive law governing a cross-border relationship falls within the scope of the principle of equal treatment and is required to comply with it, irrespective of the fact that it is applicable in accordance with a choice-of-law rule or a choice-of-law clause agreed by private parties. Similarly, regardless of their specific nature and objective, national and Union choice-of-law rules also come within the scope of the principle of equal treatment.

However, it is emphasised that the functioning of the principle of equal treatment is not comparable to that of a choice-of-law rule. The requirement that only non-discriminatory rules can be applied in the Union under it does not, even indirectly, determine the applicable law in the sense understood from a choice-of-law perspective. This is because, unlike a choice-of-law rule, the principle of equal treatment does not contain even an implicit reference to a particular national law that always applies in light of it.

# **Choice of the applicable law and equal treatment in the European Union**

by

Rufat Babayev

*Submitted in accordance with the requirements for the degree of Doctor of  
Philosophy*

Durham University

Durham Law School

2012

*Dedicated to my dear parents  
for their love, never-ending support  
and encouragement*

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Any errors or inadequacies that may remain in this work are my responsibility alone.

## Introduction

Those who exercise the Treaty free movement rights can find themselves involved in contractual, non-contractual or other civil law relationships that are linked to the law of two or more Member States. Such an inter-State relationship between private parties or, in the jargon of EU Law, a cross-border relationship between private parties would fall within the scope of the law of each Member State to which it is linked. This, in turn, raises the question of to which national legal system the private cross-border relationship at issue would be subject. Choice-of-law rules are rules that aim to solve this problem. Based on nationality or territoriality as a connecting factor, choice-of-law rules determine the law governing cross-border relationships. In addition, private parties engaged in a cross-border relationship are free to choose the national law that would regulate, for instance, their contractual and non-contractual rights and obligations.

Due to its inter-State or cross-border nature, such a relationship would also come within the scope of the principle of equal treatment on grounds of nationality and movement laid down in Article 18 TFEU and in the Treaty free movement provisions (hereafter ‘principle of equal treatment’).<sup>1</sup> In light of the principle of equal treatment, any rules applied in the context of a cross-border relationship in the Union must be non-discriminatory both on grounds of nationality and movement. Considering the far-reaching scope of the principle of equal treatment,

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<sup>1</sup> Unless stated otherwise, the term ‘principle of equal treatment’ will be used in order to refer to the principle of equal treatment (or non-discrimination principle) enshrined in Article 18 TFEU and in the Treaty free movement provisions. This term seems to better reflect the fact that the principle of equal treatment under these Treaty provisions is not confined to discrimination on grounds of nationality, but also deals with national rules that put at a disadvantage those who have exercised the Treaty free movement rights.

the question this thesis aims to address is whether and, if yes, how it affects the determination of the law applicable to cross-border contractual, non-contractual or other civil law relationships in the Union.

### **Setting the problem**

To begin with, both the principle of equal treatment and choice-of-law rules deal with cross-border relationships.<sup>2</sup> They both have an impact on what rules are applicable in the context of a cross-border relationship. In particular, in light of the principle of equal treatment under Article 18 TFEU and the Treaty free movement provisions, applicable rules must not discriminate on grounds of nationality or put at a disadvantage those who have exercised the Treaty free movement rights.<sup>3</sup> Unless there are objective justifications, rules cannot be applied, if they produce such effects. From a choice-of-law perspective, in turn, a cross-border relationship could theoretically be subject to each of the national legal systems it is linked to. However, since their simultaneous application is often impossible due to substantive differences between them,<sup>4</sup> choice-of-law rules determine what national legislation governs the cross-border relationship at issue.

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<sup>2</sup> Ulrich Klinke, 'European Company Law and the ECJ: The Court's Judgments in the Years 2001 to 2004' (2005) 2 *European Company and Financial Law Review* 270, 272-273.

<sup>3</sup> The principle of equal treatment under Article 18 TFEU and the Treaty free movement provisions also prohibits discrimination on grounds of movement. In this respect, see eg Case C-419/92 *Ingetraut Scholz v Opera Universitaria di Cagliari and Cinzia Porcedda* [1994] ECR I-505, para 12; Case C-107/94 *P. H. Asscher v Staatssecretaris van Financiën* [1996] ECR I-3089, para 32; Case C-224/98 *Marie-Nathalie D'Hoop v Office national de l'emploi* [2002] ECR I-6191, para 30; Case C-464/02 *Commission v Kingdom of Denmark* [2005] ECR I-7929, para 50; Joined Cases C-151/04 and C-152/04 *Criminal proceedings against Claude Nadin and Others* [2005] ECR I-11203, para 34; Case C-192/05 *K. Tas-Hagen and R.A. Tas v Raadskamer WUBO van de Pensioen- en Uitkeringsraad* [2006] ECR I-10451, para 31; Case C-544/07 *Uwe Rüffler v Dyrektor Izby Skarbowej we Wrocławiu Osrodek Zamiejscowy w Wałbrzychu* [2009] ECR I-3389, para 73.

<sup>4</sup> Marc Fallon and Johan Meeusen, 'Private International Law in the European Union and the Exception of Mutual Recognition' (2002) 4 *Yearbook of Private International Law* 37, 46.

Notwithstanding the fact that both the principle of equal treatment and choice-of-law rules promote private activities across borders, they differ substantially, particularly in terms of the objectives they pursue.<sup>5</sup> Prior to the introduction of Union citizenship, the principle of equal treatment under Article 18 TFEU and the Treaty free movement provisions mainly aimed to ensure free movement of those engaged in an economic activity. In this way, the principle of equal treatment supplemented the objective of unifying the fragmented national markets into a single market,<sup>6</sup> in which economic factors such as goods, persons and capital could move freely across national borders. However, with the introduction of Union citizenship and the right to move and reside under Article 21 TFEU, the equal treatment requirement enshrined in Article 18 TFEU is no longer confined to those who are engaged in an economic activity, but also applies to economically inactive Union citizens.<sup>7</sup> Thus, the principle of equal treatment under Article 18 TFEU also ensures free movement of economically inactive Union citizens.

In contrast, choice-of-law rules aim to guarantee ‘an efficient and just solution’ for a *conflict* of national substantive laws.<sup>8</sup> By doing so, choice-of-law rules are intended to provide certainty over the applicable law and predictability of litigation, which are crucial for private parties engaged in cross-border

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<sup>5</sup> Ulrich Klinke (n 2) 273.

<sup>6</sup> Gillian More, ‘The principle of equal treatment: from market unifier to fundamental right’ in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EULaw* (Oxford University Press 1999) 520.

<sup>7</sup> See eg Case C-85/96 *María Martínez Sala v Freistaat Bayern* [1998] ECR I-2691; Case C-184/99 *Rudy Grzelczyk v Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve* [2001] ECR I-6193; Case C-209/03 *The Queen (on the application of Dany Bidar) v London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECR I-2119.

<sup>8</sup> Mireille van Eechoud, *Choice of Law in copyright and related rights: Alternatives to the Lex Protectionis* (Kluwer Law International 2003) 16.

contractual, non-contractual or other civil law relationships. This aim, however, better ascribes to unified choice-of-law rules that are enshrined in Union secondary legislation, because of the differences existing between national choice-of-law rules. The application of divergent national choice-of-law rules could lead to the substance of a cross-border relationship to be regulated according to divergent national substantive rules. In comparison, Union choice-of-law rules guarantee that the same national substantive law is applied to a cross-border relationship, irrespective of the national court seised with it.

A possible conflict between the principle of equal treatment and choice-of-law rules could not be excluded, considering the fact that they both deal with cross-border relationships, but have divergent objectives. All rules applicable in the context of a cross-border relationship are subject to scrutiny under the principle of equal treatment and cannot be applied if they impose discriminatory treatment, unless there are objective justifications for doing so. A rule is caught because of its effect on free movement in the Union regardless of its nature, origin or domestic classification.<sup>9</sup> In light of this, the national substantive law *designated* as applicable as regards a given cross-border relationship by a choice-of-law rule might be subject to scrutiny under the principle of equal treatment. In this respect, it is necessary to clarify whether the fact that the national substantive law at issue is applied pursuant to a national or Union choice-of-law rule could have any effect on the scrutiny of that law under the principle of equal treatment. Furthermore, it is possible that the *designated* national substantive law *per se* is not

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<sup>9</sup> See Case C-20/92 *Anthony Hubbard (Testamentvollstrecker) v Peter Hamburger* [1993] ECR I-3777, para 19; Case 82/71 *Ministère public de Italian Republic v Società agricola industria latter (SAIL)* [1972] ECR I-119, para 5. This also finds support in Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629, para 17.

discriminatory, but its mere application to a cross-border relationship pursuant to a choice-of-law rule results in an outcome contrary to the principle of equal treatment. In this context, two issues need to be addressed. First, one could query whether the specific nature of choice-of-law rules, i.e. the fact that they only *designate* the applicable law without dealing with any matters of substance, could play any role in the scrutiny of these rules under the principle of equal treatment. Second, more importantly, since national or Union choice-of-law rules only *designate* the law applicable to cross-border relationships in the Union, it is questionable whether they could also be caught by the principle of equal treatment.

In addition to national and Union choice-of-law rules that determine the applicable law, private parties are free to choose the law governing the cross-border contractual, non-contractual or other civil law relationships they are involved in. This freedom, which is also referred to as the principle of party autonomy, is inherently linked to the principle of contractual freedom. The principle of party autonomy is enshrined not only in national law, but also in Union secondary legislation. In particular, under the Rome I, Rome II and Rome III Regulations,<sup>10</sup> private parties can choose the national law regulating, for instance, their contractual and non-contractual obligations as well as matters related to divorce and separation arising in a cross-border context.

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<sup>10</sup> Regulation 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ('Rome II Regulation') [2007] OJ L 199/40; Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ('Rome I Regulation') [2008] OJ L 177/6; Regulation 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L7/1.

Taking into account the fact that the principle of party autonomy is firmly established in the Union legal order, one could question whether it could have any effect on the scrutiny under the principle of equal treatment of the law chosen by private parties to a cross-border relationship. The proponents of the ordo-liberal ideas on the European integration process point out that the Treaty free movement provisions guarantee and extend contractual freedom and the freedom to choose the governing law across borders. On this basis, they argue that scrutiny under the Treaty free movement provisions vary depending on the extent of the discretion available to private parties to a cross-border contractual relationship. In particular, according to them, only national rules that are mandatory in an inter-State context, the scope of which private parties cannot escape by choosing the law of another Member State as the governing law, could be caught by the Treaty free movement provisions. Other rules that are not mandatory in an inter-State context and private parties can escape their scope by opting for the law of another Member State are less likely to be caught by the Treaty free movement provisions.

The exercise of the Treaty free movement rights is certainly interlinked with the exercise of contractual freedom and the freedom to choose the governing law. It is hardly possible, for instance, to supply goods or provide services without the freedom to decide whether to enter into a contractual relationship or agree specific contractual clauses and terms. Any limitations of contractual freedom and the freedom to choose the governing law could impede cross-border activities in the Union. In this regard, however, it is questionable whether the principle of party autonomy, in particular, the discretion available to private parties to avoid the

scope of certain national rules by choosing the governing law, could affect the scrutiny of these rules under the principle of equal treatment.

In the present context, on a more general and theoretical note, one could also wonder whether the effect of the principle of equal treatment can go beyond than merely subjecting applicable substantive or choice-of-law rules to scrutiny.<sup>11</sup> In particular, the question, here, is whether the principle of equal treatment under Article 18 TFEU and Treaty free movement provisions could be understood as an implicit rule that itself *designates* the national law applicable a cross-border relationship in the Union. In this respect, it is necessary to mention that due to their aim in promoting cross-border activities across borders the possible effect of the Treaty free movement provisions on the choice of the applicable law has been subject to a debate in the academic literature.<sup>12</sup> Among others, for instance, Michaels<sup>13</sup> has examined the country of origin principle in light of the vested right theory.<sup>14</sup> The author is of the opinion that ‘the country-of-origin principle is a

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<sup>11</sup> Here, by the term ‘applicable substantive rules’ I also refer to the law chosen by private parties in the context of cross-border relationships.

<sup>12</sup> See Apostolos Gkoutzinis, ‘Free Movement of Services in the EC Treaty and the Law of Contractual Obligations Relating to Banking and Financial Services’ (2004) 41 *Common Market Law Review* 119; Michel Tison, ‘Unravelling the General Good Exception: The Case of Financial Services’ in Mads Andenas and Wulf-Henning Roth, *Services and Free Movement in EU Law* (Oxford University Press 2002); Ralf Michaels, ‘EU Law as Private International Law? Reconceptualising the Country-of-Origin Principle as Vested-Rights Theory’ (2006) 2 *Journal of Private International Law* 195; Jona Israël, *European Cross-Border Insolvency Regulation: a Study of Regulation 1346/2000 on Insolvency Proceedings in light of a Paradigm of Co-operation and a Comitatus Europaea* (Intersentia 2005); Marc Fallon and Johan Meeusen (n 4) 37; Johan Meeusen, ‘Instrumentalisation of Private International Law in the European Union: Towards a European Conflicts Revolution?’ (2007) 9 *European Journal of Migration and Law* 287; Jan Wouters, ‘Choice-of-law and the Single Market for Financial Services’ (1997) 4 *Maastricht Journal of European and Comparative Law* 161; Francois Rigaux, ‘New Problems of Private International Law in the Single Market’ (1993-1994) 4 *King’s College Law Journal* 23.

<sup>13</sup> Ralf Michaels, ‘EU Law as Private International Law?’ (n 12).

<sup>14</sup> Vested rights theory is a traditional choice-of-law doctrine promulgated by A.V. Dicey in England and J. H. Beale in the United States. According to Dicey’s interpretation of this doctrine, for instance, every right duly acquired under the law of any country was recognised and enforced by English courts, even though the only applicable law in the latter was always English law. The enforcement of the right acquired under the law of another country could be rejected, if it was contrary to English public policy or moral rules. See in this respect Albert Venn Dicey, ‘On

choice-of-law principle, albeit not one according to classic conflict of laws but a new form of vested-rights principle'.<sup>15</sup> Similarly, Fallon and Meeusen have analysed the possible choice-of-law effect of the mutual recognition principle.<sup>16</sup> The authors argue that the mutual recognition principle is neutral as to the choice of the applicable law in the sense that it does not incorporate a hidden or fast choice of the applicable law referring to the law of the Member State of origin.<sup>17</sup>

Both the country of origin and the mutual recognition principles are inherently linked to and are arguably even derived from the principle of equal treatment laid down in the Treaty free movement provisions. Taking this into consideration, it is necessary to establish how the principle of equal treatment itself, in turn, operates from a choice-of-law perspective. In particular, the question that needs to be addressed here is whether the functioning of the principle of equal treatment could be in any way compared to that of a choice-of-law rule.

In summary, this thesis seeks to examine the scope and functioning of the principle of equal treatment from a choice-of-law perspective. In particular, on the one hand, it looks at the possible scrutiny of the applicable substantive and choice-of-law rules under the principle of equal treatment. On the other hand, it discusses whether the effect of the principle of equal treatment is confined to that or whether it could also be understood as itself implicitly operating similar to a choice-of-law rule.

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Private International Law as a Branch of the Law of England' (1890) 6 *Law Quarterly Review* 1; Joseph H. Beale, 'Dicey's "Choice-of-law"' (1896) 10 *Harvard Law Review* 887.

<sup>15</sup> Ralf Michaels, 'The New European Choice-of-Law Revolution: Lessons for the United States?' (2008) 82 *Tulane Law Review* 1607, 1628. According to the author, the possible role of the country of origin principle in the context of the choice of the applicable law can be best understood by analogising it to the vested right theory.

<sup>16</sup> Marc Fallon and Johan Meeusen (n 4).

<sup>17</sup> *ibid* 52.

## **Solving the problem**

In addressing the issues raised above, this thesis is intended to offer a different perspective to the study of the scope and functioning of the principle of equal treatment under Article 18 TFEU and the Treaty free movement provisions. The main claim of this thesis is that in the context of the determination of the law applicable to a cross-border relationship the principle of equal treatment only functions as an additional check on the operation of otherwise applicable substantive and choice-of-law rules.<sup>18</sup> In other words, the effect of the principle of equal treatment on the applicable law is best described from a *qualitative* point of view. Even though in light of the principle of equal treatment only rules that are non-discriminatory on grounds of nationality and movement can be applied to a cross-border relationship in the Union, the principle of equal treatment itself, however, does not explicitly or implicitly determine the applicable law in the sense understood from a choice-of-law perspective. In contrast to a choice-of-law rule, the principle of equal treatment does not embody a reference to a particular national law that always becomes applicable whenever one has recourse to it. Although this might seem obvious to an EU scholar, it is necessary to emphasise that the mere requirement under the principle of equal treatment that only rules non-discriminatory in nature and effect can be applicable in the Union does not, even indirectly, address the question of what law is governing a given cross-border relationship. Instead, looking at how it operates in practice, the principle of

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<sup>18</sup> The term ‘check on the operation of rules’ is borrowed from Joost Blom, ‘Public Policy in Private International Law and Its Evolution in Time’ (2003) 50 *Netherlands International Law Review* 373, 374.

equal treatment is confined to the scrutiny of rules the applicability of which is already known or has already been determined.

In this respect, it is argued that the national substantive law applicable pursuant to a choice-of-law rule or a choice-of-law clause agreed by private parties could be subject to scrutiny under the principle of equal treatment. Unless it is objectively justified, the otherwise applicable national substantive law would not be applied if found to be discriminatory in nature or effect. The fact that it is applicable in accordance with a choice-of-law rule or a choice-of-law clause agreed by private parties is hardly likely to play any role in the justification process.

As far as national choice-of-law rules are concerned, I point out that any possible difference in treatment in terms of the applicable law imposed in light of them is not contrary to principle of equal treatment, if nationality or territoriality they are usually based upon is merely used as a neutral connecting factor to determine the governing law. Otherwise, a national choice-of-law rule based on either of these connecting factors could be found to be incompatible with the principle of equal treatment and, therefore, would require objective justification.

As regards Union choice-of-law rules, in particular those adopted under Article 81 TFEU, any possible difference in treatment in terms of the applicable law imposed in light of them is more likely to trigger the principle of equal treatment on grounds of movement rather than nationality. This is because of the single neutral connecting factors they are based upon. Those who have exercised the Treaty free movement rights, for instance, might be put at a disadvantage in light

of the law applicable pursuant to these choice-of-law rules. In this respect, however, it is argued that the aim of Union choice-of-law rules adopted under Article 81 TFEU in ensuring certainty over the applicable law and predictability of litigation in the context of cross-border relationships between private parties should be considered if not given effect as a sufficient ground for objective justification.

### **Laying out the structure**

This thesis is structured in four chapters.

### **Chapter I – Applicable national substantive law**

In the first chapter, I start with a brief overview of choice-of-law rules applicable in the Union context. This part primarily serves the aim of establishing the basis for the subsequent analysis of the interaction between choice-of-law rules and the principle of equal treatment.

I then examine the scrutiny of the *designated* national substantive law under the principle of equal treatment. In this respect, I argue that if that law imposes discriminatory treatment, it cannot be applied in light of the principle of equal treatment, unless it is objectively justified. The fact that the national substantive law is *designated* by a national or Union choice-of-law rule would not make any difference in this respect. This is because the issue in the present context concerns the compliance of the national substantive law itself with the principle of equal

treatment. A national or Union choice-of-law rule declares a particular national substantive law as applicable, but it does not ensure its automatic compliance with the principle of equal treatment. In other words, it does not provide immunity of the *designated* national substantive law from scrutiny under the principle of equal treatment.

Further, I consider the possible ground a forum-court could rely upon to invoke the principle of equal treatment against the application of the *designated* national substantive rule. In this respect, I first compare the effect of the principle of equal treatment with that of mandatory rules and the public policy exception. The aim, here, is to find out whether the principle of equal treatment could be applied by a forum court as being either of them.

From a choice-of-law perspective, mandatory rules and the public policy exception are known as principles that provide grounds to deviate from the traditional method of identifying the law governing a cross-border relationship. Even though similar to the principle of equal treatment they also confront the application of the *designated* national substantive law, I argue that mandatory rules and the public policy exception, in essence, produce different outcomes. Mandatory rules replace or override the rules of the law applicable by virtue of a choice-of-law rule or chosen by private parties. In this regard, they provide different substantive solutions that reflect state policies or certain social, economic and political interests inherent in them. In case of the public policy exception, rejecting the otherwise applicable national substantive law, in turn,

usually leads to the application of the law of the forum (*lex fori*). None of these, however, could be said about the principle of equal treatment.

Notwithstanding the fact the principle of equal treatment cannot be compared to mandatory rules or the public policy exception, I argue that a forum court may and is even obliged to give effect to it pursuant to the Union public policy exception. The latter, though not distinctly, is enshrined in Union secondary legislation unifying choice-of-law rules under Article 81 TFEU and essentially derives from the obligation of loyal cooperation under Article 4 TEU. In this way, thus, not only the law of the forum, but also that of another Member State could be scrutinised by a forum court in light of the principle of equal treatment. Having said that, I also point out that the possible assessment of the compatibility of the law of a Member State by a forum court sitting in another Member State does not seem straightforward enough. In particular, in as much as this ensures the compliance with Union law and aims to provide justice in the context of cross-border relationships between private parties, this could be problematic considering the possible lack of knowledge and expertise of a forum court in the law of that Member State. A probable solution in this respect appears to be the possibility of a forum court to initiate a preliminary ruling procedure. However, as I point out, this only seems to be effective, if the Court adopts a less restrictive and more lenient approach.

## **Chapter II - Choice-of-law rules**

In the second chapter, I explore the relationship between the principle of equal treatment and choice-of-law rules themselves. I first argue that choice-of-law

rules also fall within the scope of the principle of equal treatment. I demonstrate that the specific nature and objective of these rules do not play a role in this respect, since rules are scrutinised in light of the principle of equal treatment essentially because of their effect on free movement in the Union.

### **National choice-of-law rules**

I then turn to the question whether the application of choice-of-law rules could actually be caught by the principle of equal treatment. I start with national choice-of-law rules with first focusing on those that are based on nationality as a connecting factor. Here, my main argument is that a difference in treatment in terms of the applicable law imposed on grounds of nationality would not be incompatible with the principle of equal treatment and, therefore, require objective justification, as long as nationality is merely used as a neutral connecting factor to determine the applicable law. This, for instance, would not be the case in two situations. First, as the careful analysis of *Garcia Avello*, *Boukhalfa* and *Hoorn* demonstrates, this is when the use of nationality, in fact, leads to a preference given to one nationality over the other. Unless it is objectively justified, any possible difference in treatment in terms of the applicable law in this context is likely to be caught by the principle of equal treatment. Second, it also seems to be discriminatory, if a Member State, where nationality is used as a primary connecting factor, for instance, refuses as regards the same matter to give effect to habitual residence, which in turn is used as a primary connecting factor in another Member State. In this context, I agree with the Opinion of Advocate General Sharpston in *Grunkin Paul* that in light of the

principle of equal treatment on grounds of movement, in certain circumstances falling within the scope of the Treaty free movement provisions, Member States are required to give equal weight to nationality and habitual residence as connecting factors to determine the law applicable to the same matter.<sup>19</sup>

In a similar way, I then examine whether national choice-of-law rules that are based on territoriality as a connecting factor could be caught by the principle of equal treatment. In this respect, I focus on the use of a company's 'real seat' as a connecting factor, which was at issue, for instance, in *Centros*, *Überseering* and *Inspire Art*. According to this connecting factor, the law applicable to a company, in particular the matters related to its existence and legal status, is the law of the place where its head office or central management is located.<sup>20</sup> Relying on the Court's rulings, on the one hand, in *Centros*, *Überseering* and *Inspire Art*, and in *Daily Mail* and *Cartesio*, on the other hand, I first point out that it is compatible with Articles 49 and 54 TFEU, if a Member State merely uses 'real seat' as a connecting factor to determine whether a company is established under its law. Second, based on this connecting factor, a Member State can also refuse to permit a company to retain the status of being established under its law, if it intends to move its seat to another Member State. I argue, however, that it is discriminatory contrary to Articles 49 and 54 TFEU if a Member State refuses to recognise the legal capacity of a company established under the law of another Member State based on the place of incorporation as a connecting factor. Similarly, in light of Articles 49 and 54 TFEU, a Member State cannot impose any additional requirements on such a company, if it has its seat or branch on its territory, unless

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<sup>19</sup> Case C-353/06 *Proceedings brought by Stefan Grunkin and Dorothee Regina Paul* [2008] ECR I-7639, Opinion of Advocate General Sharpston.

<sup>20</sup> Robert R Drury, 'Migrating Companies' (1999) 24 *European Law Review* 354, 356.

there are objectively justified. Similar to the previous part, I conclude that in circumstances falling within the scope of Articles 49 and 54 TFEU, a Member State should give equal weight to the place of incorporation and ‘real seat’ as connecting factors in the determination of the legal capacity of a company.

### **Union choice-of-law rules**

Further, in this chapter, I look at whether the application of Union choice-of-law rules could also be in conflict with the principle of equal treatment. My analysis, here, is centred on *Bosmann*, where the Court found that the *lex loci laboris* rule, the main choice-of-law rule under Regulation 1408/71,<sup>21</sup> could not be applied if it put migrant workers at a disadvantage by depriving them the right to social security benefits or having the amount of these benefits reduced. One could certainly be sceptical about any general impact of this finding on the role of the *lex loci laboris* rule. At the same time, however, I argue that *Bosmann* seems to extend the requirement of equal treatment on grounds of movement and the ‘binary’<sup>22</sup> approach with regard to choice-of-law rules under Regulation 1408/71 (now Regulation 883/2004).

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<sup>21</sup> Regulation 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community [1971] OJ L 149/2. It has been replaced and repealed Regulation 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L 166/1.

<sup>22</sup> Eleanor Spaventa, *Free movement of persons in the European Union -Barriers to movement in their constitutional context* (Kluwer Law International 2007) 140. See also Eleanor Spaventa, ‘The impact of Articles 12, 18, 39 and 43 of the EC Treaty on the coordination of social security system’ in Yves Jorens (ed.), *50 years of Social Security Coordination Past – Present – Future* (Report of the conference celebrating the 50th Anniversary of the European Coordination of Social Security, European Commission, 2009), 118 <[ec.europa.eu/social/BlobServlet?docId=5338&LangId=en](http://ec.europa.eu/social/BlobServlet?docId=5338&LangId=en)> accessed 19 September 2011. It has so far been applied in the context of Union citizenship and health care cases; <sup>22</sup> Michael Dougan and Eleanor Spaventa, ‘Educating Rudy and the (non-) English patient: A double-bill on residency rights under Article 18 EC’ (2003) 28 *European Law Review* 699.

Relying on this, I query whether this could also concern Union choice-of-law rules adopted under Article 81 TFEU, under which the Union legislator is provided with an express competence to deal with choice-of-law matters. In particular, the question here is whether a difference in treatment in terms of the applicable law imposed by these rules could be contrary to the principle of equal treatment on grounds of movement and required to be set aside in so far as a particular case is concerned.<sup>23</sup> In this respect, I argue that a different approach should be adopted as regards these rules. I explain this by the fact that subjecting them to the principle of equal treatment does not sit well with their aim, which is to guarantee certainty over the applicable law and predictability of litigation. There is a risk that this aim could be jeopardised, if these rules are required to be set aside in light of the principle of equal treatment on grounds of movement. Any possible disadvantage arising as a result of the application of these choice-of-law rules cannot be excluded. However, I argue that the importance of certainty over the applicable law and predictability of litigation in the context of cross-border contractual, non-contractual or other civil law relationships warrants the aim of Union choice-of-law rules adopted under Article 81 TFEU to be considered and even taken as a ground for objective justification of such a disadvantage.

### **Chapter III – Principle of party autonomy**

In the third chapter, I focus on the possible role of the principle of party autonomy in the context of scrutiny under the principle of equal treatment. I first look at the

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<sup>23</sup> Here, I only focus on the principle of equal treatment on grounds of movement. This is because of the neutral connecting factors Union choice-of-law rules under Article 81 TFEU are based upon, it is less likely that they could result in direct or indirect discrimination on grounds of nationality.

rationale behind the principle of party autonomy, its place in the Union legal order and limitations attached to it under Union secondary legislation.

I then explore the relationship between the principle of party autonomy and the principle of equal treatment. In contrast to the ordo-liberal approach, in this chapter I argue that the party autonomy principle, in particular the discretion available to private parties to set aside national rules by choosing the governing law, does not appear to affect scrutiny under the principle of equal treatment.

For this purpose, I outline three scenarios that might occur in a contractual context.<sup>24</sup> First, two private parties established in Member States A and B can choose the law of Member State B as the governing law. Suppose that the party established in Member State A supplies goods or provides services to the party established in Member State B. Second, the same parties can opt for the law of a third Member State. And finally, two private parties established in the same Member State can choose the law of a third Member State to govern their contract.

I point out that in light of Article 3 (4) of the Rome I Regulation, the principle of equal treatment could be, at least theoretically, applied in all three scenarios, including the third one.<sup>25</sup> However, only in the first scenario, a rule part of the chosen law is most likely to be found to be discriminatory contrary to Articles 34

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<sup>24</sup> I have included three schemes to better illustrate these scenarios.

<sup>25</sup> According to this provision, 'if all other elements relevant to the situation are located in one or more Member States, the choice of the applicable law of the country other than that of a Member State shall not prejudice the application of the provisions of Union law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by an agreement'.

or 56 TFEU. This is hardly likely to occur in the second and third scenarios, considering the remoteness of a link between the contract at issue and the third Member State. This is because of the absence of the exercise of the freedoms under Articles 34 or 56 TFEU involving the territory of that Member State.

### **Mandatory rules**

In the context of the first scenario, thus, I first consider rules of the chosen law that are mandatory in an inter-State context. These are national rules that can apply to a given cross-border relationship on their own terms, irrespective of, for instance, the law *designated* by a choice-of-law rule. I argue that these rules are subject to scrutiny under the principle of equal treatment and cannot be applied if they are discriminatory, for instance, against the party established in Member State A. I point out that this outcome would not be any different, if these rules are part of the law chosen by private parties. This is because they are mandatory in an inter-State context and, therefore, would apply to a contract even without a choice-of-law clause agreed by private parties.

### **Default rules**

In the same vein, in the context of the first scenario, I then examine national rules that are not mandatory in an inter-State context. These are, for instance, default rules that are applicable to a given contract only if they are part of the national law *designated* by a choice-of-law rule or that chosen by private parties. Therefore, unlike national rules that are mandatory in an inter-State context, default rules do

not apply on their own terms. More importantly, private parties to a contract are free to exclude the applicability of default rules of the chosen law by replacing them with specific contractual terms instead. Because of that, private parties have more discretion over the scope of default rules that are part of the chosen law.

I first point out that default rules of the chosen law can also come within the scope of the principle of equal treatment, provided that they fall within the Treaty. The discretion of private parties over the scope of these rules does not seem to play a role in mere finding their discriminatory effect. Similarly, the fact that private parties are free to opt out of a default rule of the chosen law but have not done so does not appear to be a sufficient ground to apply that rule when it is discriminatory contrary to Articles 34 or 56 TFEU. Private parties are certainly bound by a choice-of-law clause and any other contractual arrangement. However, I argue, first, that not opting out of a default rule might not always indicate the actual intention of the parties to a contract. Second, the issue of the compatibility of a default rule might arise at a later stage, in which case it would be inconsistent with the internal market rationale not to allow a party to raise this matter before a forum court, regardless of the discretion it enjoys over its scope. I conclude that this line of argumentation does not seem to be affected by the Court's obiter dictum in *Alsthom Atlantique*,<sup>26</sup> considering the fact that the case concerned Article 35 TFEU and the obiter dictum has not been reiterated by the Court as regards other Treaty free movement provisions.

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<sup>26</sup> The Court held that parties to an international contract of sale were generally free to determine the law applicable to their contractual relationship and could therefore avoid being subject to the national law at issue.

## **Contractual term**

To shed further light on the role of the discretion available to private parties, I then consider the relationship between a contractual term and the principle of equal treatment. I start with the analysis of the horizontal direct effect of the Treaty free movement provisions. I argue that even a contractual term agreed between private parties could be subject to scrutiny under the principle of equal treatment laid down in Articles 45, 49 and 56 TFEU, which could possibly produce a horizontal direct effect.<sup>27</sup> As I point out, however, this could only occur if there are factors that limit the exercise of contractual freedom available to private parties. First, this could be the case when the discriminated party to a contract that agreed a given contractual term is in a relatively weaker bargaining position within a contractual relationship. Second, it could also be that the discriminated party to a contract has to agree a given contractual term, because either the other party, which is imposing it, is in a monopolistic position or such a contractual term is a common practice within a specific market.<sup>28</sup> These two factors are obviously interlinked. I conclude that in their absence contractual freedom itself appears to be an effective means to deal with any disadvantages that could be otherwise imposed in a contractual context.

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<sup>27</sup> Unlike Article 34 TFEU, a horizontal direct effect seems possible in the context these Treaty free movement provisions.

<sup>28</sup> Michael Schillig, 'The Interpretation of European Private Law in light of Market Freedoms and EU Fundamental Rights' (2008) 15 *Maastricht Journal of European and Comparative Law* 285, 300.

#### **Chapter IV – Is it an implicit choice-of-law rule?**

In the fourth chapter, I aim to clarify whether the effect produced by the principle of equal treatment could be in any way compared to that of a choice-of-law rule. I point out that in contrast to a choice-of-law rule the principle of equal treatment does not explicitly or implicitly determine the law governing a cross-border relationship. To demonstrate that, I analyse the functioning of the principle of equal treatment in three different contexts. I start by looking at the situations where those coming from other Member States are deprived of *advantages* available to their in-state equivalents, then turning to double burden situations. In this respect, I argue that the principle of equal treatment only opposes the application of the discriminatory rule of a Member State. It itself does not, even indirectly, lead to the application of the law of another Member State.

I then examine the effect of the principle of equal treatment in the context of *Garcia Avello*, *Bosmann* and *Boukhalfa*, where a choice-of-law rule itself is either subject to or involved in scrutiny under the principle of equal treatment. In this respect, I argue that in all three cases the principle of equal treatment certainly has an impact on to what national law a given cross-border relationship should be subject, but only in *Boukhalfa* the application of the principle of equal treatment led to the substitution of the otherwise applicable national law. But this, as I point out, does not appear to be sufficient to compare the effect produced by the principle of equal treatment to that of a choice-of-law rule, considering the specific national choice-of-law rule and, more importantly, the factual circumstances involved in *Boukhalfa*.

The overall conclusion of this thesis is that in the context of the determination of the law governing a cross-border relationship, the principle of equal treatment only functions as an additional check on the operation of otherwise applicable substantive and choice-of-law rules, both of which if found to be discriminatory would not be applied, unless there are objectively justified. The principle of equal treatment under Article 18 TFEU and the Treaty free movement provisions does not, even implicitly, create an opening for the application of the law of a Member State. This is because, in contrast to a choice-of-law rule, it in essence does not contain a reference to a particular national substantive law that always becomes applicable whenever one has recourse to it.

## Chapter I

### THE PRINCIPLE OF EQUAL TREATMENT AND THE *DESIGNATED* LAW

Given their divergent objectives, a choice-of-law rule could be at odds with the principle of equal treatment laid down in Article 18 TFEU or the Treaty free movement provisions.<sup>1</sup> In particular, the *designated* national substantive law, for

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<sup>1</sup> Article 18 TFEU enshrines the general prohibition of discrimination on grounds of nationality. In particular, it provides that ‘within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited’. The term ‘any specific provisions’ refers to, for instance, Articles 45, 49 and 56 TFEU that embody the principle of equal treatment on grounds of nationality in the context of free movement of persons. The general prohibition of discrimination on grounds of nationality under Article 18 TFEU only applies when the issue at hand does not fall within the scope of these Treaty provisions. See in this respect Case 305/87 *Commission v Hellenic Republic* [1989] ECR I-1461, para 13; Case C-10/90 *Maria Masgio v Bundesknappschaft* [1991] ECR I-1119, para 13; Case C-379/92 *Criminal proceedings against Matteo Peralta* [1994] ECR I-3453, para 18; Case C-1/93 *Halliburton Services BV v Staatssecretaris van Financiën* [1994] ECR I-1137, para 12; Case C-176/96 *Jyri Lehtonen and Castor Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL (FRBSB)* [2000] ECR I-2681, para 37; Case C-311/97 *Royal Bank of Scotland plc v Elliniko Dimosio (Greek State)* [1999] ECR I-2651, para 20; Case C-251/98 *C. Baars v Inspecteur der Belastingen Particulieren/Ondernemingen Gorinchem* [2000] ECR I-2787, para 23; Joined Cases C-397/98 and C-410/98 *Metallgesellschaft Ltd and Others (C-397/98), Hoechst AG and Hoechst (UK) Ltd (C-410/98) v Commissioners of Inland Revenue and HM Attorney General* [2001] ECR I-1727, para 38; Case C-422/01 *Försäkringsaktiebolaget Skandia (publ) and Ola Ramstedt v Riksskatteverket* [2003] ECR I-6817, para 61; Case C-443/06 *Erika Waltraud Ilse Hollmann v Fazenda Pública* [2007] ECR I-8491, para 28; Case C-105/07 *Lammers & Van Cleeff NV v Belgische Staat* [2008] ECR I-173, para 14; Case C-311/08 *Société de Gestion Industrielle (SGI) v État belge* [2010] ECR I-487, para 31. In other words, the relationship between, on the one hand, the principle of equal treatment under Article 18 TFEU and, on the other hand, the Treaty free movement provisions is based on the principle of *lex specialis derogat lex generalis*. See in this respect Anthony Arnall, *The European Union and Its Court of Justice* (Oxford University Press 1999) 202; A P van der Mei, *Free Movement of Persons within the European Union: Cross-border Access to Public Benefits* (Hart Publishing 2003) 69; Pasquale Pistone, *The Impact of Community Law on Tax Treaties: Issues and Solutions* (Kluwer Law International 2002) 22. This means that when the Treaty free movement provisions are not applicable, an individual can still rely on Article 18 TFEU, provided that a situation falls within the scope of the Treaty. See eg Case C-411/98 *Angelo Ferlini v Centre hospitalier de Luxembourg* [2000] ECR I-8081, para 46-47. However, if a national rule is contrary to the principle of equal treatment under the Treaty free movement provisions, it is also considered to be contrary to Article 18 TFEU. See in this respect Case 13/76 *Gaetano Donà v Mario Mantero* [1976] ECR 1333, para 19; Case 90/76 *S.r.l. Ufficio Henry van Ameyde v S.r.l. Ufficio central italiano di assistenza assicurativa automobilisti in circolazione internazionale (UCI)* [1977] ECR 1091, para 27; Case 305/87 *Commission v Hellenic Republic* [1989] ECR I-1461, para 12. In a similar way, if a national rule is compatible with the principle of equal treatment under the Treaty free movement provisions, it is also considered to be compatible with Article 18 TFEU. See in this respect Case C-326/92 *Phil Collins v Imtrat Handelsgesellschaft mbH and Patricia Im- und Export Verwaltungsgesellschaft mbH and Leif Emanuel Kraul v EMI Electrola GmbH* [1993] ECR I-5145, Opinion of Advocate General Jacobs, para 13.

instance, could be subject to scrutiny under the principle of equal treatment. In this context, it is necessary to clarify whether the fact that the law at issue is applicable to a cross-border relationship pursuant to a choice-of-law rule could make any difference in its scrutiny under the principle of equal treatment and, in particular, whether this could play any role in its justification. Furthermore, it is not clear as to how a forum court would be able to invoke the principle of equal treatment against the application of the *designated* national substantive rule. Generally, from a conflict of laws perspective, a forum court can refuse to apply the *designated* national substantive law, if it is contrary, on the one hand, to the mandatory rules or public policy of the forum, and on the other hand, to the mandatory rules of the country, to which the cross-border relationship at issue is linked. In this context, one might question whether from a choice-of-law perspective the principle of equal treatment could be in any way compared to a mandatory rule or the public policy exception and, therefore, applied as being either of them.<sup>2</sup> If the answer is in the negative, what are the grounds for a forum court to give effect to the principle of equal treatment against the application of the *designated* national substantive rule and what are the problems that might arise in this regard?

In this chapter, I will start with an overview of choice-of-law rules that are applicable in the Union context and their specific nature.<sup>3</sup> This part will primarily

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<sup>2</sup> I focus on mandatory rules and the public policy exception because Union secondary legislation that enshrines unified choice-of-law rules does not contain a clear-cut provision that requires a forum court sitting in a Member State to apply Union primary law. One could certainly mention Article 3 (4) of the Rome I Regulation, which, however, is confined to the law chosen by private parties to a cross-border contractual relationship. In addition, there is also Preamble 35 of the Rome II Regulation and Preamble 40 of the Rome I Regulation. They, however, seem to concern other relevant Union secondary legislation.

<sup>3</sup> I will also mention choice-of-law rules of international origin applicable in the Union context in order to emphasise the importance of the unification of choice-of-law rules at Union level.

serve the aim of establishing the basis for the subsequent analysis of the interaction between choice-of-law rules and the principle of equal treatment. I will then discuss the possible role of choice-of-law rules in the context of the scrutiny of the *designated* national substantive law under the principle of equal treatment. For this purpose, I will look at the approach taken by the Court in the cases where national rules usually applicable pursuant to a choice-of-law rule are scrutinised in light of Article 18 TFEU or the Treaty free movement provisions. In the final part, I will provide a comparative analysis of the principle of equal treatment with mandatory rules and the public policy exception. Having argued that the principle of equal treatment substantially differs from a mandatory rule and the public policy exception, I will look at other grounds based on which a forum court can invoke the principle of equal treatment against the application of the *designated* national substantive law.

## **1. Choice-of-law rules in the Union**

The exercise of the Treaty free movement rights involves entering into contractual, non-contractual or other civil law relationships linked to more than one national legal system. For instance, a branch situated in a Member State of a bank incorporated in another Member State can offer banking services to a customer who is employed in a third Member State but resident in a fourth Member State. Such a cross-border relationship between private parties can theoretically be subject to each of the national legal systems it is linked to. However, because of the difference in substance between them, the simultaneous

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However, my analysis in this chapter and throughout this thesis will concern national and Union choice-of-law rules. This is mainly due to the fact that choice-of-law rules that are enshrined in international conventions are not ratified or in force in majority of Member States.

application of the law of each State to the same factual background might contradict each other yielding conflicting results.<sup>4</sup> Thus, their cumulative application is often impossible,<sup>5</sup> which, in turn, raises the question of what national law is applicable to a given cross-border relationship. Choice-of-law rules aim to provide a solution in this respect. These rules *designate* the applicable national substantive law. In this way, they determine the territorial and personal limitations of national substantive rules.<sup>6</sup> As far as matters of substance are concerned, choice-of-law rules are *indifferent* in nature, meaning that they themselves do not provide any substantive solutions.<sup>7</sup> The latter, in turn, is dealt by the *designated* national substantive law. In a contractual context, for instance, a choice-of-law rule does not address any substantive issues related to a contract, for instance its validity or the rights of contracting parties. The rule only determines the national substantive rules regulating these matters.

Choice-of-law rules operate based on so-called connecting factors, which link a given judicial category to a particular national substantive law.<sup>8</sup> The most important connecting factors are nationality and territoriality.<sup>9</sup> Choice-of-law rules based on nationality as a connecting factor mainly apply to matters of

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<sup>4</sup> J Georges Sauveplane, 'Renvoi' in Ulrich Drobnig and Konrad Zweigert (eds), *International Encyclopedia of Comparative Law*, Instalment 26 (Mohr Siebeck 1990) 12; Mireille van Eechoud (n 2) 106.

<sup>5</sup> Marc Fallon and Johan Meeusen, 'Private International Law in the European Union and the Exception of Mutual Recognition' (2002) 4 *Yearbook of Private International Law* 37, 46.

<sup>6</sup> Kurt Lipstein, *Principles of the Conflict of Laws: National and International* (Martinus Nijhoff 1981) 93.

<sup>7</sup> Frank Vischer, 'General Course on Private International Law' (1992) 232 *Recueil des Cours* 9, 23; Th M de Boer, 'Facultative Choice of Law. The Procedural Status of Choice-of-Law Rules and Foreign Law' (1996) 257 *Recueil des Cours* 223, 239.

<sup>8</sup> Lawrence Collins, C G J Morse, David McClean and Others (eds), *Dicey, Morris and Collins on the Conflict of laws* (4th edn, Sweet & Maxwell 2006) 33.

<sup>9</sup> Ralf Michaels, 'The New European Choice-of-Law Revolution: Lessons for the United States?' (2008) 82 *Tulane Law Review* 1607, 1615.

personal status, family and succession.<sup>10</sup> With regard to other matters, choice-of-law rules predominantly operate based on territoriality. This means that the regulation of a particular judicial category is allocated to a national substantive law based on its location. In this respect, for instance, among others, one could mention choice-of-law rules that refer to the place of employment, the place of a company's establishment, the place where an immovable property is located or the place where a disputed event takes place.

Prior to the Amsterdam Treaty, the areas of choice-of-law rules and internal market were quite separate.<sup>11</sup> Although, the original EC Treaty introduced the free movement provisions in order to foster private activities across the borders of Member States, it did not touch upon any choice-of-law issues.<sup>12</sup> Each Member State had its own set of choice-of-law rules which, based on different principles, provided different solutions with regard to the regulation of cross-border relationships.<sup>13</sup> There were also choice-of-law rules embodied in international conventions adopted by international organisations, such as the Hague Conference on Private International Law.<sup>14</sup> The Conference has adopted several conventions,

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<sup>10</sup> Johan Meeusen, 'Instrumentalisation of Private International Law in the European Union: Towards a European Conflicts Revolution?' (2007) 9 *European Journal of Migration and Law* 287, 291; See also Michael Bogdan, *Concise Introduction to EU Private International Law* (Europa Law Publishing 2006) 23.

<sup>11</sup> Katharina Boele-Woelki and Ronald H van Ooik, 'The Communitarization of Private International Law' (2002) 4 *Yearbook of Private International Law* 1, 2; See also Oliver Remien, 'European Private International Law, the European Union and its Emerging Area of Freedom, Security and Justice' (2001) 38 *Common Market Law Review* 53, 53.

<sup>12</sup> Jürgen Basedow, 'The Communitarization of the Conflict of Laws under the Treaty of Amsterdam' (2000) 37 *Common Market Law Review* 687, 687; Ulrich Drobnig, 'Conflict of Laws and the European Economic Union' (1966-1967) 15 *American Journal of Comparative Law* 204, 204.

<sup>13</sup> Gülüm Bayraktaroğlu, 'Harmonization of Private International Law at Different Levels: Communitarization v. International Harmonization' (2003) 5 *European Journal of Law Reform* 127, 131.

<sup>14</sup> See also international conventions adopted by UNCITRAL: 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG); 1974 United Nations on the Limitations

which enshrine unified choice-of-law rules with respect to various areas including the international sale of goods, protection of children, traffic accidents, maintenance obligations and child abduction.<sup>15</sup> For instance, with regard to non-contractual liability arising from traffic accidents, the applicable national substantive law is the law of the country where the accidents occurs.<sup>16</sup> Similarly, the liability of manufacturers and other persons for damages caused by a product is determined by the law of the place of injury.<sup>17</sup>

Such unification of choice-of-law rules has always been necessary due to the problem arising as a result of the application of divergent national choice-of-law rules. In light of it, the same cross-border relationship could be subject to different national substantive laws. In other words, the applicable national substantive law might vary depending on a forum court seised with a case. Unified choice-of-law rules would provide a solution in this respect by ensuring that a given cross-border relationship is subject to the same national substantive law irrespective of the forum.<sup>18</sup> However, the international unification of national choice-of-law rules has had a limited effect, since the applicability of these rules is very much

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Period in the International Sale of Goods; 1974 United Nation Convention on the Limitation Period in the International Sale of Goods.

<sup>15</sup> See 1955 Convention on the law applicable to international sales of goods; 1996 Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measure for the protection of children; 1971 Convention on the law applicable to traffic accidents; 1973 Convention on the law applicable to maintenance obligations; 1980 Convention on the civil aspect of international child abduction. One should keep in mind however that not all Member States have ratified these conventions.

<sup>16</sup> See Article 3 of 1971 Convention on the law applicable to traffic accidents. The Member States which have ratified the Convention are France, Belgium, Austria, Luxembourg, Netherlands and Spain.

<sup>17</sup> See Article 4 of 1973 Convention on the law applicable to products liability. This choice-of-law rule applies if the law of the place of injury is also the place of the habitual residence of the person directly suffering damage; the principal place of business of the person claimed to be liable or the place where the products were acquired by the person directly suffering damage. Only four Member States (Finland, France, Luxembourg and Spain) have ratified this convention.

<sup>18</sup> Peter M North and James J Fawcett, *Cheshire and North's Private International law* (Butterworth's 1999) 11.

dependant on the ratification of the international conventions that embody them. Thus, whether a particular internationally unified choice-of-law rule applies to a cross-border relationship in the Union context would be conditional on the place of the forum.

The first step linking the areas of choice-of-law rules and internal market was the adoption of the 1980 Rome Convention on the law applicable to contractual obligations.<sup>19</sup> The Convention established a set of uniform choice-of-law rules that determined the national substantive law applicable with regard to contractual obligations.<sup>20</sup> Besides the Rome Convention, the two areas have also been linked by a number of uniform choice-of-law rules contained in various Regulations and Directives.<sup>21</sup>

A crucial step towards the unification of national choice-of-law rules was made with the adoption of the Amsterdam Treaty. The changes brought about by it heralded a new era with regard to the place of choice-of-law rules in the Union

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<sup>19</sup> 1980 Rome Convention on the law applicable to the contractual obligations [1998] OJ C 027.

<sup>20</sup> Conor Quigley, *European Union Contract Law: the Effect of EC Legislation on Contractual Rights, Obligations and Remedies*, vol 1 (Kluwer Law International 1997) 5. The Convention was an inter-State agreement and did not have the status of a Union legislative instrument. See in this respect, S M Nott, 'For Better or Worse? The Europeanisation of the Conflict of Laws' (2002) 24 *Liverpool Law Review* 3, 4. This could be explained by the absence of a legal basis in the EEC Treaty at that time with regard to choice-of-law matters. See in this respect, Paul Beaumont, 'European Court of Justice and Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters' (1999) 48 *International & Comparative Law Quarterly* 206, 228-229.

<sup>21</sup> Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 095/29; Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis [1994] OJ L 280/83; Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associate guarantees [1999] OJ L 171/12. These Directives provide protection to the consumer in case the law of a non-Member State is specified as the law applicable to a contract. See also Regulation 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L 166/1 that has replaced and repealed Regulation 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community [1971] OJ L 149/2.

legal order. The new Title IV of the EC Treaty, in particular Article 65 EC, for the first time expressly empowered the then Community legislator to deal with choice-of-law matters.<sup>22</sup> Currently, under Article 81 TFEU that has replaced Article 65 EC, in order to develop judicial cooperation in civil matters having cross-border implications,

the European Parliament and the Council (...) shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring (...) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction.

Based on this Treaty provision, a number of Regulations enshrining unified choice-of-law rules have so far been adopted: the Rome I Regulation that replaced the Rome Convention on the law applicable to contractual obligations;<sup>23</sup> the Rome II Regulation on the law applicable to non-contractual obligations;<sup>24</sup> the Regulation on maintenance obligations;<sup>25</sup> and the Rome III Regulation on the law applicable to divorce and legal separation.<sup>26</sup>

The introduction of Article 81 TFEU has opened up the possibility to address at Union level the problem arising as a result of the application of divergent national choice-of-law rules. A good example, here, is the choice-of-law rule applicable with regard to a tort or delict. Prior to the adoption of the Rome II Regulation, in

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<sup>22</sup> Ulrich Drobnig, 'European Private International Law after the Treaty of Amsterdam: Perspectives for the Next Decade' (2000) 11 *King's College Law Journal* 190, 190.

<sup>23</sup> Regulation 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ('Rome II Regulation') [2007] OJ L 199/40.

<sup>24</sup> Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ('Rome I Regulation') [2008] OJ L 177/6.

<sup>25</sup> Regulation 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L7/1.

<sup>26</sup> Regulation 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation ('Rome III Regulation') [2010] OJ L 343/10.

most Member States the national substantive law regulating issues related to a tort or delict was determined pursuant to the *lex loci delicti commissi* rule, i.e. the choice-of-law rule referring to the law of the place where the harmful act was committed.<sup>27</sup> However, the interpretation of this rule varied from Member State to Member State. In some, the term ‘place where the harmful act was committed’ referred to the place where the causal event took place, while in others, it meant the place where the damage arose.<sup>28</sup> In addition, in some cases, it was left for a forum court or the plaintiff to choose the relevant jurisdiction.<sup>29</sup> Such interpretations of the same rule in different Member States might affect the position of private parties involved in tort situations. It would be difficult to foresee what national substantive law would be applied to a tort case, given the fact that the use of divergent interpretations of the same rule would lead to the application of different national substantive rules. This has been addressed by the Union choice-of-law rule that *designates* the law of the place where the damage occurs as the law applicable to a non-contractual obligation arising out of a tort/delict (the *lex loci damni* rule).<sup>30</sup>

So far choice-of-law rules unified at Union level have been adopted in the form of Regulations, which, as is well known, are ‘binding in their entirety and directly applicable’<sup>31</sup> in Member States. This ensures the uniform and consistent application of these rules by national authorities, in particular national courts dealing with cross-border relationships. At the same time, however, this does not

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<sup>27</sup> Willibald Posch, ‘The ‘Draft Regulation Rome II’ in 2004: It Past and Future Perspectives’ (2004) 6 *Yearbook of Private International Law* 129, 140.

<sup>28</sup> Bernhard A Koch, ‘Comparative Report’, in Bernhard A Koch (ed.), *Economic Loss caused by genetically modified organisms: Liability and Redress for the Adventitious Presence of GMOs in Non-GM Crops*, Tort and Insurance Law 24 (Springer 2008) 637.

<sup>29</sup> *ibid*, see eg footnotes 230-235 concerning each Member State.

<sup>30</sup> See Article 4.1 of the Rome II Regulation.

<sup>31</sup> Article 288 TFEU.

fully guarantee that the problem with the international unification of choice-of-law rules mentioned above will not occur at Union level. In this respect one could mention, for instance, the Rome III Regulation. In contrast to the Rome I and II Regulations, the Rome III Regulation has only established an enhanced cooperation in the area of the law applicable to divorce and legal separation due to the lack of unanimity on the Commission's proposal. Therefore, the Regulation is effective amongst the Member States participating in the enhanced cooperation,<sup>32</sup> while national choice-of-law rules remain applicable in others. Furthermore, the unification of choice-of-law rules at Union level so far has not involved all areas. In those that are not subject to Union harmonised rules, Member States apply their own choice-of-law rules. Some are based on the same connecting factors, while others vary,<sup>33</sup> which means that the problem related to the application of divergent choice-of-law rules still remains. In this regard, one could mention, for instance, the law applicable to companies (*lex societatis*), which in some Member States is the law of the place where a company is incorporated,<sup>34</sup> whilst in others, it is the law of the place where a company's head office or central management is located.<sup>35</sup> Similarly, the law applicable to names varies from Member State to Member State - it is determined based on either nationality or habitual residence.<sup>36</sup>

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<sup>32</sup> According to Recital 6 of the Preamble to the Rome I Regulation, these are Belgium, Bulgaria, Germany, Greece, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia.

<sup>33</sup> Gülüm Bayraktaroğlu (n 13) 131.

<sup>34</sup> These are, for instance, United Kingdom, Ireland and Netherlands.

<sup>35</sup> These are, for instance, Belgium, Germany, France, Greece, Spain, Luxembourg, Portugal and Hungary. With regard to its scrutiny under Articles 49 and 54 TFEU, see Case 81/87 *The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc* [1988] ECR 5483; Case C-212/97 *Centros Ltd. v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459; Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I-9919; Case C-210/06 *Cartesio Oktató és Szolgáltató bt* [2008] ECR I-9641.

<sup>36</sup> With regard to their scrutiny under Article 18 TFEU and the Treaty free movement provisions, see Case C-148/02 *Carlos Garcia Avello v État belge* [2003] ECR I-11613; Case C-353/06 *Proceedings brought by Stefan Grunkin and Dorothee Regina Paul* [2008] ECR I-7639; Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* (CJEU, 22 December 2010).

## 2. Scrutiny under the principle of equal treatment

A forum court relying on the relevant choice-of-law rule would determine the national substantive law applicable to a cross-border contractual, non-contractual or other civil law relationship between private parties. First of all, it is necessary to mention that most rules applicable in this respect are usually those of private law nature.<sup>37</sup> The latter refers to a system of rules that deals with matters, for instance, related to contracts, torts and properties in the context of legal relationships between private parties.<sup>38</sup> These rules are closely connected with the Treaty free movement provisions.<sup>39</sup> As Rutgers points out, they provide the ‘legal infrastructure’ for the exercise of the Treaty free movement rights.<sup>40</sup> Without them, cross-border activities in the internal market would simply be impossible.<sup>41</sup> Indeed, one can hardly imagine, for instance, the possibility to sell goods, to provide services or to hire employees without entering into a contract and rules to regulate such contractual relationships.

At the outset, one could have thought that private law rules did not fall within the scope of the Treaty free movement provisions. This is because, initially, the Treaty free movement provisions were arguably more focused on the elimination of barriers to free movement in the internal market, which resulted from the

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<sup>37</sup> Gerhard Dannemann, ‘Accidental Discrimination in the Conflict of Laws: Applying, Considering, and Adjusting Rules from Different Jurisdictions’ (2008) 10 *Yearbook of Private International Law* 113, 114.

<sup>38</sup> Holger Spamann, ‘Choice of Law in a Federal System and an Internal Market’ (2001) 8 *Jean Monnet Working Papers* 24.

<sup>39</sup> Jürgen Basedow, ‘A Common Contract Law for the Common Market’ (1996) 33 *Common Market Law Review* 1169, 1179.

<sup>40</sup> Jacobien W Rutgers, ‘Free Movements and Contract Law’ (2008) 3 *European Review of Contract Law* 474, 475.

<sup>41</sup> Stefan Leible, ‘Fundamental Freedoms and European Contract Law’ in Stefan Grundmann (ed.), *Constitutional Values and European Contract Law* (Kluwer Law International 2008) 65.

application of public and administrative rules of Member States.<sup>42</sup> Despite that, however, according to the Court's case-law, private law rules are not subject to any special treatment.<sup>43</sup> They can also come within the scope of the Treaty free movement provisions. In particular, these rules can also be scrutinised under the principle of equal treatment laid down under Article 18 TFEU or under the Treaty free movement provisions. Unless they are objectively justified, these rules cannot be applied, if they impose discriminatory treatment on grounds of either nationality or movement – i.e if they put at a disadvantage those who have exercised the Treaty free movement rights.<sup>44</sup> This derives, as the Court held, from the fact that 'the effectiveness of [Union] law cannot vary according to the various

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<sup>42</sup> Marc Fallon and Johan Meeusen (n 5) 46.

<sup>43</sup> See eg Case 22/80 *Boussac Saint-Frères SA v Brigitte Gerstenmeier* [1980] ECR 3427; Case C-339/89 *Alsthom Atlantique SA v Compagne de construction mécanique Sulzer SA* [1991] ECR I-107; Case C-168/91 *Christos Konstantidinis v Stadt Altensteig* [1993] ECR I-1191.

<sup>44</sup> Direct discrimination on grounds of nationality occurs when a national of another Member State is treated differently in law. See eg Case 167/73 *Commission v France* [1974] ECR 359; Case 270/83 *Commission v France* [1986] ECR 273. Indirect discrimination on grounds of nationality, in turn, arises when a rule or measure of a Member State, although based apparently on a neutral criterion, bears (or likely to bear) more heavily on a national of another Member State. See eg Case 152/73 *Giovanni Maria Sotgiu v Deutsche Bundespost* [1974] ECR 153; Case 39/75 *Robert-Gerardus Coenen and Others v Sociaal-Economische Raad* [1975] ECR 1547; Joined Cases 62 and 63/81 *Société anonyme de droit français Seco et Société anonyme de droit français Desquenue & Giral v Etablissement d'assurance contre la vieillesse et l'invalidité* [1982] ECR 223; Case C-237/94 *John O'Flynn v Adjudication Officer* [1996] ECR I-2617. As regards companies, 'their registered office (...) serves as the connecting factor with the legal system of a particular state, like nationality in the case of natural persons'. See in this respect Case 270/83 *Commission v France* [1986] ECR 273, para 18; Case C-330/91 *The Queen v Inland Revenue Commissioners, ex parte Commerzbank AG* [1993] ECR 4017, para 13; Case C-264/96 *Imperial Chemical Industries plc (ICI) v Kenneth Hall Colmer (Her Majesty's Inspector of Taxes)* [1998] ECR I-4695, para 20; Case C-311/97 *Royal Bank of Scotland plc v Elliniko Dimosio (Greek State)* [1999] ECR I-2651, para 23; Case C-141/99 *Algemene Maatschappij voor Investeren en Dienstverlening NV (AMID) v Belgische Staat* [2000] ECR I-11619, para 20. The notion of indirect discrimination is also codified in Union secondary legislation. For instance, Article 2 of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22 states that 'indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons'. Similarly, Article 2 of Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16 provides that 'indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons'.

branches of national law which it may affect'.<sup>45</sup> The scope of Union law cannot depend on the nature of a national rule or its domestic qualification.<sup>46</sup> It is the effect of a particular rule on free movement in the Union that brings it within the scope of the principle of equal treatment under Article 18 TFEU and the Treaty free movement provisions.<sup>47</sup>

Now, in this context, one might also question whether the scrutiny of national private law rules under the principle of equal treatment could be affected by the fact that the scope of these rules as regards a given cross-border relationship is determined by a choice-of-law rule. In particular, it is not clear whether the applicability of a discriminatory national private law rule in accordance with a choice-of-law rule could play a role in its justification.<sup>48</sup> The answer is in the

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<sup>45</sup> See Case 82/71 *Ministère public de Italian Republic v Società agricola industria latter (SAIL)* [1972] ECR I-119, para 5; Case C-20/92 *Anthony Hubbard (Testamentvollstrecker) v Peter Hamburger* [1993] ECR I-3777, para 19. This also finds support in Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629, para 17.

<sup>46</sup> Marc Fallon and Stéphanie Francq, 'Towards Internationally Mandatory Directives for Consumer Contract' in Jürgen Basedow, Isaak Meier, Anton K Schnyder and Others (eds), *Private International Law: From National Conflicts Rules Towards Harmonization and Unification - Liber Amicorum Kurt Siehr* (T.M.C Asser Institute 2000) 172; Jona Israël, *European Cross-Border Insolvency Regulation: a Study of Regulation 1346/2000 on Insolvency Proceedings in light of a Paradigm of Co-operation and a Comitatus Europaea* (Intersentia 2005) 100.

<sup>47</sup> Stephen Weatherill, 'Recent Developments in the Law Governing the Free Movement of Goods in the EC's Internal Market' (2006) 1 *European Review of Contract Law* 90, 90.

<sup>48</sup> A directly discriminatory rule can be justified on the grounds expressly mentioned in Articles 36, 45 and 52 TFEU, whilst an indirectly discrimination rule can also be justified on the basis of the additional open category of mandatory requirements. In the context of free movement of goods, see eg Case 46/76 *W. J. G. Bauhuis v Netherlands* [1977] ECR 5; Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649; Case 34/79 *Regina v Maurice Donald Henn and John Frederick Ernest Darby* [1979] ECR 3795; Case 155/80 *Summary proceedings against Sergius Oebel* [1981] ECR 1993; Case 95/81 *Commission v Italy* [1982] ECR 2187; Case 238/82 *Duphar BV and Others v Netherlands* [1984] ECR 523; Case 229/83 *Association des Centres distributeurs Édouard Leclerc and Others v SARL "Au blé vert" and Others* [1985] ECR I; Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v Mars GmbH* [1995] ECR I-1923. In the context of free movement of workers, see eg Case 152/73 *Giovanni Maria Sotgiu v Deutsche Bundespost* [1974] ECR 153; Case 41/74 *Yvonne van Duyn v Home Office* [1974] ECR I-1337; Case 30/77 *Régina v Pierre Bouchereau* [1977] ECR 1999; Case C-237/94 *John O'Flynn v Adjudication Officer* [1996] ECR I-2617; Case C-18/95 *F.C. Terhoeve v Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland* [1999] ECR I-345; Case C-176/96 *Jyri Lehtonen and Castor Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL (FRBSB)* [2000] ECR I-2681; Case C-348/96 *Criminal proceedings against Donatella Calfa* [1999] ECR I-11. In the context of freedom

negative considering the approach taken by the Court in the cases involving this type of national rules.

In the context of free movement of goods, one could mention cases concerning national advertising and unfair competition rules. Even before the adoption of the Rome II Regulation, in most Member States these rules were applied pursuant to the choice-of-law rule referring to the law of the marketplace.<sup>49</sup> Currently, this is one of the choice-of-law rules enshrined in Article 6 of the Rome II Regulation with regard to non-contractual obligation arising out of a restriction of competition. One of the early cases where the Court was asked to rule on the compatibility of a national advertising rule with Article 34 TFEU are, for instance, *Oosthoek*, *GB-INNO-BM* and *Yves Rocher*.<sup>50</sup> The issue in these cases concerned a rule of the Member State of destination that banned certain advertising strategies which, however, were allowed in the Member State of origin. The Court found that a national rule restricting or prohibiting certain form of advertising and certain means of sales promotion could affect imports between Member States,

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of establishment and services, see eg Case C-484/93 *Peter Svensson et Lena Gustavsson v Ministre du Logement et de l'Urbanisme* [1995] ECR I-3955; Case C-158/96 *Raymond Kohll v Union des caisses de maladie* [1998] ECR I-1931; Joined Cases C-369/96 and C-376/96 *Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL (C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL (C-376/96)* [1999] ECR I-8453; Case C-224/97 *Erich Ciola v Land Vorarlberg* [1999] ECR I-2517; Case C-311/97 *Royal Bank of Scotland plc v Elliniko Dimosio (Greek State)* [1999] ECR I-2651; Case C-36/01 *Omega Spielhallen- und Automatenaufstellungs v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-960; Case C-451/03 *Servizi Ausiliari Dottori Commercialisti Srl v Giuseppe Calafiori* [2006] ECR I-2941. See also Christa Tobler, *Indirect Discrimination: a Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law* (Intersentia 2005), 316.

<sup>49</sup> Frauke Henning-Bodewig, *Unfair Competition Law: European Union and Member States* (Kluwer Law International 2006) 12. Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) no 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') [2005] OJ L 149/22 does not contain a provision regarding choice-of-law rules.

<sup>50</sup> Case 286/81 *Criminal proceedings against Oosthoek's Uitgeversmaatschappij BV* [1982] ECR 4575; Case C-362/88 *GB-INNO-BM v Confédération du commerce luxembourgeois* [1990] ECR I-667; Case C-126/91 *Schutzverband gegen Unwesen in der Wirtschaft e.V v Yves Rocher GmbH*. [1993] ECR I-2361.

since it would affect the marketing opportunities available for imported products.<sup>51</sup> Thus, the Court continued that to compel a producer either to adopt advertising or sales promotion schemes which differed from Member State to Member State or to discontinue a particular promotion scheme which was considered to be particularly effective could constitute an obstacle to imports even if the national rule at issue applied to domestic and foreign products without any distinction.<sup>52</sup> In its reasoning, however, the Court did not touch upon any choice-of-law matter, even though the national advertising rule found to be contrary to Article 34 TFEU was part of the law of the marketplace (i.e. the Member State where the advertisement was distributed).

Similarly, the absence of a reference to the relevant choice-of-law rule in the reasoning of the Court could also be observed in the context of free movement of persons. For instance, in *Phil Collins*,<sup>53</sup> the issue related to the German rule on

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<sup>51</sup> Case 286/81 *Criminal proceedings against Oosthoek's Uitgeversmaatschappij BV* [1982] ECR 4575, para 15. This was reiterated by the Court in *GB-INNO-BM* and *Yves Rocher* (see, para 7 and 10, respectively).

<sup>52</sup> *ibid.* This line of reasoning is also reflected in the specific approach developed by the Court in Joined Cases C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097. See also, Case C-292/92 *Ruth Hünermund and Others v Landesapothekerkammer Baden-Württemberg* [1993] ECR I-6787; Case C-320/93 *Lucien Ortscheit GmbH v Eurim-Pharm Arzneimittel GmbH* [1994] ECR I-5243; Case C-391/92 *Commission v Hellenic Republic* [1995] ECR I-1621; Case C-387/93 *Criminal proceedings against Giorgio Domingo Banchemo* [1995] ECR I-4663; Case C-412/93 *Société d'Importation Edouard Leclerc-Siplec v TF1 Publicité SA and M6 Publicité SA* [1995] ECR 179; Joined Cases C-34/95, C-35/95 and C-36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlang AB (C-34/95) and TV-Shop i Severige AB (C-35/95 and C-36/95)* [1997] ECR I-3843; Case C-405/98 *Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)* [2001] ECR I-1795. Having mentioned *Keck*, one should keep in mind, however, that in light of the recent rulings delivered by the Court there are question marks over whether *Keck* is still good law. See Case C-110/05 *Commission v Italy* [2009] ECR I-519; Case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* [2009] ECR I-4273. For the general discussion of these rulings, see Eleanor Spaventa, 'Leaving Keck behind? The free movement of goods after the rulings in Commission v Italy and Mickelsson and Roos' (2009) 34 *European Law Review* 914; Pal Wenneras and Ketil Boe Moen, 'Selling arrangements, keeping Keck' (2010) 35 *European Law Review* 387; Jukka Snell, 'The Notion of Market Access: A Concept or a Slogan' (2010) 47 *Common Market Law Review* 437.

<sup>53</sup> Joined Cases 92/92 and C-326/92 *Phil Collins v Imtrat Handelsgesellschaft mHbH and Patricia Im- und Export Verwaltungsgesellschaft mbH and Leif Emanuel Kraul v EMI Electrol a GmbH* [1993] ECR I-5145.

copyright, according to which the scope of copyright protection varied based on the nationality of a performer. In particular, in contrast to German performers, those from other Member States could not prohibit the non-authorised distribution of their performances, which were given abroad.<sup>54</sup> Considering the compatibility of that rule with Article 18 TFEU, the Court held that a Member State was precluded from making the grant of an exclusive right subject to the requirement that the person concerned was a national of that State.<sup>55</sup> This is because, according to the Court, Article 18 TFEU, prohibiting any discrimination on grounds of nationality, required that persons in situations governed by Union law to be placed on a completely equal footing with nationals of the Member State concerned.<sup>56</sup> The German law on copyright was applicable because of the *lex loci protectionis* rule. According to this rule, the law governing copyright and related issues is the law of the country where the copyright protection is sought.<sup>57</sup> This rule, however, was not touched upon by the Court.

This approach of the Court is present not only in cases concerning national substantive rules but also in those where national procedural rules are subject to

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<sup>54</sup> However, with the exception of foreign performing artists who fell under Article 4 of 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. According to this provision, Germany was required to grant foreign performing artists the same treatment as its own nationals in respect of performances that took place within the territory of another Contracting State of the Convention. In the present case, the Convention was not applicable, since the United States had not acceded to the Convention.

<sup>55</sup> Joined Cases 92/92 and C-326/92 *Phil Collins v Imtrat Handelsgesellschaft mbH and Patricia Im- und Export Verwaltungsgesellschaft mbH and Leif Emanuel Kraul v EMI Electrola GmbH* [1993] ECR I-5145, para 32.

<sup>56</sup> *ibid.* According to the Court, neither the disparities between the national laws relating to the protection of copyright and related right nor the fact that not all Member States had yet acceded to the 1961 Rome Convention could justify the breach of the principle under Article 18 TFEU (para 31). This was put forward by the defendants as a ground for the objective justification of the disparity in treatment.

<sup>57</sup> In Germany, in the field of copyright and neighbouring rights the applicable law is determined according to the law of the place where the copyright protection is sought. See Final Report to the Study on Intellectual Property and the Conflict of Laws, (ETD/99/B-3000/E/16, 18 April 2000), 14 <[http://ec.europa.eu/internal\\_market/copyright/docs/studies/etd1999b53000e16\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/etd1999b53000e16_en.pdf)> accessed 23 September 2011.

scrutiny. It is a well-established principle both in civil and common law systems that the applicable rules of procedure are determined pursuant to the law of the forum.<sup>58</sup> Rules of procedure regulate the manner in which judicial proceedings are conducted.<sup>59</sup> The compatibility of these rules with the principle of equal treatment was raised, for instance, *Data Delectra*, *Hayes* and *Saldanha*.<sup>60</sup> The issue in these cases concerned the procedural rule of a Member State that required only foreign nationals, acting as plaintiffs, to furnish security for costs of judicial proceedings. The rule was found by the Court to be contrary to Article 18 TFEU. Here also there is no mention of the relevant choice-of-law rule in the reasoning of the Court.

Two conclusions could be drawn from the approach adopted by the Court. On the one hand, it could be argued that the Court assumes that a given national rule is applicable pursuant to the relevant choice-of-law rule and only considers its effect.<sup>61</sup> On the other hand, more importantly, no interest shown by the Court in the choice-of-law aspect seems to demonstrate that in the context of scrutiny

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<sup>58</sup> Gernot Biehler, *Procedures in International Law* (Springer 2008) 90; George Panagopoulos, 'Substance and Procedure in Private International Law' (2005) 1 *Yearbook of Private International Law* 69, 69; Janeen M Carruthers, 'Substance and Procedure in the Conflict of laws: A Continuing Debate in Relation to Damages' (2004) 53 *International & Comparative Law Quarterly* 691, 691.

<sup>59</sup> George Panagopoulos (n 58) 71.

<sup>60</sup> Case C-43/95 *Data Delecta Aktiebolag and Ronny Forsberg v MSL Dynamics Ltd.* [1996] ECR I-4661; Case C-323/95 *David Charles Hayes and Jeannette Karen Hayes v Kronenberger GmbH* [1997] ECR I-1711; Case C-122/96 *Stephen Austin Saldanha and MTS Securities Corporation v Hiross Holding AG* [1997] ECR I-5325. See also Case 15/78 *Société générale alsacienne de banque SA v Walter Koestler* [1978] ECR 1971; Case 22/80 *Boussac Saint-Frères SA v Brigitte Gerstenmeier* [1980] ECR 3427; Case C-412/97 *ED Srl v Italo Fenocchio* [1999] ECR I-3845. The issue in the latter case, for instance, concerned the compatibility with principle of equal treatment under Article 35 TFEU of the national procedural rule that prohibited the issue of a summary payment order to be served outside national territory. The Court held that the rule complied with Article 34 TFEU, since 'the possibility that nationals would therefore hesitate to sell goods to purchasers established in other Member States is too uncertain and indirect'. See in this respect para 11.

<sup>61</sup> Michel Tison, 'Unravelling the General Good Exception: The Case of Financial Services', in Mads Andenas and Wulf-Henning Roth, *Services and Free Movement in EU Law* (Oxford University Press 2002) 371-372.

under Article 18 TFEU and the Treaty free movement provisions the reason of the applicability of a rule or the mechanism leading to its application is less important given its actual effect on free movement in the Union.<sup>62</sup> This might certainly be due to the fact that a rule is subject to scrutiny because of its substance rather than the relevant choice-of-law rule. At the same time, however, the approach taken by the Court could also be construed as confirming that the relevant choice-of-law rule does not play any role when the *designated* national substantive rule is *per se* contrary to Article 18 TFEU or the Treaty free movement provisions. Indeed, the fact that a national substantive rule is applicable to a given cross-border relationship pursuant to a choice-of-law rule, regardless of whether it is national or Union choice-of-law rule, cannot exempt it from being subject to scrutiny under the principle of equal treatment. In a similar vein, this also cannot be taken as a sufficient justifying factor. This is because, a national or Union choice-of-law rule declares a national substantive law as applicable, but it does not ensure its automatic compliance with the principle of equal treatment. In other words, a choice-of-law rule does not provide immunity of the *designated* national substantive law from scrutiny under the principle of equal treatment. Otherwise, this would lead to an unacceptable result – a rule would easily escape scrutiny under the principle of equal treatment, when it is in fact discriminatory in nature or effect.

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<sup>62</sup> Tito Ballarino and Benedetta Ubertaini, 'On Avello and Other Judgments: A New Point of Departure in the Conflicts of Laws' (2004) 6 *Yearbook of Private International Law* 84, 102.

### 3. Invoking the principle of equal treatment

In light of the above-mentioned, a forum court sitting in a Member State can subject a national rule regulating a cross-border contractual, non-contractual or other civil law relationship to scrutiny under the principle of equal treatment, irrespective of its domestic classification into a rule of private law nature and, in particular, its applicability in this context pursuant to the relevant choice-of-law rule. What remains unclear, however, is on what basis a forum-court would be able to invoke the principle of equal treatment against the application of the *designated* national substantive rule.

From a conflict of laws perspective, the applicability of the national substantive law *designated* by a choice-of-law rule is not without exception. Mandatory rules and the public policy exception are two principles that provide grounds to depart from the accepted method of assigning a cross-border relationship to a particular national substantive law pursuant to the relevant choice-of-law rule. In other words, in light of mandatory rules and the public policy exception, the applicable national substantive rule is not determined by a choice-of-law rule, but according to other rules that reflect certain overriding values or state policies. Taking this into consideration, in so far as scrutiny of the *designated* national substantive law is concerned, one could query whether the effect of the principle of equal treatment could be compared to that of mandatory rules or the public policy exception. Specifically, the question here is whether a forum court sitting in a Member State can invoke the principle of equal treatment either as a mandatory rule or the public policy exception against the application of the *designated*

national substantive law. If this is not the case, what is the basis to invoke the principle of equal treatment in this context?

### 3.1. Mandatory rules

There are various terms used in the academic literature in order to explain these rules. These include, among others, *lois de police*, rules of immediate application, self-limiting rules and spatially conditioned rules. As Guedj points out, these are not synonyms, though they have certain commonalities.<sup>63</sup> Notwithstanding their possible differences, for purposes of clarity in the present context I will refer to them as ‘mandatory rules’.

Mandatory rules are applied to cross-border relationships irrespective of the national substantive law applicable by virtue of a choice-of-law rule.<sup>64</sup> Mandatory rules go beyond the mere *choice* of the applicable law by providing substantive solutions,<sup>65</sup> but without regard to the result in a single case.<sup>66</sup> In other words, these rules replace the rules of the law applicable pursuant to a choice-of-law rule or chosen by private parties by providing different substantive solutions that reflect certain state policies or other social, economic, and political interests inherent in

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<sup>63</sup> Thomas G Guedj, ‘The Theory of the Lois de Police, a Functional Trend in Continental Private International Law – A Comparative Analysis With Modern American Theories’(1991) 39 *American Journal of Comparative Law* 661, 665.

<sup>64</sup> Pierre Mayer, ‘Mandatory Rules of Law in International Arbitration’ (1986) 2 *Arbitration International* 274, 274.

<sup>65</sup> Peter E Nygh, ‘The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and in Tort’ (1995) 251 *Recueil Des Cours* 269, 378; Susanne Knofel, ‘Mandatory rules and Choice of Law: A Comparative Approach to Article 7 (2) of the Rome Convention’ (1999) *Journal of Business Law* 239, 245; Jens Rinze, ‘The Scope of Party Autonomy under the 1980 Rome Convention on the Law Applicable to Contractual Obligations’ (1994) *Journal of Business Law* 412, 426.

<sup>66</sup> Frank Vischer (n 7) 102.

them.<sup>67</sup> These policies and interests are so crucial that the application of the law of another State cannot be tolerated.<sup>68</sup> Among others, one could mention, for instance, policies of fiscal nature, policies protecting certain economic and monetary interests, free and fair trade or functioning of an effective market or policies safeguarding environment and animal welfare.<sup>69</sup>

Mandatory rules are considered to be part of the substantive law of a State, whereby their application is not dependent upon the designation by a choice-of-law rule or the choice made by private parties to cross-border relationships.<sup>70</sup> A forum court seised with a case is required to give effect to these rules in the context of any cross-border relationship, irrespective of the otherwise applicable national substantive law.<sup>71</sup> This also applies to the situation where private parties to a contract have chosen the law governing the contract. In other words, this means that private parties cannot avoid their scope having a choice-of-law clause in their contract.<sup>72</sup> Such an obligation does not only concern the mandatory rules that are part of the law of the forum, but also the law of other States that a given cross-border relationship is linked to.<sup>73</sup>

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<sup>67</sup> Andrew Barraclough and Jeffrey Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration' (2005) 6 *Melbourne Journal of International Law* 205, 206.

<sup>68</sup> Thomas G Guedj (n 63) 665.

<sup>69</sup> Marc Blessing, 'Impact of the Extraterritorial Application of Mandatory Rules of Law on International Contracts' (1999) 9 *Swiss Commercial Law Series* 5, 14 – 15.

<sup>70</sup> Thomas G Guedj (n 63) 665.

<sup>71</sup> Horatia Muir Watt and Luca G Radicati di Brozolo, 'Party Autonomy and Mandatory Rules in a Global World' (2004) 4 *Global Jurists Advances* 1, 1.

<sup>72</sup> Christopher R Drahozal, 'Contracting Around: Default Rules, Mandatory Rules and Judicial Review of Arbitral Awards' (2002-2003) 3 *Pepperdine Dispute Resolution Law Journal* 419, 420.

<sup>73</sup> *ibid* 12-14.

The mandatory nature of these rules primarily depends on the sphere of their application, which is determined by a reference to their objective or purpose.<sup>74</sup> Legal acts containing mandatory rules can explicitly embody the scope and purpose of these rules, whilst in other cases it is determined through judicial interpretation.<sup>75</sup> Mandatory rules can have limited scope *ratione materiae* or *ratione personae*. As regards the former, for instance, one can mention mandatory rules, the applicability of which is limited to the territory of a particular State. As far as the latter is concerned, these are, for instance, rules that are applicable to the nationals of a State, regardless of the place where they reside.

Rules can be mandatory in nature in a domestic or inter-State context. Mandatory rules in a domestic context are those that are mandatory only with regard to a legal relationship that is confined to the territory of a single State. Mandatory rules in an inter-State context, in turn, refer to rules that have mandatory applicability with regard to any legal relationship irrespective of whether it is linked to more than one national legal system. Due to differences in their scope, these rules do not have the same effect on the national substantive law *designated* by a choice-of-law rule or chosen by private parties. Mandatory rules in a domestic context are not mandatory with regard to legal relationship linked to more than one national legal system.<sup>76</sup>

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<sup>74</sup> Thomas G Guedj (n 63) 665.

<sup>75</sup> *ibid*, see also Jens Rinze (n 65) 427.

<sup>76</sup> Trevor C Hartley, 'The Modern Approach to Private International Law. International Litigation and Transactions from a Common-Law Perspective: General Course on Private International Law' (2006) 319 *Recueil des Cours* 9, 225. As an example, one could mention a rule concerning the validity of a contract. Suppose that in Member State A that rule is mandatory only with regard to a contractual relationship confined to its territory. This rule would have no effect with regard to a contract between two private parties established in Member States A and B respectively and if the law of Member State B is the law governing their contract according to the relevant choice-of-law rule. In other words, the scope of national rules that are mandatory in a domestic context is limited in the context of a cross-border relationship subject to the law of another State. Thus, the

Rules that are mandatory in an inter-State context are also mentioned in Union secondary legislation that enshrines unified choice-of-law rules. They are referred to as overriding mandatory provisions. In the context of cross-border contractual obligations, Article 9 of the Rome I Regulation defines them as ‘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’.<sup>77</sup> Article 9 of the Rome II Regulation, in turn, provides that unified choice-of-law rules regulating cross-border non-contractual obligations should not restrict the application of the law of the forum in a situation where they are mandatory irrespective of the otherwise applicable law. Overriding mandatory provisions under these provisions apply to all cross-border relationships – they are not confined to intra-Union ones.<sup>78</sup> This category includes both rules of public and private law nature.<sup>79</sup>

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application of national rules that are mandatory in a domestic context is decided in accordance with the relevant choice-of-law rule. See in this respect, Trevor C Hartley (n 76) 226.

<sup>77</sup> Paragraph 1 of Article 9 of Rome Convention. This definition was drawn from the Court’s finding in Joined Cases C-369/96 and C-376/96 *Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL (C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL (C-376/96)* [1999] ECR I-8453. The issue in these cases concerned the Belgian legislation on social obligations, which was classified as public-order legislation. It was applied to the French companies that were temporarily involved in construction in Belgium. The Court held ‘the fact that national rules are categorised as public-order legislation does not mean that they are exempt from compliance with the provisions of the Treaty; if it did, the primacy and uniform application of [Union] law would be undermined. The considerations underlying such national legislation can be taken into account by [Union] law only in terms of the exceptions to [Union] freedoms expressly provided for by the Treaty and, where appropriate, on the ground that they constitute overriding reasons relating to the public interest’. See paragraph 30.

<sup>78</sup> Andrea Bonomi, ‘The Rome I Regulation on the Law Applicable to Contractual Obligations. Some General Remarks’ (2008) 10 *Yearbook of Private International Law* 165, 173. See also Andrea Bonomi, ‘Overriding Mandatory Provisions in the Rome I Regulation on the Law Applicable to Contractual Obligations’ (2008) 10 *Yearbook of Private International Law* 285, 288-289.

<sup>79</sup> Christopher Tillman, ‘The Relationship between Party Autonomy and the Mandatory Rules in the Rome Convention’ (2002) *Journal of Business Law* 45, 67.

Both the principle of equal treatment and mandatory rules in an inter-State context confront the application of the *designated* national substantive law to a given cross-border relationship. They are, however, essentially different. As mentioned earlier, mandatory rules in an inter-State context are rules that apply irrespective of the law applicable by virtue of a choice-of-law rule or chosen by private parties.<sup>80</sup> The ‘mandatory-ness’ of these rules should be understood specifically from a choice-of-law perspective. They replace or override the rules of the otherwise applicable national substantive law by providing different substantive solutions that reflect state policies or other interests inherent in them.<sup>81</sup> In contrast, although the principle of equal treatment is also mandatory in nature, it does not provide any substantive solutions, but merely ensures that applicable national rules are not directly or indirectly discriminatory on grounds of nationality or result in a disadvantage imposed on those who have exercised the Treaty free movement rights. In other words, the aim of the principle of equal treatment is not to deal with any matter of substance, but to guarantee that it is regulated by non-discriminatory means. Furthermore, in case of mandatory rules, in essence, no attention is paid to the content of the otherwise applicable national substantive rule.<sup>82</sup> They are applicable irrespective of what the latter provides. The principle of equal treatment, it turn, appears to operate in the opposite way. It is only triggered by the allegedly discriminatory effect of a particular rule. For instance, in *Garcia Avello*,<sup>83</sup> the principle of equal treatment applied because of the discriminatory treatment imposed in light of the Belgian substantive rule concerning names. Therefore, it could be argued that the functioning of the

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<sup>80</sup> Pierre Mayer (n 64) 274.

<sup>81</sup> Andrew Barraclough and Jeffrey Waincymer (n 67) 206.

<sup>82</sup> Thomas G Guedj (n 63) 680.

<sup>83</sup> Case C-148/02 *Carlos Garcia Avello v État belge* [2003] ECR I-11613.

principle of equal treatment is very much premised on the content of a rule and its effect on free movement in the Union.

### 3.2. Public policy of the forum

The public policy exception is a principle that provides an additional ground for a forum court not to apply the otherwise applicable national substantive law. As Lew points out, ‘public policy reflects the fundamental economic, legal, moral, political, religious and social standards of every extra-territorial community (...) and covers principles and standards, which are so sacrosanct as to require their maintenance at all costs and without exemption’.<sup>84</sup> The public policy exception bars the application of the *designated* national substantive law, if it contradicts the policies of the State that enforces it.<sup>85</sup> In this way, the public policy exception operates as a principle that produced the so-called *negative* effect, since relying on it, a forum court can refuse to apply any national substantive law or recognise any judgment delivered by a court sitting in another State.<sup>86</sup> Usually, the law of the forum would be applied instead.<sup>87</sup> The public policy exception is enshrined in Union secondary legislation that unifies national choice-of-law rules. For instance, Article 21 of the Rome I Regulation, Article 26 of the Rome II Regulation and Article 12 of the Rome III Regulation provide that the application of the law *designated* by the relevant choice-of-law rule may be refused if it is manifestly incompatible with the public policy of the forum.

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<sup>84</sup> Julian D M Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards* (Oceana Publications 1978) 532.

<sup>85</sup> Jacob Dolinger, ‘World Public Policy: Real International Public Policy in the Conflict of Laws’ (1982) 17 *Texas International Law Journal* 167, 167.

<sup>86</sup> *ibid* 169.

<sup>87</sup> Michael Forde, ‘The ‘Ordre Public’ Exception and Adjudicative Jurisdiction Conventions’ (1980) 29 *International and Comparative Law Quarterly* 259, 260.

There is no consensus in the academic literature as regards the difference between mandatory rules and the public policy exception. Some argue that these are two different principles.<sup>88</sup> Several arguments are put forward in this respect. First, the rationale and the starting point of these principles differ.<sup>89</sup> The public policy exception centres on the result of the application of the *designated* national substantive law to a cross-border relationship. It usually applies after the *designation* of that law pursuant to the relevant choice-of-law rule.<sup>90</sup> In contrast, mandatory rules express the imperativity of a domestic regulation, having no attention paid to the content of the *designated* national substantive law.<sup>91</sup> Therefore, in essence, they are applied prior to the *designation* of the national substantive law at issue. Others, however, assert that the application of mandatory rules is a specific manifestation of a State's public policy.<sup>92</sup> For advocates of this approach, public policy consists of 'laws of immediate application whose observance is essential for safeguarding the political, social and economic organisation of a country'.<sup>93</sup> Public policy is comprised of mandatory rules that include a State's most basic notions of morality and justice'.<sup>94</sup> Internationally recognised principles, such as the principle of party autonomy, equal treatment of parties, non-discrimination, good faith, and human rights, are also emphasised in

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<sup>88</sup> Thomas G Guedj (n 63) 680.

<sup>89</sup> *ibid.*

<sup>90</sup> *ibid.*

<sup>91</sup> *ibid.*, see also Frank Vischer (n 7) 102.

<sup>92</sup> Michael Forde (n 87) 259.

<sup>93</sup> Yves Derains, 'Public Policy and the Law Applicable to the Dispute in International Arbitration' in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (ICCA Congress Series 1987) 228.

<sup>94</sup> Mark A Buchanan, 'Public Policy and International Commercial Arbitration' (1988) 26 *American Business Law Journal* 511, 513.

this respect.<sup>95</sup> Notwithstanding the possible differences between the rationale underpinning mandatory rules and the public policy exception, both exclude the application of the otherwise national substantive law.

It was demonstrated earlier that unless there are objective justifications, the *designated* national substantive law cannot be applied, if it imposes discriminatory treatment contrary to Article 18 TFEU or the Treaty free movement provisions. Giving effect to the principle of equal treatment could, thus, lead to the application of the otherwise applicable national substantive law being refused. From a choice-of-law perspective, this outcome might resemble the one that occurs when a forum court gives effect to the public policy of the forum. Both the principle of equal treatment and the public policy exception result in the rejection of the application of the *designated* national substantive law. The application of both requires scrutiny of the effect of the applicable law in a case at hand. A particular rule is caught by the principle of equal treatment, if it is discriminatory on grounds of nationality or movement. Similarly, the application of the law that manifestly contradicts the public policy of the forum is rejected. In addition, both appear to apply at the final stage of the actual application of the *designated* national substantive law, rather than at the stage involving the process of the selection or formulating of that law, as it is the case with mandatory rules.<sup>96</sup> With regard to the principle of equal treatment, this seems to be the case particularly when indirectly discriminatory treatment on grounds of nationality is

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<sup>95</sup> Laurence R Fenelon, 'Applicability of Foreign Mandatory Rules in International Arbitration', <<http://www.rcmck.com/business-publications/foreign-mandatory-rules-in-international-arbitration/>> accessed 18 September 2011.

<sup>96</sup> Michel Tison (n 61) 371.

at issue. The mere application of a rule appears to be necessary in order to establish its indirectly discriminatory effect.

However, in addition to their similarities, one could also point out the differences between the principle of equal treatment and the public policy exception. The rejection of the applicable law relying on the public policy of the forum usually leads to the application of the law of the forum. In contrast, one can hardly envisage such an outcome with respect to the principle of equal treatment. This is based on the fact that the principle of equal treatment does not contain an implicit reference to a particular national substantive law that always becomes applicable whenever one has recourse to it.<sup>97</sup> Furthermore, using Lew's words,<sup>98</sup> the public policy exception serves to protect 'the fundamental economic, legal, moral, political, religious and social standards' of the forum. The principle of equal treatment, in turn, ensures free movement in the Union.<sup>99</sup>

### **3.3. Union public policy**

In terms of the outcome of their application against the *designated* national substantive law, the principle of equal treatment, thus, can hardly be compared to the mandatory rules or public policy of the forum. However, this should not be

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<sup>97</sup> This is further elaborated in the third chapter.

<sup>98</sup> Julian D M Lew (n 84) 532.

<sup>99</sup> On a different note, the public policy exception also falls within the scope of the principle of equal treatment. The Court held on several occasions that national measures based on public policy cannot impose discriminatory treatment on grounds of nationality. See in this respect Case 41/74 *Yvonne van Duyn v Home Office* [1974] ECR I-1337, para 23; Joined Cases C-65/95 and C-111/95 *The Queen v Secretary of State for the Home Department, ex parte Mann Singh Shingara (C-65/95) and ex parte Abbas Radiom (C-111/95)* [1997] ECR I-3343, para 28; Case C-348/96 *Criminal proceedings against Donatella Calfa* [1999] ECR I-11, para 20; Case C-100/01 *Ministre de l'Intérieur v Aitor Oteiza Olazabal* [2002] ECR I-10981, para 40. See also Luigi Fumagalli, 'EC Private International Law and the Public Policy Exception: Modern Features of a Traditional Concept' (2004) 6 *Yearbook of Private International Law* 171.

understood as suggesting that the principle of equal treatment cannot be invoked by a forum court sitting in a Member State if the otherwise applicable national substantive rule is discriminatory in nature or effect. In contrast, the right and also obligation of a forum court to do so is derived from the principle of equal treatment being one of the fundamental principles in the Union legal order. In general, as has been pointed out by Fumagalli, from a conflict of laws perspective Union primary and secondary law constitute the core of Union public policy, which should be given effect by a forum court similar to the public policy of the forum.<sup>100</sup>

It is necessary to mention that the term ‘Union public policy’ is not specifically mentioned, for instance, in Union secondary legislation adopted under Article 81 TFEU that unifies national choice-of-law rules. Nor does the latter, in particular the Rome I, Rome II and Rome III Regulations, for example, contain a clear-cut preference given to Treaty provisions or general principles over the national substantive law *designated* by the relevant choice-of-law rule.<sup>101</sup> Despite that, however, the Union public policy exception is, in essence, implicitly embedded, for instance, in the Preambles to the Rome I and Rome II Regulations. In both, it is stipulated that ‘the Regulation should not prejudice the application of other instruments laying down provisions designed to contribute to the proper

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<sup>100</sup> Luigi Fumagalli (n 99) 178-180.

<sup>101</sup> The Commission’s original proposal for the Rome II Regulation provided such a provision. Article 23 stated that ‘[the] Regulation shall not prejudice the application of provisions contained in the Treaties establishing the European Communities or in acts of the institutions of the European Communities which: in relation to particular matters, lay down choice-of-law rules relating to non-contractual obligations; or lay down rules which apply irrespective of the national law governing the non-contractual obligation in question by virtue of this Regulation; or prevent application of a provision or provisions of the law of the forum or of the law designated by this Regulation’. Article 27 of the final version, however, only states that ‘[the] Regulation shall not prejudice the application of provisions of [Union] law which, in relation to particular matters, lay down conflict-of-law rules relating to non-contractual obligations’.

functioning of the internal market in so far as they cannot be applied in conjunction with the law designated by the rules of this Regulation. The application of provisions of the applicable law designated by the rules of this Regulation should not restrict the free movement of goods and services as regulated by Union instruments'.<sup>102</sup> In a certain way, in this respect, one could also mention Article 3 (4) of the Rome I Regulation, which provides an exception to the freedom of private parties to choose the governing law. In particular, it states that 'where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of [Union] law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement'.

More generally, the duty of a forum court sitting in a Member State to give effect to Union public policy and, in particular, the principle of equal treatment as part of it, emanates from the obligation of loyal cooperation under Article 4 TEU.<sup>103</sup> This duty, first of all, concerns the law of the forum, in case it is determined as applicable to a cross-border relationship pursuant to the relevant choice-of-law rule. More importantly, it could also be extended to the law of another Member

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<sup>102</sup> Preamble 35 of the Rome II Regulation and Preamble 40 of the Rome I Regulation. However, with regard to the last part, it is not clear whether it refers to the substance of the provisions of the law *designated* by these Regulations or their mere application in light of these Regulations. cf. Article 23 of the Commission's original proposal for the Rome II Regulation, which stated that '[the] regulation shall not prejudice the application of [Union] instruments which, in relation to particular matters and in areas coordinated by such instruments, subject the supply of services or goods to the laws of the Member State where the service-provider is established and, in the area coordinated, allow restrictions on freedom to provide services or goods originating in another Member State only in limited circumstances'.

<sup>103</sup> According to Article 4 (3) TEU, 'the Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives'.

State in a similar context. In particular, one would expect a forum court sitting in a Member State to set aside the otherwise applicable rule of another Member State as regards a given cross-border relationship, if it is found to be discriminatory contrary to Article 18 TFEU or the Treaty free movement provisions. In this respect, strictly in terms of the compliance with the relevant Union rules, it would not matter whether it is the application of the law of the forum or that of another Member State is under consideration.<sup>104</sup>

At the same time, however, this might not be as straightforward as it appears. One could question, for instance, whether a forum court sitting in a Member State is better placed to assess the compatibility of the law of another Member State with Article 18 TFEU or the Treaty free movement provisions, taking into account its possible lack of knowledge and expertise in that law. While it is true that even when a forum court considers the compatibility of the otherwise applicable foreign law in light of the public policy of the forum, it would need to be aware, to a certain extent, of the substantive content of the law at issue. If the law at hand contradicts the public policy of the forum, a forum court would simply refuse to apply it. In the present context, however, the task of a forum court might be more complex, since it would have to establish whether the rule of another Member State at issue is discriminatory and, consequently, its compatibility or incompatibility with Article 18 TFEU or the Treaty free movement provisions. In particular, finding direct discrimination on grounds of nationality could be problematic, but more so, establishing indirect discrimination on grounds of

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<sup>104</sup> Though, it is questionable whether a forum court sitting in a Member State can actually assess the compliance of, for instance, foreign goods with the law of the Member State where they are produced. This is because otherwise this would be inconsistent with the free movement of goods and services rationale in the internal market. More on this, see Chapter 5.

nationality and, specifically, examining the grounds for objective justification of both.

A possible solution, in this respect, lies in the possibility for a forum court to request a preliminary ruling under Article 267 TFEU. It is already an established practice that the preliminary reference procedure can be used even when the questions raised by a national court concern the law of another Member State.<sup>105</sup> The possibility for a forum court to make a preliminary reference could help to minimise any possible error in ruling on the compatibility of the law of another Member State with Article 18 TFEU or the Treaty free movement provisions. More importantly, this also allows the Member State whose legislation is under consideration to be involved in the proceedings.<sup>106</sup> Having said that, as much as this might be a solution for the problem arising as a result of the court of a Member State assessing the compatibility of the law of another Member State with the relevant Union rules, it is also necessary to point out the reluctance and the rather restrictive approach of the Court in addressing this type of preliminary ruling requests.<sup>107</sup>

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<sup>105</sup> See eg Case 20/64 *SARL Albatros v Société des pétroles et des combustibles liquides (Sopéco)* [1965] ECR 29, p 34; Case 261/81 *Walter Rau Lebensmittelwerke v De Smedt PVBA* [1982] ECR I-3961, para 9; Case C-150/88 *Kommanditgesellschaft in Firma Eau de Cologne & Parfümerie-Fabrik, Glockengasse n. 4711 v Provide Srl.* [1989] ECR I-3891, para 12; Case C-47/90 *Établissements Delhaize frères et Compagnie Le Lion SA v Promalvin SA and AGE Bodegas Unidas SA* [1992] ECR I-3669, para 9.

<sup>106</sup> On the flip side, however, one could also argue that this might create practical difficulties for that Member State in defending its legislation at issue, since it would have to merely intervene in the preliminary ruling proceedings before the Court without being involving in the main proceedings before the referring national court. See in this respect, Morten P Broberg and Niels Fenger, *Preliminary references to the European Court of Justice* (Oxford University Press 2010), 200. As the Court held, ‘the reply on this point must be that in the absence of provisions of [Union] law in the matter, the possibility of taking proceedings before a national court against a member state other than that in which that court is situated depends both on the laws of the latter and on the principles of International law’. See in this respect, Case 244/80 *Pasquale Foglia v Mariella Novello* [1981] ECR 3045, para 24.

<sup>107</sup> Morten P Broberg and Niels Fenger (n 106) 200.

To start with, in *Foglia*, for instance, the Court held that ‘[it] must display special vigilance when, in the course of proceedings between individuals, a question is referred to it with a view to permitting the national court to decide whether the legislation of another Member State is in accordance with [Union] law’.<sup>108</sup> This is because, according to the Court, given the freedom granted to private parties to a contract under national legal systems, ‘[their conduct] may be such as to make it impossible for the State concerned to arrange for an appropriate defence of its interests by causing the question of the invalidity of its legislation to be decided by a court of another Member state’.<sup>109</sup> This, in turn, as the Court continued, could result in the preliminary ruling procedure being diverted by private parties from the purpose which it was laid down by the Treaty.

Furthermore, in the more recent rulings of *der Weduwe* and *Bacardi-Martini*,<sup>110</sup> the Court declined to rule on the questions submitted, emphasising the limited or incomplete interpretation of the law of another Member State and the lack of reasoning on the necessity for a preliminary ruling provided by the referring court. In particular, in *der Weduwe*, the issue related to the judicial investigation conducted by the Belgian authorities concerning the offences of forgery. Mr der Weduwe, a Dutch national employed by two banks in Luxembourg, was questioned as a defendant in the course of this investigation. Even though he was under the obligation to provide evidence under Belgian law, Mr der Weduwe refused to do so, invoking the obligation of professional banking secrecy under Luxembourg law. This was found by the Belgian court to seriously impede the

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<sup>108</sup> Case 244/80 *Pasquale Foglia v Mariella Novello* (Foglia 2) [1981] ECR 3045, para 30.

<sup>109</sup> *ibid*, para 29.

<sup>110</sup> Case C-153/00 *Criminal proceedings against Paul der Weduwe* [2002] ECR I-11319; Case C-318/00 *Bacardi-Martini SAS and Cellier des Dauphins v Newcastle United Football Company Ltd* [2003] ECR I-905.

collection of evidence into activities carried out in Belgium under Article 56 TFEU. In particular, the employees of banks established in Luxembourg and exercising the right to provide services in Belgium were faced with a dilemma of having to breach either the Belgian law on providing evidence or the Luxembourg law on professional banking secrecy. In this context, the Belgian court referred questions concerning the compatibility of both with Article 56 TFEU. The Court found them to be inadmissible. In this respect, it questioned the interpretation of the referring court that the Luxembourg law on professional banking secrecy had an extra-territorial effect in Belgium and that any possible exceptions attached to it were limited to the territory of Luxembourg. The Court held, first, that such an interpretation of the Luxembourg law at issue was hypothetical since Luxembourg courts had not ruled on it and, second, that ‘it [was] not the only possible interpretation’.<sup>111</sup> According to the Court, ‘the national court has not in any way explained why it considers the interpretation on which it relies to be the only one possible’.<sup>112</sup> ‘The fact that the relevance of the questions raised by the national court rests on a particular interpretation of a national law other than its own made it particularly necessary to state the grounds for the order for reference on that point’.<sup>113</sup>

In *Bacardi-Martini*, in turn, the issue related to the questions of the compatibility of the French law prohibiting the advertisement of alcoholic drinks on television with Article 56 TFEU referred by an English court. This was in the context of the contractual dispute between Bacardi-Martini and Newcastle United, and also involving Dorna Marketing. Dorna Marketing was in a contractual agreement

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<sup>111</sup> Case C-153/00 *Criminal proceedings against Paul der Weduwe* [2002] ECR I-11319, para 37.

<sup>112</sup> *ibid.*, para 38.

<sup>113</sup> *ibid.*

with several football clubs including Newcastle United to sell and display advertisements around the touchline of football pitches. It entered into a contract with Bacardi-Martini, a French company, and undertook to provide the latter with advertising time. Since one of the games played by Newcastle United was to be broadcasted on a French channel, Newcastle United instructed Dorna Marketing to remove Bacardi-Martini's advertisement from the touchline displays in order to comply with the French law at issue. As a result, Bacardi-Martini brought proceedings against Newcastle United seeking damages and injunctions. The English court hearing the case decided to seek a preliminary ruling on the compatibility of the French law at issue with Article 56 TFEU.<sup>114</sup> The Court again declared the questions submitted inadmissible. It held that since the questions were intended to assess the compatibility of the law of another Member State with Union law, the national court had to explain why it considered them to be necessary to deliver a judgment.<sup>115</sup> According to the Court, even though the English court considered the question of the legality of the French law to be important, in its reasoning, however, it essentially confined itself to repeating Newcastle United's argument that the failure to remove the relevant advertisement would result in a breach of the French law. In particular, the English court did not demonstrate whether it itself considered that Newcastle United could reasonably suppose that it was obliged to comply with the French law at issue. On this basis, the Court concluded that it did not have the evidence that it was necessary to rule

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<sup>114</sup> One of the reasons for doing so was the fact that the English court found it inappropriate to rule on the compatibility of the French law with Article 56 TFEU without the French Government being able to submit its observations on the point.

<sup>115</sup> Case C-318/00 *Bacardi-Martini SAS and Cellier des Dauphins v Newcastle United Football Company Ltd* [2003] ECR I-905, para 46. See also the reasoning of the Court in Case C-341/01 *Plato Plastik Robert Frank GmbH v Caropack Handelsgesellschaft mbH* [2004] ECR I-4883.

on the question of the compatibility of the law of a Member State referred by a court of another Member State.

*Der Weduwe* and *Bacardi-Martini* demonstrate, first of all, that the issue of a forum court sitting in a Member State assessing the compatibility of the law of another Member State with Article 18 TFEU and, in particular, the Treaty free movement provisions is not just theoretical but also practical. Second, more importantly, they once again highlight the problem related to the lack of knowledge and expertise of a court sitting in a Member State in deciding on the compliance of the law of another Member State with the relevant Union rules. In this respect, the rather restrictive approach taken by the Court in both cases is not of much help. Such a problem might often arise in the context of cross-border disputes between private parties involving choice-of-law matters in the internal market. Considering this and the importance of providing legal certainty in this context, there is a need for the Court's expertise and assistance and, consequently, for more leniency on the part of the Court in dealing with such preliminary ruling questions.<sup>116</sup> This is not to say that every request for a preliminary ruling should actually be considered by the Court or that there should not be any conditions attached in this regard. This specifically concerns cases before a national court, which similar to *Bacardi-Martini*, for instance, involve a genuine dispute involving the law of more than one Member State;<sup>117</sup> where a preliminary ruling

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<sup>116</sup> Robert Lane, 'Article 234: A Few Rough Edges Still' in Mark Hoskins and William Robinson, *A True European: Essays for Judge David Edward* (Hart Publishing 2004) 338.

<sup>117</sup> See eg Case 104/79 *Pasquale Foglia v Mariella Novello* (Foglia I) [1980] ECR 745. The Court in this ruling held that 'the duty of the Court of Justice under [Article 267 TFEU] is to supply all courts in the [Union] with the information on the interpretation of [Union] law which is necessary to enable them to settle genuine disputes which are brought before them'.

is indeed likely to be pivotal for the resolution of such a dispute;<sup>118</sup> and finally, where the interests of, at least, one of the parties are at stake.

#### **4. Interim conclusion**

In this chapter, first, I argued that the fact that the national substantive law is applicable pursuant to the relevant national or Union choice-of-law rule would have no effect, if that law is found to impose discriminatory treatment and cannot be applied in light of Article 18 TFEU or the Treaty free movement provisions. Rules are caught by the principle of equal treatment because of their effect on free movement in the Union. Their domestic classification into private law rules and, more importantly, their applicability pursuant to choice-of-law rules can hardly play a role in this regard.<sup>119</sup> National substantive rules can be applied to a given cross-border relationship pursuant to a national or Union choice-of-law rule, but this mere fact cannot be taken as a ground to exclude them from scrutiny under the principle of equal treatment nor justify any discriminatory treatment.

In this context, even though the principle of equal treatment could be in a certain way compared to mandatory rules and the public policy exception, it substantially differs from the other two in terms of the outcome of its application. Notwithstanding this fact, I argue that a forum court relying on the Union public policy exception can invoke the principle of equal treatment against the application of both the law of the forum and that of another Member State. This is certainly crucial in adjudicating cross-border disputes between private parties where the question of the applicable law arises. At the same time,

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<sup>118</sup> *ibid.*

<sup>119</sup> Jona Israël (n 46) 100; Michael Tison (n 61) 102.

nevertheless, it is doubtful whether this could genuinely ensure the compliance with Union law and provide justice in cross-border relationships, considering the possible lack of knowledge and expertise of a forum court sitting in a Member State in addressing the compatibility of the law of another Member State with Article 18 TFEU or the Treaty free movement provisions. In this respect, therefore, an important role is left to the preliminary ruling procedure, within which, however, the less restrictive and more lenient approach of the Court is desirable.

## Chapter II

### THE PRINCIPLE OF EQUAL TREATMENT AND CHOICE-OF-LAW RULES

In the previous chapter, I focused on the scrutiny of the *designated* national substantive law under the principle of equal treatment. It was demonstrated that a forum court relying on the Union public policy exception cannot apply the *designated* national substantive law, if it imposes discriminatory treatment. In this regard, it was argued that the fact that the law at issue was applicable by virtue of a national or Union choice-of-law rule could hardly affect this outcome. Now, what remains to be examined is whether choice-of-law rules themselves fall within the scope of the principle of equal treatment, and, in particular, what would be the outcome, if their application results in a difference in treatment in terms of the applicable law. Two issues could be raised in this regard. On the one hand, one could query whether the nature of choice-of-law rules, in particular, the fact that they only determine the law applicable to a cross-border relationship without dealing with matters of substance, could affect their scrutiny under the principle of equal treatment. On the other hand, it is also questionable whether a possible difference in treatment in terms of the applicable law arising as a result of the application of a national or Union choice-of-law rule could be caught by the principle of equal treatment.

In this chapter, I will first focus on whether the specific nature and objective of choice-of-law rules are sufficient to exclude these rules from the scope of the principle of equal treatment. Next, I will analyse whether national choice-of-law

rules that are based on nationality and territoriality as a connecting factor can be discriminatory contrary to the principle of equal treatment. Premised upon the finding of the Court in *Bosmann*, I will then examine the interaction of the principle of equal treatment with Union choice-of-law rules adopted under Article 81 TFEU.

### **1. Nature and objective of choice-of-law rules**

In the context of choice-of-law rules, one may first of all wonder whether their specific objective and nature require a different approach in so far as scrutiny under the principle of equal treatment enshrined in Article 18 TFEU and in the Treaty free movement provisions is concerned.

Unified choice-of-law rules adopted under Article 81 TFEU, for instance, ensure certainty over the applicable law and predictability of litigation. Preambles to both the Rome I and II Regulations mention 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’.<sup>1</sup> Based on single connecting factors, Union choice-of-law rules are intended to solve the problem arising as a result of the application of divergent national choice-of-law rules. Union choice-of-law rules ensure the clear *designation* of the law applicable

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<sup>1</sup> See Recital 6 of the Preambles to the Rome I and II Regulations.

to a cross-border relationship.<sup>2</sup> As mentioned earlier, replacing divergent national choice-of-law rules, Union choice-of-law rules guarantee that the same national substantive law is applied to the same cross-border relationship, irrespective of the forum. This, in turn, allows private parties in the context of cross-border relationships to know with certainty what national substantive law will be applicable and predict the outcome of litigation.<sup>3</sup>

In contrast to Union choice-of-law rules, there is a lack of consensus in the academic literature over the objective pursued by national choice-of-law rules.<sup>4</sup> This is mainly due to the fact that they are enshrined in national legislation but deal with cross-border (or inter-State) relationships. Therefore, whether they indeed pursue a specific objective depends on the approach one adopts.

Some argue that national choice-of-law rules merely reflect the substantive policies of the national legal system they are part of.<sup>5</sup> In particular, according to them, national choice-of-law rules are implicitly linked to and safeguard certain State policies inherent in national substantive rules.<sup>6</sup> Thus, a forum court, hearing a case, should first give effect to the substantive rules of the forum. This has been contested by those who argue that it promotes judicial parochialism and

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<sup>2</sup> Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice – Text adopted by the Justice and Home Affairs Council of 3 December 1998 [1999] OJ C 19, para 16.

<sup>3</sup> Th M de Boer, ‘The Purpose of the Uniform Choice-of-law rules: The Rome II Regulation’, (2009) 56 *Netherlands International Law Review* 295, 305.

<sup>4</sup> Joseph W Singer, ‘Real Conflicts’ (1989) 69 *Boston University Law Review* 1, 34.

<sup>5</sup> Ralf Michaels, ‘The New European Choice-of-Law Revolution: Lessons for the United States?’ (2008) 82 *Tulane Law Review* 1607, 1616.

<sup>6</sup> Jürgen Basedow, ‘The Recent Development of the Conflict of Laws’ in Jürgen Basedow, Harald Baum and Yuko Nishitani (eds), *Japanese and European Private International Law in Comparative Perspective* (Mohr Siebeck 2008) 6; Jona Israël, *European Cross-Border Insolvency Regulation: a Study of Regulation 1346/2000 on Insolvency Proceedings in light of a Paradigm of Co-operation and a Comitatus Europaea* (Intersentia 2005) 97.

chauvinism in the context of the adjudication of cross-border (or inter-State) disputes.<sup>7</sup> Strictly based on this approach, it is fair to argue that national choice-of-law rules are no different to national substantive rules in terms of the objective they pursue.

Others, however, contend that national choice-of-law rules are not confined to preserving national policies. For an example, Wai emphasises that the objectives of these rules are to ‘facilitate international commerce, increase interstate cooperation and order, and avoid parochialism and non-discrimination’.<sup>8</sup> According to the scholarship, these rules usually provide justice to private parties involved in cross-border relationships.<sup>9</sup> In particular, they fulfil the reasonable expectations of private parties, who might act in accordance with a particular national law.<sup>10</sup> Without these rules, the invariable application of the law of the forum would often result in gross injustice.<sup>11</sup> In this respect, choice-of-law rules prevent or reduce forum shopping.<sup>12</sup> This is based on the fact that if a forum court always applies its own law, a unilateral choice of the forum by private parties

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<sup>7</sup> Louise Weinberg, ‘On Departing From Forum Law’ (1983-1984) 35 *Mercer Law Review* 595, 598.

<sup>8</sup> Robert S Wai, ‘Transnational Liftoff and Judicial Touchdown: The Regulatory Function of Private International Law in the Era of Globalization’ (2001-2002) 40 *Columbia Journal of Transnational Law* 209, 224. The author examines these objectives in light of the regulatory function of choice-of-law rules developed in light of internationalist reforms. In this respect, the author refers, for instance, to the increasing number of international choice-of-law rules.

<sup>9</sup> Trevor C Hartley, ‘The Modern Approach to Private International Law. International Litigation and Transactions from a Common-Law Perspective: General Course on Private International Law’ (2006) 319 *Recueil des Cours* 9, 33. See also Lawrence Collins, C G J Morse, David McClean and Others (eds), *Dicey, Morris and Collins on the Conflict of laws* (4th edn, Sweet & Maxwell 2006) 4-5.

<sup>10</sup> Joseph W Singer (n 4) 33. However, there is an exception to that, when the law chosen by the parties to a contract contradicts the public policy of the forum.

<sup>11</sup> Peter M North and James J Fawcett, *Cheshire and North’s Private International law* (Butterworth’s 1999) 4.

<sup>12</sup> Th. M. de Boer, ‘Facultative Choice of Law. The Procedural Status of Choice-of-Law Rules and Foreign Law’ (1996) 257 *Recueil des Cours* 223, 283.

would obviously entail a unilateral choice of the governing law.<sup>13</sup> This could be unfair, for instance, towards the defendant, since he/she would have to accept the jurisdiction of the court the plaintiff would have chosen.<sup>14</sup> More importantly, similar to Union choice-of-law rules adopted under Article 81 TFEU, one could also argue that national choice-of-law rules aim to provide certainty over the law applicable to cross-border relationships and predictability of litigation.<sup>15</sup> Under this approach, thus, in terms of their objective, national choice-of-law rules could be distinguished from national substantive rules.

In addition to their specific objective, national and Union choice-of-law rules operate in a specific way. As mentioned earlier, a choice-of-law rule merely *designates* the law governing a cross-border relationship. As far as matters of substance are concerned, a choice-of-law rule is *indifferent* in nature, meaning that it itself does not provide any substantive solutions.<sup>16</sup> The latter, in turn, is dealt by the *designated* national substantive law. In other words, a choice-of-law rule does not regulate any matter of substance but only determines the rules to which it is subject.

Taking into account their objective and *indifferent* nature with regard to matters of substance, choice-of-law rules could be distinguished from substantive rules discussed in the first chapter.<sup>17</sup> This, however, does not appear to warrant any

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<sup>13</sup> *ibid.*

<sup>14</sup> *ibid.*

<sup>15</sup> However, it seems fair to assume that this function mostly pertains to unified Union and some international choice-of-law rules, considering the difference in connecting factors that national choice-of-law rules are based upon.

<sup>16</sup> Frank Vischer 'General Course on Private International Law' (1992) 232 *Recueil des Cours* 9, 23; Th M de Boer, 'Facultative Choice of Law' (n 12) 239.

<sup>17</sup> This is the case only in light of the second approach with regard to the actual objective of national choice-of-law rules.

special treatment as far as scrutiny under the principle of equal treatment is concerned. As regards the objective of choice-of-law rules, the issue seems to be rather straightforward. What objective a particular rule pursues does not have an effect on whether or not that rule can fall within the scope of the principle of equal treatment. As regards the *indifferent* nature of choice-of-law rules, at first sight, one might argue that choice-of-law rules are excluded from the scope of the principle of equal treatment, because they merely *designate* the applicable national substantive law, without touching upon the substance of the issue at hand. Thus, only the possible discriminatory effect of a substantive rule should be scrutinised under the principle of equal treatment. This might find support, for instance, in the way the Court deals with the cases involving choice-of-law rules. As mentioned earlier, the Court usually shows no interest with regard to the mechanism leading to the application of national rules.<sup>18</sup>

However, it is questionable whether the mere nature of a choice-of-law rule, specifically that of national origin, is sufficient to escape the scope of the principle of equal treatment, even if it only *designates* the applicable national substantive law. Several factors could be put forward in this regard. To start with, one could refer to the fact that a particular rule falls within the scope of the principle of equal treatment not by virtue of its nature or origin, rather by virtue of its discriminatory effect on free movement in the Union.<sup>19</sup> Similar to national substantive rules, national choice-of-law rules are also regarded as part of the law of Member States. To treat them differently could simply negate the effectiveness

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<sup>18</sup> See eg Marc Fallon and Johan Meeusen, 'Private International Law in the European Union and the Exception of Mutual Recognition' (2002) 4 *Yearbook of Private International Law* 37, 52.

<sup>19</sup> Jacobien W Rutgers, 'Free Movements and Contract Law' (2008) 3 *European Review of Contract Law* 474, 476.

of the principle of equal treatment. As the Court held, scrutiny under Treaty provisions ‘cannot vary according to the various branches of national law it may affect’.<sup>20</sup> In other words, the scope the principle of equal treatment cannot depend on the nature of a national rule.<sup>21</sup>

For instance, in *Data Delecta* mentioned earlier,<sup>22</sup> the Court found that the Swedish rule requiring only foreigners to furnish securities for the costs of judicial proceedings fell within the scope of the Treaty for the purpose of Article 18 TFEU.<sup>23</sup> In particular the Court held that the rule came within the scope of the Treaty, because of its possible effect on the economic activity of traders from other Member States.<sup>24</sup> Although the rule at issue was not intended to regulate any commercial activity, as the Court specified, it could, however, disadvantage nationals of other Member States, since they could not resolve any disputes arising from their economic activities in the same way as Swedish nationals.<sup>25</sup> The national rule at issue was procedural in nature. In contrast to substantive rules, it did not directly concern any economic activity and, more importantly, it did not provide any substantive solutions. However, this factor did not play any role in the Court reasoning. The rule was found to fall within the scope of Article 18 TFEU. In this regard, what was important was its effect on intra-Union trade

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<sup>20</sup> See Case 82/71 *Ministère public de Italian Republic v Società agricola industria latter (SAIL)* [1972] ECR I-119, para 5; Case C-20/92 *Anthony Hubbard (Testamentvollstrecker) v Peter Hamburger* [1993] ECR I-3777, para 19. This also finds support in Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629, para 17.

<sup>21</sup> Jona Israël (n 6) 100.

<sup>22</sup> Case C-43/95 *Data Delecta Aktiebolag and Ronny Forsberg v MSL Dynamics Ltd.* [1996] ECR I-4661.

<sup>23</sup> With regard to national procedural rules, see also Case C-122/95 *Stephen Austin Saldanha and MTS Securities Corporation v Hiross Holding AG* [1997] ECR I-5325; Case C-323/95 *David Charles Hayes and Jeannette Karen Hayes v Kronenberger GbmH* [1997] ECR I-1711; Case C-274/96 *Criminal proceedings against Horst Otto Bickel and Ulrich Franz* [1998] ECR I-7673

<sup>24</sup> Case C-43/95 *Data Delecta Aktiebolag and Ronny Forsberg v MSL Dynamics Ltd* [1996] ECR I-4661, para 13.

<sup>25</sup> *ibid.*

irrespective of its nature and, in particular, domestic classification.<sup>26</sup> On this basis, it is fair to argue that national choice-of-law rules also come within the scope of Article 18 TFEU and the Treaty free movement provisions. Similar to national procedural rules, the specific nature of national choice-of-law rules can hardly make a difference, if their application has an effect on intra-Union trade.

Furthermore, in the present context, it is also necessary to mention the obligation of loyal co-operation imposed on Member States by Article 4 TEU, which also concerns national courts. In several occasions, the Court held that when applying domestic law, national courts are required to interpret it in a way which accords with the requirements of Union law.<sup>27</sup> This duty is not confined to national substantive rules, but also concerns other rules including choice-of-law rules. Therefore, on this basis, it could be argued that a national court, dealing with a cross-border relationship is obliged to give effect to the relevant national choice-of-law rule, only if it complies with Union law.

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<sup>26</sup> Even though the Court emphasised the principle of national procedural autonomy, national procedural rules also fall within the scope of the Treaty and their applicability is subject to the ‘equivalence’ and ‘effectiveness’ requirements. See in this respect Case 33/76 *Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989; Case 158/80 *Rewe-Handelsgesellschaft Nord mbH et Rewe-Markt Steffen v Hauptzollamt Kiel* [1981] ECR 1805; Case C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and Others* [1990] ECR I-2433; Case C-377/89 *Ann Cotter and Norah McDermott v Minister for Social Welfare and Attorney General* [1991] ECR I-1155; Case C-208/90 *Theresa Emmott v Minister for Social Welfare and Attorney General* [1991] ECR I-4269; Case C-271/91 *M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] ECR I-4367; Case C-326/96 *B.S. Levez v T.H. Jennings (Harlow Pools) Ltd* [1998] ECR I-7835; Case C-13/01 *Safalero Srl v Prefetto di Genova* [2003] ECR I-8679; Case C-467/01 *Ministero delle Finanze v Eribrand SpA, formerly Eurico Italia SpA* [2003] ECR I-6471; Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* [2007] ECR I-2271.

<sup>27</sup> See eg Case 157/86 *Mary Murphy and Others v An Bord Telecom Eireann* [1988] ECR I-673, para 11; Case C-165/91 *Simon J. M. Van Munster v Rijksdienst voor Pensioenen* [1994] ECR I-4661, para 34; See also Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135, para 8.

In addition, as pointed out in the first chapter, this duty imposed on national courts concerns not only their own national rules but also those of other Member States. This means that a national court applying a choice-of-law rule of another Member State is also required to ensure that it complies with Union law.<sup>28</sup> This is of particular importance with regard to divergent national choice-of-law rules, which might *designate* different national substantive rules applicable to the same matter.<sup>29</sup> For instance, as mentioned earlier, the law applicable to companies in some Member States is the law of the country where a company is incorporated, whilst in others, it is the law of the place where a company's head office or central management is located.<sup>30</sup> Thus, if a choice-of-law rule applicable to a cross-border relationship is part of the law of a Member State, a forum court sitting in another Member State could only apply this rule, if it does not infringe Union law.

This line of reasoning also concerns Union choice-of-law rules. They also fall within the scope of the principle of equal treatment enshrined in Article 18 TFEU and in the Treaty free movement provisions, despite the specific objective they pursue. As discussed below, however, this does not exclude the possibility for their objective in ensuring certainty over the applicable law and predictability of litigation to be considered as a ground for objective justification, if the application of a Union choice-of-law rule leads to an outcome contrary to the principle of equal treatment.

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<sup>28</sup> Jona Israël (n 6) 100.

<sup>29</sup> Gülüm Bayraktaroğlu, 'Harmonization of Private International Law at Different Levels: Communitarization v International Harmonization' (2003) 5 *European Journal of Law Reform* 127, 131.

<sup>30</sup> With respect to the former, one could mention, for instance, United Kingdom, Ireland and Netherlands. As regards the latter, one could mention for instance, Belgium, Germany, France, Greece, Spain, Luxembourg, Portugal and Hungary.

Thus, notwithstanding their specific nature and objective, national and Union choice-of-law rules could also fall within the scope of the principle of equal treatment enshrined in Article 18 TFEU and in the Treaty free movement provisions. Now, it is necessary to find out whether a difference in treatment in terms of the applicable law arising as a result of the application of a national and Union choice-of-law rule could be incompatible with the principle of equal treatment.

## 2. National choice-of-law rules

Let us start with national choice-of-law rules. These rules usually determine the applicable law based on nationality or territoriality as a connecting factor.<sup>31</sup>

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<sup>31</sup> Nationality as a connecting factor to determine the applicable law was first expounded by Pasquale Mancini in the mid-nineteenth century. See, Pasquale S. Mancini, *Della nazionalità come fondamento del diritto delle genti* (Turin 1853). Mancini argued that national substantive law designated as applicable on the basis of nationality was the most suitable law to govern personal relationships of individuals, regardless of the place where they resided. See in this respect, Peter Nygh, *Autonomy in International Contracts* (Oxford University Press 1999), 8. According to Mancini, this meant that national substantive law should follow each person, whereby when he/she was abroad only the law of his/her nationality would be applicable to him/her. See in this respect, M Boguslavskii, *Private International Law: the Soviet Approach* (David Winter and William B. Simons tr, Martinus Nijhoff Publishers 1988) 47; Alex Mills, 'The Private History of International Law' (2006) 55 *International Comparative Law Quarterly* 1, 40.

Choice-of-law rules based on territoriality as a connecting factor are firmly rooted in the methods introduced by Friedrich Carl von Savigny in the nineteenth century. See in this respect, Jan von Hein, 'Something Old and Something Borrowed, but Nothing New? Rome II and the European Choice-of-Law Revolution' (2007-2008) 82 *Tulane Law Review* 1663, 1668. For Savigny, a conflict of national substantive laws in the context of a cross-border relationship essentially concerned a conflict of territorial laws. The determination of the applicable national substantive law in Savigny's theory in this respect is essentially premised upon the so-called 'seat' of a cross-border relationship. In particular, according to him, in order to find the national substantive law governing a particular cross-border relationship, it is necessary 'to discover for every legal relation (case) that legal territory to which, in its proper nature, it belongs or is subject (in which it has its seat)'. Savigny proposed, for instance, to use the following choice-of-law rules. These are 'the domicile of any person concerned in the legal relation; the place where a thing which is the object of the legal relation is situated; the place of a juridical act, which has been or is to be done; the place of the tribunal which has to decide a law suit'. For example, according to Savigny, the law governing rights and obligations related to an movable or immovable property is the law of the place where it is located, because 'their object is perceived by senses, and therefore occupies a definite space, the locality in space at which they are situated is naturally the seat of every legal relation into which they can enter'. See in this respect, Friedrich C von Savigny, *A Treatise on the*

## 2.1. Nationality as a connecting factor

A choice-of-law rule based on nationality as a connecting factor was involved in *Boukhalfa*.<sup>32</sup> The issue in that case related to the German choice-of-law rule concerning the employment contracts of the staff in the German diplomatic representations. Pursuant to this rule, the employment contracts signed with the staff having German nationality were governed by German law, whilst those signed with the staff having other nationalities were regulated in accordance with the law or custom of the host country. This rule was applied to Ms Boukhalfa, a Belgian national, who was employed in the German embassy in Algiers. As a result, in contrast to the employees having German nationality, her employment contract was subject to Algerian law. The question referred to the Court was whether such a difference in treatment in terms of the applicable law was prohibited by Article 45 TFEU. The Court, however, did not clearly address this question. Instead, its reasoning mainly concerned the territorial scope of Union law.<sup>33</sup> In this respect, relying on the link between Ms Boukhalfa's employment contract and German law, the Court found that Article 45 TFEU was applicable.<sup>34</sup>

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*Conflict of Laws, and the Limits of their Operation in Respect of Place and Time* (William Guthrie tr, T&T Clark Law Publishers 1869) 89-129.

<sup>32</sup> Case C-214/94 *Ingrid Boukhalfa v Bundesrepublik Deutschland* [1996] ECR I-2253.

<sup>33</sup> The Court reiterated that Union law also applied to professional activities carried outside the Union territory, if there was a sufficient close link between an employment relationship and the law of a Member State and, thus, the relevant rule of Union law. (See para15). More on the extraterritorial application of Union law, see eg Case 36/74 *B.N.O Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie et Federacion Española Ciclismo* [1974] ECR 1405; Case 237/83 *SARL Prodest v Caisse Primaire d'Assurance Maladie de Paris* [1984] ECR 3153; Case 9/88 *Mário Lopes da Veiga v Staatssecretaris van Justitie* [1989] ECR 2989; Case C-60/93 *R. L. Aldewereld v Staatssecretaris van Financiën* [1994] ECR I-2991; Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091.

<sup>34</sup> Case C-214/94 *Ingrid Boukhalfa v Bundesrepublik Deutschland* [1996] ECR I-2253, para 16.

Hence, the applicability of Article 45 TFEU meant that the German choice-of-law rule at issue could not be applied, since a Belgian national could not be treated worse than a German national.<sup>35</sup> This point was well addressed by AG Lèger in his Opinion. He held that in accordance with the German choice-of-law rule, the employment contracts of those working in the German diplomatic representations were subject to different rules according to whether or not they were German nationals.<sup>36</sup> In other words, according to AG Lèger, the criterion giving rise to a difference in treatment in terms of the applicable law of the comparably placed employees was clearly nationality.<sup>37</sup>

*Boukhalfa*, thus, shows how the mere application of a national choice-of-law rule based on nationality as a connecting factor could result in an outcome contrary to the principle of equal treatment on grounds of nationality. In this respect, however, it is not clear whether this should be understood as a general rule that nationality cannot be used as a connecting factor to determine the applicable law in the Union. It is true that in light of such a choice-of-law rule, a possible disparity in treatment, for instance, imposed on nationals of two Member States as a result of the application of different national substantive laws pursuant to their different nationalities cannot be ruled out. Nevertheless, even though this *prima facie* might seem to be directly discriminatory on grounds of nationality, such a difference in treatment in terms of the applicable law would not be incompatible with Article 18 TFEU or the Treaty free movement provisions, provided that

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<sup>35</sup> Michael Bogdan, *Concise Introduction to EU Private International Law* (Europa Law Publishing 2006) 21.

<sup>36</sup> Case C-214/94 *Ingrid Boukhalfa v Bundesrepublik Deutschland* [1996] ECR I-2253, Opinion of Advocate General Lèger, para 18.

<sup>37</sup> *ibid.*

nationality in this context is only used as a neutral connecting factor only to determine the applicable law.

At the outset, it is necessary to mention that nationality is one of the connecting factors that are inherent in most national legal systems in the Union. Nationality determines the substantive law, for instance, applicable with regard to the matters of personal status and capacity, family relations and succession.<sup>38</sup> As argued by the scholarship, nationality in this context has been adopted and used as a connecting factor to strengthen and maintain the special ties between a State and its nationals.<sup>39</sup> Choice-of-law rules that are based on nationality as a connecting factor offer ‘a method of ascertaining the law which most closely accords with the social and cultural environment of the person concerned’.<sup>40</sup> Therefore, within these national legal systems, nationality is a legitimate ground to determine the applicable law and cannot *per se* be held to be incompatible with the principle of equal treatment so long as it is used as a neutral connecting factor.

This line of reasoning also finds support in the Court’s case-law. A choice-of-law rule based on nationality as a connecting factor was also involved, for instance, in *Garcia Avello*.<sup>41</sup> The issue in that case related to the Belgian rule, according to

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<sup>38</sup> Michael Bogdan (n 35) 23. See also John O’Brien and Raymond Smith, *Conflict of Laws* (2nd edn, Cavendish 1999), 88. Though, habitual residence is also used as a connecting factor in some Member States. See eg Case C-353/06 *Proceedings brought by Stefan Grunkin and Dorothee Regina Paul* [2008] ECR I-7639. The issue in that case concerned the Danish choice-of-law rule, under which the law applicable with regard to names is the law of habitual residence.

<sup>39</sup> See eg Johan Meeusen, ‘Instrumentalisation of Private International Law in the European Union: Towards a European Conflicts Revolution?’ (2007) 9 *European Journal of Migration and Law* 287, 293; Kurt Siehr, ‘General Problems of Private International Law in Modern Codifications – *De Lege Lata* and *De Lege Europea Ferenda*’ (2005) 7 *Yearbook of Private International Law* 17, 32.

<sup>40</sup> Ko Swan Sik, ‘The Netherlands and the Law concerning Nationality’ (1980) 3 *International Law in the Netherlands* 1, 18.

<sup>41</sup> Case C-148/02 *Carlos Garcia Avello v État belge* [2003] ECR I-11613.

which a child could only bear his/her father's surname. Under the Belgian choice-of-law rule, this rule applied to all Belgian nationals, even if they were resident outside Belgium. In addition, it was also applicable to Belgian nationals, who at the same time had one or more nationalities. The rule was applied with regard to the children who had dual Belgian-Spanish nationality. Their parents, Mr Garcia Avello and Mrs Weber, requested the Belgian authorities to register their children's surname as 'Garcia Weber' according to the Spanish tradition, instead of 'Garcia Avello'. Pursuant to the Belgian rule, their request was rejected by the Belgian authorities. The question referred to the Court was whether this was compatible with Article 18 TFEU. The Court pointed out that the principle of equal treatment on grounds of nationality required that comparable situations should not be treated differently and different situations should not be treated in the same way.<sup>42</sup> Having mentioned the fact that under Belgian rule at issue, a person having only Belgian nationality and a person having Belgian and other nationality were treated similarly, the Court went on to the question of whether these two categories of persons were indeed in comparably placed situations. According to the Court this was not the case. Based on that, the Court held that Belgian nationals, who had also other nationality, bore different surnames under the legal systems concerned.<sup>43</sup> To treat this category of persons in a similar way as those having only Belgian nationality would create difficulties for them, for instance, with regard to the legal effect of diplomas or documents drawn in different surnames.<sup>44</sup>

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<sup>42</sup> *ibid* para 31.

<sup>43</sup> *ibid* para 35.

<sup>44</sup> *ibid* para 36.

The Court's reasoning appears to have rather limited or no impact on the application of the Belgian choice-of-law rule based on nationality as a connecting factor. In particular, the Court did not condemn the Belgian authorities for using nationality as a connecting factor for the application of the Belgian rule concerning names. On the contrary, as Meeusen points out, the Court itself rested its reasoning on the dual nationality of the children and the different rights to which their two nationalities gave rise.<sup>45</sup> Thus, it appears that the main problem in *Garcia Avello* was not the application of the choice-of-law rule based on nationality as a connecting factor, but the Belgian rule that gave a preference to Belgian nationality as regards Belgian nationals who also had other nationalities. Because of that, they were also required to comply with the choice of surname under the Belgian substantive rule at issue. This is supported by the wording of the conclusion reached by the Court. It held that Articles 18 and 20 TFEU precluded the Belgian authorities to refuse the request to change the children's surname, when the purpose of the request was to enable those children to bear a surname, to which they were entitled pursuant to the law and tradition of another Member State.<sup>46</sup>

The argument that the use of nationality only as a neutral connecting factor is compatible with the principle of equal treatment on grounds of nationality also derives from the case of *Hoorn*.<sup>47</sup> The issue in that case related to the agreement between Germany and the Netherlands on the pension payments in respect of the forced labour performed in Germany during the Second World War. According to the agreement, the amount of the pension payment was calculated pursuant to the

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<sup>45</sup> Johan Meeusen (n 39) 294.

<sup>46</sup> Case C-148/02 *Carlos Garcia Avello v État belge* [2003] ECR I-11613, para 45.

<sup>47</sup> Case C-305/92 *Albert Hoorn v Landesversicherungsanstalt Westfalen* [1994] ECR I-1525.

law of a worker's nationality. Therefore, the amount of the pension payment provided to Mr Hoorn, a Dutch national, was determined according to Dutch law and was less than that granted to German nationals under German law. Mr Hoorn submitted that the difference in the amount of the pension payment paid was contrary to Article 18 TFEU. This claim was rejected by the Court. It held that the agreement between Germany and the Netherlands 'merely determines the law applicable to the workers concerned, without stating the scope of the benefits'.<sup>48</sup> According to the Court, the difference in treatment arose from the difference in the amount of the benefits granted under Dutch and German law.<sup>49</sup> Furthermore, the Court also found that the fact that Mr Hoorn was subject to Dutch law was not contrary to Article 18 TFEU, since it treated all eligible Union citizens equally irrespective of their nationality.<sup>50</sup>

From the reasoning of the Court in *Bosmann* and *Hoorn*, it is clear that not every difference in treatment in terms of the applicable law imposed by a national choice-of-law rule based on nationality as a connecting factor is in fact contrary to Article 18 TFEU or the Treaty free movement provisions. In particular, such a difference in treatment, though *prima facie* directly discriminatory on grounds of nationality, would not constitute discrimination and, thus, require objective

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<sup>48</sup> *ibid* para 12.

<sup>49</sup> *ibid*.

<sup>50</sup> *ibid* para 13. In this respect, it is also necessary to mention that free movement in the internal market is not supposed to be neutral as regards, for instance, taxation or social security. See in this respect Joined Cases C-393/99 and C-394/99 *Institut national d'assurances sociales pour travailleurs indépendants (Inasti) v Claude Hervein and Hervillier SA (C-393/99) and Guy Lorthiois and Comtexbel SA (C-394/99)* [2002] ECR I-2829, para 30; Case C-365/02 *Proceedings brought by Marie Lindfors* [2004] ECR I-7183, para 34; Case C-403/03 *Egon Schempp v Finanzamt München V* [2005] ECR I-6421, para 45.

justification if nationality in this context is merely used as a neutral connecting factor to determine the applicable law.<sup>51</sup>

This, however, would not be the case, for instance, in two situations. First, this is when the applicable law is determined based on the possession of a particular nationality rather than the factor of nationality in general. This would constitute discrimination on grounds of nationality, since the preference given to a particular nationality would result in a group that possesses that nationality being privileged over the other one that does not.<sup>52</sup> Therefore, unless there is an objective justification,<sup>53</sup> such a choice-of-law rule would be caught by Article 18 TFEU or the Treaty free movement provisions. This is quite evident, if one compares, for instance, the choice-of-law rules involved in *Boukhalfa* and *Hoorn*. The rule in *Boukhalfa* does not appear to be neutral as the one in *Hoorn*. Specifically, in *Boukhalfa*, it seems that the determination of the applicable national substantive law was more centred on the fact of the possession of German nationality, rather than the factor of nationality in general as it was the case in *Hoorn*.<sup>54</sup> In other

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<sup>51</sup> Case C-353/06 *Proceedings brought by Stefan Grunkin and Dorothee Regina Paul* [2008] ECR I-7639, Opinion of Advocate General Sharpston, para 62. According to Advocate General Sharpston, distinctions between individuals as regards the applicable law based on nationality are inevitable where nationality only serves as a link to a particular national legal system. This also finds support in the recently adopted Rome III Regulation. Under Articles 5 and 8 of the Rome III Regulation, as one of the options provided, spouses can choose the law of the State of which one of them is a national as the law governing their divorce or legal separation. In the absence of a choice made, the law of the State of which both spouses are nationals at the time the court is seised with the case could be the applicable national substantive law.

<sup>52</sup> Tito Ballarino and Benedetta Ubertazzi, 'On Avello and Other Judgments: A New Point of Departure in the Conflicts of Laws' (2004) 6 *Yearbook of Private International Law* 84, 102. See also, Benedetta Ubertazzi, 'The Inapplicability of the Connecting Factor of Nationality to the Negotiating Capacity in International Commerce' (2008) 10 *Yearbook of Private International Law* 711, 723.

<sup>53</sup> As regards a justified residence requirement, see eg Case C-209/03 *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECR I-2119; Case C-138/02 *Brian Francis Collins v Secretary of State for Work and Pensions* [2004] ECR I-2703; Case C-158/07 *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep* [2008] ECR I-8507.

<sup>54</sup> See also Case C-55/00 *Elide Gottardo v Istituto nazionale della previdenza sociale (INPS)* [2002] ECR I-413.

words, as AG Lèger pointed out in *Boukhalfa*, the law applicable to the employment contracts was determined based on the fact of whether or not the person had German nationality. In this way, the choice-of-law rule at issue disadvantaged those who were nationals of other Member States, by treating them differently than German nationals. In this respect, it seems correct to argue that as far as the use of nationality as a connecting factor is concerned, a Member State is required to give equal value to its own nationality and that of another Member State, unless there is an objective justification for not doing so.

Second, it could also be contrary to Article 18 TFEU or the Treaty free movement provisions, in particular, discriminatory on grounds of movement, if a Member State, where nationality is used as a connecting factor, for instance, refuses to give effect to habitual residence, which is, in turn, used as a connecting factor in another Member State. That is to say, even though it is up to Member States to choose whether to have either nationality or habitual residence as a principal connecting factor in any area within their legal system, in certain circumstances falling within the scope of the Treaty free movement rights they might also be required to give equal value to both.

This is well explained by Advocate General Sharpston in *Grunkin Paul*.<sup>55</sup> The issue in that case related to the refusal by the German authorities to recognise the name consisting of both parents' surnames that was given under Danish law to a child, a German national, who was born and resided in Denmark. His both parents were also German nationals but resided in Denmark. According to the Danish

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<sup>55</sup> Case C-353/06 *Proceedings brought by Stefan Grunkin and Dorothee Regina Paul* [2008] ECR I-7639, Opinion of Advocate General Sharpston.

choice-of-law rule, the law applicable with regard to names is the law of the place of habitual residence, while under the German choice-of-law rule it is the law of a person's nationality. In contrast to German law that excludes the possibility to combine both parents' surnames, Danish law allows that using either a hyphen or as a middle name.

According to Advocate General Sharpston, the refusal to recognise the effects of measures which were valid under another legal system using another connecting factor offended the principle of equal treatment. The Advocate General found that it was contrary to the general principle of equal treatment, if 'a choice of law rule of a Member State leads systematically to a refusal to recognise a surname given to a national of that Member State in accordance with the law of his Member State of birth and habitual residence, which is applicable by virtue of its own choice of law rules'.<sup>56</sup> In Advocate General's words, the principle of equal treatment required that, 'when a situation is not purely internal to a Member State but involves the exercise of a right guaranteed by the (...) Treaty, a link to the law of another Member State should not be treated differently according to whether it is based on nationality or habitual residence'.<sup>57</sup>

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<sup>56</sup> *ibid* para 69. AG Sharpston held this based on the fact that if the child was born in a Member State that applies the *jus soli*, he could have acquired the nationality of that Member State and, in such a scenario, German authorities would have recognised the name given under the law of that Member State. Therefore, in AG Sharpston's words, 'German citizens born in another Member State and registered under a name formed in accordance with the law of that State as the State of their habitual residence are thus treated differently depending on whether the State also allows them to acquire its nationality, a matter not necessarily linked to the criterion it uses when determining the applicable law relating to names'. (see para 68).

<sup>57</sup> *ibid*.

## 2.2. Territoriality as a connecting factor

So far the analysis concerned the possible discriminatory effect arising as a result of the application of a national choice-of-law rule based on nationality as a connecting factor. Now, let us consider the question of whether a national choice-of-law rule based on territoriality as a connecting factor could also be caught by the principle of equal treatment laid down under Article 18 TFEU and, specifically, the Treaty free movement provisions.

In accordance with a national choice-of-law rule based on territoriality as a connecting factor, the applicable national substantive law is determined pursuant to the location of the essential element of a given legal relationship. As an example, one could mention, for instance, habitual residence, marketplace, the place of employment, the place of a company's establishment, the place where an immovable property is located, or the place where a disputed event takes place. Such a territorial choice of the applicable law was, for instance, subject to scrutiny under Articles 49 and 54 TFEU in a series of rulings concerning company formation and recognition. These are, for instance, *Centros*, *Überseering* and *Inspire Art*.

Before going into them, it is necessary to mention that there are two different theories, i.e. the place of incorporation theory and the real-seat theory, used in Member States to identify the law governing companies.<sup>58</sup> According to the

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<sup>58</sup> Luca Cerioni, *EU corporate law and EU company tax law* (Edward Elgar Publishing 2007) 70. The place of incorporation theory is used, for instance, in United Kingdom, Ireland, Netherlands, Finland, Denmark and Sweden. The real seat theory, in turn, is used, for instance, in Belgium, Germany, France, Greece, Spain, Luxembourg, Portugal and Hungary.

place of incorporation theory, a company is a creature of the legal system where it is incorporated and, thus, the place of a company's incorporation is regarded as the most appropriate connecting factor to determine the law governing the matters related to its formation, internal relations and recognition.<sup>59</sup> In contrast, under the real-seat theory, the prevailing legal system is where a company conducts its main activities and, therefore, the place where its head office or central management is located is considered as the main connecting factor to determine the applicable law.<sup>60</sup>

In *Centros*,<sup>61</sup> the subject of contention was the refusal by the Danish authorities to register a branch of Centros, a company incorporated in the UK. The refusal was based on the ground that Centros had never traded in the UK and was essentially seeking to create not a branch but a permanent establishment in Denmark by circumventing the rules regarding the paying-up of minimum capital under Danish law. English law did not impose such a requirement. The Court found that the refusal by a Member State to register a branch of a company formed in accordance with the law of another Member State constituted an obstacle to the exercise of freedom of establishment under Articles 49 and 54 TFEU. The Court rejected the argument related to the possible circumvention of the relevant rules under Danish law. In particular, the Court held that 'the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. The right to form a company in accordance with the law of a

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<sup>59</sup> Robert R Drury, 'Migrating Companies' (1999) 24 *European Law Review* 354, 356.

<sup>60</sup> *ibid.*

<sup>61</sup> Case C-212/97 *Centros Ltd. v. Erhvervs-og Selskabsstyrelsen* [1999] ECR I-1459.

Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty'.<sup>62</sup> The Court also added that the fact that a company did not conduct any business in the Member State of its incorporation was not sufficient to prove the existence of an abuse or fraudulent conduct.<sup>63</sup>

In *Überseering*,<sup>64</sup> the issue related to the German rule, under which, the right of a company to bring legal proceedings was dependent on its legal capacity. According to German law, the latter was determined pursuant to the law of the place where a company had its actual centre of administration as oppose to the law of the place of its incorporation. This was also applicable to companies, incorporated in other States, which had transferred their actual centre of administration to Germany. *Überseering* was a company incorporated in the Netherlands and owned a property in Germany. It entered into a contract with NCC to refurbish a garage and a motel situated on that property.<sup>65</sup> *Überseering* sought compensation from NCC, because it was not satisfied with the paint work done by the latter. Its claim was dismissed by the German court. It found that *Überseering*'s actual centre of administration was transferred to Germany once its shares were acquired by two German nationals. As a result, according to the German court, as a company incorporated in the Netherlands, *Überseering* did not have a legal capacity in Germany and, consequently, the right to bring legal proceedings there.

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<sup>62</sup> *ibid* para 27.

<sup>63</sup> *ibid* para 29.

<sup>64</sup> Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I-9919.

<sup>65</sup> In the meantime, two German nationals residing in Germany acquired all shares in *Überseering*.

The Court found the refusal to recognise the legal capacity of a company incorporated in a Member State on the ground that its actual centre of administration had been moved to another Member State was contrary to Articles 49 and 54 TFEU. In this regard, the Court held that *Überseering*, validly incorporated in the Netherlands, was entitled under Articles 49 and 54 TFEU to exercise freedom of establishment.<sup>66</sup> It was of little significance that its shares were acquired by German nationals residing in Germany, since that did not cause *Überseering* to cease to be a legal person under Dutch law.<sup>67</sup> According to the Court, the company's 'existence is inseparable from its status as a company incorporated under [Dutch] law, since a company exists only by virtue of the national legislation which determines its incorporation and functioning. The requirement of reincorporation of the same company in Germany is therefore tantamount to outright negation of freedom of establishment'.<sup>68</sup>

In *Inspire Art*,<sup>69</sup> in turn, the issue concerned the Dutch rule, which required companies incorporated in other States but carrying their activities exclusively in the Netherlands to register as a formally foreign company and meet several requirements in this respect, such as minimum capital and directors' liability. This rule was applied to *Inspire Art*, a British company, which was carrying its activity in the Netherlands through a branch in Amsterdam. Its sole director, who resided in The Hague, was authorised to act alone and independently on behalf of the company. Due to its exclusive activity in the Netherlands, *Inspire Art* was therefore

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<sup>66</sup> *ibid* para 80.

<sup>67</sup> *ibid*.

<sup>68</sup> *ibid* para 81.

<sup>69</sup> Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] ECR I-10155.

required to add in the commercial register that it was a formally foreign company and meet the necessary requirements in this regard.

The Court was asked to rule on whether this was compatible with Articles 49 and 54 TFEU. Relying on *Centros* and *Segers*,<sup>70</sup> the Court first reiterated that with regard to the application of these Treaty provisions, it was immaterial that a company was formed in a Member State only for the purpose of establishing itself in another Member State, where its main or entire activity was to be conducted.<sup>71</sup> In particular, according to the Court, the fact that a company was formed in the first Member State for the sole purpose of enjoying the benefit of more favourable legislation did not constitute an abuse.<sup>72</sup> The Court, thus, held that Inspire Art could rely on Articles 49 and 54 TFEU, even if it was formed in the UK for the purpose of circumventing the stricter rules under Dutch law. As a result, the application of the additional rules on minimum capital and directors' liability under Dutch law to a company formed in accordance with the law of another Member State had the effect of impeding the exercise of freedom of establishment.<sup>73</sup> In this respect, the Court also pointed out that the fact that foreign companies were recognised under Dutch law and were not refused registration did not make a difference.<sup>74</sup>

*Centros*, *Überseering* and *Inspire Art*, thus, show that the use of 'real seat' or, in other words, the place where a company's head office or central management is

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<sup>70</sup> Case 79/85 *D.H.M. Segers v Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen* [1986] ECR I-2375, para 16; Case C-212/97 *Centros Ltd. v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459, para 17.

<sup>71</sup> Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] ECR I-10155, para 95.

<sup>72</sup> *ibid* para 96.

<sup>73</sup> *ibid* para 101.

<sup>74</sup> *ibid* para 99.

located as a connecting factor can be discriminatory contrary to Articles 49 and 54 TFEU.<sup>75</sup> From the outset, it is necessary to point out that the mere use of ‘real seat’ as a connecting factor by a Member State is clearly compatible with Articles 49 and 54 TFEU. In particular, similar to nationality and habitual residence in case of natural persons, it is up to a Member State to decide whether to base upon either ‘real seat’ or the place of incorporation as a connecting factor to establish the legal personality of a company and, in general, the fact that the latter has the status of being established under its law. This is evident from the reasoning the Court gave in the early case of *Daily Mail* and has reiterated in the recent case of *Cartesio*.<sup>76</sup> In these cases, the Court held that ‘unlike natural persons, companies are creatures of the law and, in the present state of [Union] law, creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning’.<sup>77</sup> The Court also added that the Treaty had taken into account this variety in national legislation, which was expressed by the fact that connecting factors such as the registered office, central administration and principal place of business were given the same footing under Article 54 TFEU.<sup>78</sup> According to the Court, the freedom of a Member State to define the relevant connecting factor did not only concern the formation of a company, but also the condition whereby a company could retain the status of

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<sup>75</sup> More on the effect of the Court rulings, see eg Hans C Hirt, ‘Freedom of Establishment, International Company Law and the Comparison of European Company Law Systems after the ECJ’s decision in *Inspire Art Ltd*’ (2004) 15 *European Business Law Review* 1189; Eddy Wymeersch, ‘The Transfer of the Company’s seat in European Company Law’ (2003) 40 *Common Market Law Review* 661; Werner F Ebke, ‘Centros - Some Realities and Some Mysteries’ (2000) 48 *American Journal of Comparative Law* 623; Wolf-Georg Ringe, ‘No Freedom of Emigration for Companies?’ (2005) 16 *European Business Law Review* 621.

<sup>76</sup> Case 81/87 *The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc* [1988] ECR 5483; Case C-210/06 *Cartesio Oktató és Szolgáltató bt* [2008] ECR I-9641.

<sup>77</sup> *ibid* *Daily Mail*, para 19; *Cartesio*, para 104.

<sup>78</sup> *ibid* *Daily Mail*, para 21; *Cartesio*, para 106.

being established under its law.<sup>79</sup> Thus, on the one hand, to grant such a status, a Member State is free to require a company to have its registered office as well as its ‘real seat’ on its territory.<sup>80</sup> On the other hand, a Member State can also refuse to permit a company to retain that status if it intends to move its seat to another Member State.<sup>81</sup>

In light of *Centros*, *Überseering* and *Inspire Art*, however, it would be incompatible with Articles 49 and 54 TFEU, if a Member State refuses to recognise a company validly incorporated under the law of another Member State relying on ‘real seat’ as a connecting factor. In particular, assume for a moment that a Member State allows a company incorporated under its law to move its seat to another Member State while retaining the status of being established under its law. The second Member State in this respect cannot use ‘real seat’ as a connecting factor to deny the legal capacity of that company by requiring it to re-incorporate itself under its law,<sup>82</sup> and consequently, have its registered office as well as ‘real seat’ on its territory.<sup>83</sup> Similarly, the second Member State cannot impose additional requirements on the branch of a company validly incorporated

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<sup>79</sup> *Cartesio*, para 107.

<sup>80</sup> *ibid* para 110.

<sup>81</sup> *ibid*. In this respect, the requirement of winding-up or liquidation could be imposed on the company. However, according to the Court such a requirement could be incompatible with Articles 49 and 54 TFEU, ‘a company governed by the law of one Member State moves to another Member State with an attendant change as regards the national law applicable, since in [this] situation the company is converted into a form of company which is governed by the law of the Member State to which it has moved’.

<sup>82</sup> Enrico Vaccaro, ‘Transfer of Seat and Freedom of Establishment in European Company Law’ (2005) 16 *European Business Law Review* 1348, 1350.

<sup>83</sup> Under the real seat theory, for a company to have its legal capacity recognised, it has to be incorporated in the ‘real seat’ State, meaning that its place of incorporation and ‘real seat’ should coincide within one and the same State. See in this respect, Peter Behrens, ‘From “Real Seat” to “Legal Seat”’: Germany’s Private International Company Law Revolution’ in Peter Hay, Lajos Vekas, Yehuda Elkana and Others (eds), *Resolving International Conflicts: liber amicorum Tibor Várady* (Central European University Press 2009) 46. See also, Alexandros Roussos, ‘Realising the Free Movement of Companies’ (2001) 12 *European Business Law Review* 7, 8-9; Werner F Ebke, ‘The European Conflict-of-Corporate-Laws Revolution: Überseering, Inspire Art and Beyond’ (2005) 16 *European Business Law Review* 7, 13.

under the law of another Member State before it is allowed to enjoy the right under Articles 49 and 54 TFEU. In both occasions, therefore, the use of ‘real seat’ as a connecting factor would be incompatible with Articles 49 and 54 TFEU, unless there are objective justifications for doing so. As the Court pointed out, requirements relating to the general interest, such as the protection of the interests of creditors, minority shareholders or employees, could in certain circumstances be taken as a ground for objective justification.<sup>84</sup> Though, it is necessary to mention that in *Centros*, *Überseering* and *Inspire Art*, for instance, the Court did not accept any claims based on these grounds.

In this context, strictly in terms of the limitations imposed on the use of a choice-of-law rule based on a specific connecting factor, *Centros*, *Überseering* and *Inspire Art* in a certain way could be compared to *Grunkin Paul*. As further explained in the fourth chapter, *Grunkin Paul* and other similar rulings seem to extend the principle of party autonomy with regard to names.<sup>85</sup> That is to say, a person can register a name according to the tradition and law of a Member State of his/her own choice on the basis of a particular connecting factor, for example habitual residence. Another Member State in this regard cannot refuse to recognise that name based on another connecting factor, such as nationality, unless it is objectively justified. In the same vein, the party autonomy principle also appears to be extended to the matters related to company formation and

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<sup>84</sup> See eg Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I-9919, para 92.

<sup>85</sup> Case C-148/02 *Carlos Garcia Avello v État belge* [2003] ECR I-11613; Case C-353/06 *Proceedings brought by Stefan Grunkin and Dorothee Regina Paul* [2008] ECR I-7639; Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* (CJEU, 22 December 2010); Case C-391/09 *Malgożata Runevič-Vardyn, Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others* (CJEU, 12 May 2011).

recognition.<sup>86</sup> This means that one has the freedom to choose any national jurisdiction to establish a company, irrespective of whether the connecting factor used in this regard is the place of incorporation or ‘real seat’. Other Member States, in turn, are obliged to recognise such a company and any additional requirements imposed on it or its branch should be objectively justified. Because of its specific nature, this obligation particularly concerns a Member State that follows the real-seat theory. In this way, similar to the nationality-habitual residence dichotomy discussed earlier, in situations falling within the scope of Articles 49 and 54 TFEU, such a Member State is required to give equal weight to the place of incorporation and ‘real seat’ as connecting factors to determine the legal capacity of a company.<sup>87</sup>

### **3. Union choice-of-law rules**

The analysis presented above shows that national choice-of-law rules can be caught by the principle of equal treatment, if nationality or territoriality they are based upon is not merely used as a neutral connecting factor to determine the applicable law. In particular, the following is likely to be incompatible with the principle of equal treatment and, therefore, require objective justification. This would be the case, for instance, when in the process of identifying the applicable law one nationality is given preference over the other nationality. Similarly, this could also occur if nationality and habitual residence or two territorial connecting

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<sup>86</sup> Sylvaine Poillot-Peruzzetto, ‘International Company Law in the ECJ Decisions’ in Jürgen Basedow, Harald Baum and Yuko Nishitani (eds) (n 6) 197.

<sup>87</sup> In this respect, it seems relevant to mention the finding of AG Sharpston in *Grunkin Paul* that ‘when a situation is not purely internal to a Member State but involves the exercise of a right guaranteed by the (...) Treaty, a link to the law of another Member State should not be treated differently’. Such a situation was present, for instance, in *Überseering*, where a company having its ‘real seat’ in Germany but the place of incorporation in another Member State was treated differently than a company having its ‘real seat’ and the place of incorporation in Germany.

factors having the same scope, such as the place of incorporation and ‘real seat’, are not given equal weight by a Member State.

As far as Union choice-of-law rules are concerned, in particular those adopted under Article 81 TFEU, the situation, however, appears to be different. Considering the territorial nature of the connecting factors that Union choice-of-law rules adopted under Article 81 TFEU are premised upon, the application of these rules might lead to a difference in treatment in terms of the applicable law. Such a difference in treatment is less likely to constitute direct or indirect discrimination on grounds of nationality, because Union choice-of-law rules are based on single neutral connecting factors, which, in turn, are designed in light of the Treaty free movement provisions. However, as mentioned earlier, the principle of equal treatment under Article 18 TFEU and the Treaty free movement provisions is not confined to questions of nationality, but also encompasses the prohibition of discrimination on grounds of movement. Thus, a rule that puts at a disadvantage and as a result treats differently those who have exercised the Treaty free movement rights in comparison to those who have not could be caught under these Treaty provisions.<sup>88</sup> In this context, one could therefore query whether a difference in treatment in terms of the applicable law imposed on those who have exercised the Treaty free movement rights and those who have not could also be found to be discriminatory under Article 18 TFEU or the Treaty free movement

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<sup>88</sup> See eg. Case C-419/92 *Ingetraut Scholz v Opera Universitaria di Cagliari and Cinzia Porcedda* [1994] ECR I-505, para 12; Case C-107/94 *P. H. Asscher v Staatssecretaris van Financiën* [1996] ECR I-3089, para 32; Case C-224/98 *Marie-Nathalie D'Hoop v Office national de l'emploi* [2002] ECR I-6191, para 30; Case C-464/02 *Commission v Kingdom of Denmark* [2005] ECR I-7929, para 50; Joined Cases C-151/04 and C-152/04 *Criminal proceedings against Claude Nadin and Others* [2005] ECR I-11203, para 34; Case C-192/05 *K. Tas-Hagen and R.A. Tas v Raadskamer WUBO van de Pensioen- en Uitkeringsraad* [2006] ECR I-10451, para 31; Case C-544/07 *Uwe Ruffler v Dyrektor Izby Skarbowej we Wrocławiu Ośrodek Zamiejscowy w Wałbrzychu* [2009] ECR I-3389, para 73.

provisions. In particular, it is not clear whether the objective of Union choice-of-law rules adopted under Article 81 TFEU in ensuring certainty over the applicable law and predictability of litigation in the context of cross-border relationships could play any role in this regard.

In this context, let us first consider *Bosmann*. This case could be interpreted as involving discriminatory treatment on grounds of movement imposed as a result of the application of the *lex loci laboris* rule, the main choice-of-law rule enshrined in Regulation 1408/71.<sup>89</sup> The specific approach taken by the Court in *Bosmann* with regard to the *lex loci laboris* rule could shed some light on the relationship between Union choice-of-law rule adopted under Article 81 TFEU and the principle of equal treatment on grounds of movement laid down in Article 18 TFEU and in the Treaty free movement provisions.

### **3.1. *Bosmann* and Union choice-of-law rules under Article 48 TFEU\***

Pursuant to *the lex loci laboris* rule under Regulation 1408/71, a person employed in the territory of a Member State was subject to the legislation of that State in relation to social security, even if he/she resided in the territory of another Member State.<sup>90</sup> According to the facts in *Bosmann*, Mrs Bosmann, a Belgian national, was entitled to a child benefit in Germany, where she was residing. After taking up a job in the Netherlands, the German authorities refused to pay the

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\* The findings in this section has been published in (2011) 1 *European Journal of Social Law* 76.

<sup>89</sup> Regulation 1408/71 was adopted under Article 48 TFEU and aimed to coordinate the application of national social security legislations. This Regulation has been replaced and repealed by Regulation 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, [2004] OJ L 166/1.

<sup>90</sup> *Ibid*, Article 13. According to Article 73, that person was also entitled in respect of his/her family members to the family benefits provided for by the legislation of the Member State of employment. This rule also remains as a main choice-of-law rule in Regulation 883/2004.

benefit, relying on the fact that Mrs Bosmann was subject to Dutch law in light of the *lex loci laboris* rule. However, under Dutch law she could not receive a similar benefit, since it was not paid with regard to children aged over 18. The question referred to the Court was whether Regulation 1408/71 should be interpreted restrictively so as to allow Mrs Bosmann to receive a child benefit under German law.

In his Opinion, Advocate General Mazák held that the refusal by the German authorities to grant a child benefit to Mrs Bosmann was lawful. According to AG Mazák, the issue in this context specifically concerned the substantive conditions for the entitlement to a child benefit laid down under Dutch law, rather than the applicability of Dutch law pursuant to the *lex loci laboris* rule.<sup>91</sup> AG Mazák continued that the entitlement to a child benefit was a matter dealt in accordance with the applicable national legislation, which varied from Member State to Member State. This is because, in AG Mazák's words, under Union law national social security systems were only coordinated, not harmonised.<sup>92</sup>

The Court, however, reached the opposite conclusion. According to the Court, even though the German authorities were not required to grant a child benefit to Mrs Bosmann,<sup>93</sup> this did not necessarily mean that she had no possibility to

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<sup>91</sup> Case C-352/06 *Brigitte Bosmann v Bundesagentur für Arbeit – Familienkasse Aachen* [2008] ECR I-3827, Opinion of Advocate General Mazák, para 64.

<sup>92</sup> *Ibid*, para 59. The position taken by Advocate General Mazák supports the idea that Union choice-of-law rules should be given effect, even if their application results in disadvantageous treatment. This is because such treatment is linked to the differences in substance existing between the applicable national substantive rules.

<sup>93</sup> Case C-352/06 *Brigitte Bosmann v Bundesagentur für Arbeit – Familienkasse Aachen* [2008] ECR I-3827, para 27. This was because, pursuant to the *lex loci laboris* rule enshrined in the Regulation, the applicable law was Dutch law, which did not provide a similar benefit. In addition, the Court rejected the argument that the *lex loci laboris* rule should be disregarded in light of Article 10 of Regulation 574/72 of 21 March 1972 laying down the procedure for implementing

receive the benefit. She was eligible for it under the German legislation, since she resided in Germany.<sup>94</sup> In this regard, the Court held that the Regulation should be interpreted in light of Article 48 TFEU, which aimed to facilitate free movement of workers so that migrant workers did not lose their right to social security benefits or had the amount of these benefits reduced because they had exercised the right to free movement.<sup>95</sup> On these grounds, the Court came to the conclusion that Mrs Bosmann could receive a child benefit pursuant to German law, even though Dutch law was the only applicable law pursuant to the *lex loci laboris* rule.

### 3.1.1. *Discrimination on grounds of movement*

To begin with, *Bosmann* seems to extend the equal treatment requirement on grounds of movement under Article 45 TFEU with regard to the *lex loci laboris* rule and even other choice-of-law rules under Regulation 1408/71 (now Regulation 883/2004). As pointed out earlier, Article 18 TFEU and the Treaty free movement provisions go beyond the mere prohibition of discrimination on grounds of nationality, whether it is direct or indirect.<sup>96</sup> The principle of equal treatment under these Treaty provisions also prohibits a difference in treatment on grounds of movement - situations where those who have exercised the Treaty free

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Regulation 1408/71 on the application of social security schemes to employed persons, to self-employed persons, to self-employed persons and to their families moving within the Community [2006] OJ L 74/1. This Regulation has been repealed by Regulation 883/2004. According to Article 10 of this Regulation (rules applicable in the case of overlapping of rights), ‘entitlement to benefits or family allowance due under the legislation of a Member State, (...) shall be suspended when, during the same period and for the same member of the family, benefits are due only in pursuance of the national legislation of another Member State (...)’.

<sup>94</sup> *Ibid*, para 28.

<sup>95</sup> *Ibid*, para 29.

<sup>96</sup> Case C-353/06 *Proceedings brought by Stefan Grunkin and Dorothee Regina Paul* [2008] ECR I-7639, Opinion of Advocate General Sharpston, para 64. See also Anastasia Iliopoulou and Helen Toner, ‘A New Approach to Discrimination Against Free Movers?’ (2003) 28 *European Law Review* 389, 395; Nicolas Bernard, ‘Discrimination and Free Movement in EC Law’ (1996) 45 *International Comparative Law Quarterly* 82, 87. Obviously, not to mention non-discriminatory barriers that are caught by the Treaty free movement provisions.

movement rights are disadvantaged, or in other words, situations where cross-border activities are treated less advantageously than domestic ones.<sup>97</sup> In the context of Article 18 TFEU, this is well illustrated in *D’Hoop*.<sup>98</sup> The issue in this case concerned the tideover allowance available under Belgian law for job-seeking school-leavers, if they had completed secondary education in Belgium. Ms D’Hoop was denied the allowance on the ground that she had completed her secondary education in France. This was found by the Court to be incompatible with Union law. Considering the issue in the context of Articles 18 and 21 TFEU, the Court held that:

In that a citizen of the Union must be granted in all Member States the same treatment in law as that accorded to the nationals of those Member States who find themselves in the same situation, it would be incompatible with the right of freedom of movement were a citizen, in the Member State of which he is a national, to receive treatment less favourable than he would enjoy if he had not availed himself of the opportunities offered by the Treaty in relation to freedom of movement.<sup>99</sup>

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<sup>97</sup> Damien Charmers, Gareth Davies and Giorgio Monti, *European Union Law: Cases and Materials* (Cambridge University Press 2010) 462. This has its roots in the general formula reiterated by the Court on several occasions that comparable situations must not be treated differently and that different situations must not be treated in the same way. See in this respect, Case 106/83 *Sermide SpA v Cassa Conguaglio Zucchero and Others* [1984] ECR 4209, para 28; Case C-148/02 *Carlos Garcia Avello v État belge* [2003] ECR I-11613, para 31; Case C-403/03 *Egon Schempp v Finanzamt München V* [2005] ECR I-6421, para 28; Case C-524/06 *Heinz Huber v Bundesrepublik Deutschland* [2008] ECR I-9705, para 75; Case C-164/07 *James Wood v Fonds de garantie des victimes des actes de terrorisme et d’autres infractions* [2008] ECR I-4143, para 13; Case C-155/09 *Commission v Greece* (CJEU, 20 January 2011), para 68.

<sup>98</sup> Case C-224/98 *Marie-Nathalie D’Hoop v Office national de l’emploi* [2002] ECR I-6191.

<sup>99</sup> *ibid* para 30. See also, Case C-406/04 *Gérald De Cuyper v Office national de l’emploi* [2006] ECR I-6947, para 39; Case C-192/05 *K. Tas-Hagen and R.A. Tas v Raadskamer WUBO van de Pensioen- en Uitkeringsraad* [2006] ECR I-10451, para 31; Case C-353/06 *Proceedings brought by Stefan Grunkin and Dorothee Regina Paul* [2008] ECR I-7639, para 21; Case C-499/06 *Halina Nerkowska v Zakład Ubezpieczeń Społecznych Oddział w Koszalinie* [2008] ECR I-3993, para 32; Case C-221/07 *Krystyna Zablocka-Weyhermüller v Land Baden-Württemberg* [2008] ECR I-9029, para 35; Case C-544/07 *Uwe Rüffler v Direktor Izby Skarbowej we Wrocławiu Ośrodek Zamiejscowy w Wałbrzychu* [2009] ECR I-3389, para 73; Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* (CJEU, 22 December 2010), para 53; Case C-391/09 *Malgożata Runevič-Vardyn, Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others* (CJEU, 12 May 2011), para 68.

Similarly, in the context of the Treaty provisions on free movement of persons, one could mention, for instance, *Nadin*.<sup>100</sup> The issue in that case related to the Belgian rule that prohibited residents in Belgium to use vehicles registered in and made available to them by employers established in other Member States. According to the Court, the rule was contrary to Article 49 TFEU. In this respect, the Court held that:

The provisions of the Treaty on freedom of movement for persons are intended to facilitate the pursuit by [Union] citizens of occupational activities of all kinds throughout the [Union], and preclude measures which might place [Union] citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State.<sup>101</sup>

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<sup>100</sup> Joined Cases C-151/04 and C-152/04 *Criminal proceedings against Claude Nadin and Others* [2005] ECR I-11203.

<sup>101</sup> *ibid* para 34. See also, with regard to rules on qualification, Case 115/78 *J. Knoors v Secretary of State for Economic Affairs* [1979] ECR 399, para 19; Case 246/80 *C. Broekmeulen v Huisarts Registratie Commissie* [1981] ECR 2311, para 27; Case C-61/89 *Criminal proceedings against Marc Gaston Bouchoucha* [1990] ECR I-3551, para 13;; Case C-19/92 *Dieter Kraus v Land Baden-Württemberg* [1993] ECR. I-1663, para 32; Case C-153/02 *Valentina Neri v European School of Economics (ESE Insight World Education System Ltd)* [2003] ECR I-13555, para 51; Case C-286/06 *Commission v Kingdom of Spain* [2008] ECR I-8025, para 72; Case C-151/07 *Theologos-Grigorios Khatzithanasis v Ipourgos Igiias kai Kinonikis Allilengiis and Organismos Epangelmatikis Ekpaidefsis kai Katartisis (OEEK)* [2008] ECR I-9013, para 32. With regard to possible limitations, see eg Case C-311/06 *Consiglio Nazionale degli Ingegneri v Ministero della Giustizia and Marco Cavallera* [2009] ECR I-415. With regard to rules on residence, see eg Case C-107/94 *P. H. Asscher v Staatssecretaris van Financiën* [1996] ECR I-3089, para 32; With regard to immigration rules, see Case C-370/90 *The Queen v Immigration Appeal Tribunal et Surinder Singh, ex parte Secretary of State for Home Department* [1992] ECR I-4265, para 23. With regard rules concerning previous employment or the place of employment, see eg Case C-419/92 *Ingetraut Scholz v Opera Universitaria di Cagliari and Cinzia Porcedda* [1994] ECR I-505, para 12; Case C-464/02 *Commission v Kingdom of Denmark* [2005] ECR I-7929, para 50. With regard to service providers and recipients, see eg Case C-381/93 *Commission France* [1995] ECR I-5145, para 17; Case C-70/99 *Commission v Portugal* [2001] ECR I-4845, para 27; Case C-295/00 *Commission v Italy* [2002] ECR I-1737, para 10; Case C-92/01 *Georgios Stylianakis v Elliniko Dimosio* [2003] ECR I-1291, para 25; Case C-281/06 *Hans-Dieter Jundt and Hedwig Jundt v Finanzamt Offenburg* [2007] ECR I-12231, para 52. In a certain way, here one could also mention Joined Cases 286/82 and 26/83 *Graziana Luisi and Giuseppe Carbone v Ministero del Tesoro* [1984] ECR 377, para 16; Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141, para 35-39; Case C-158/96 *Raymond Kohll v Union des caisses de maladie* [1998] ECR I-1931, para 35; Case C-157/99 *B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473, para 61; Case C-17/00 *François De Coster v Collège des bourgmestre et échevins de Watermael-Boitsfort* [2001] ECR I-9445, para 30-35; Case C-8/02 *Ludwig Leichtle v Bundesanstalt für Arbeit* [2004] ECR I-2641, para 37; Case C-464/02 *Commission v Denmark* [2005] ECR I-7929, para 34.

Such a difference in treatment could also be observed in *Bosmann*. The application of Dutch law pursuant to the *lex loci laboris* rule in *Bosmann* did not result in directly or indirectly discriminatory treatment on grounds of nationality. However, its application to the situation involving Mrs Bosmann put her at a disadvantage, because she had exercised the right to free movement under Article 45 TFEU. In particular, giving effect to Dutch law instead of German law with respect to the entitlement to a child benefit could be argued resulted in a difference in treatment between, on the one hand, those resident and employed in Germany and, on the other hand, those resident in Germany but employed in other Member States.<sup>102</sup> The fact that this was held to be contrary to Article 48 TFEU taken together with Article 45 TFEU seems to extend the prohibition of discrimination on grounds of movement with regard to the *lex loci laboris* rule,

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<sup>102</sup> cf Joined Case C-393/99 and C-394/99 *Institut national d'assurances sociales pour travailleurs indépendants (Inasti) v Claude Hervein and Hervillier SA (C-393/99) and Guy Lorthiois and Comtexbel SA (C-394/99)* [2002] ECR I-2829. The Court in that case held that 'the Treaty offers no guarantee to a worker that extending his activities into more than one Member State or transferring them to another Member State will be neutral as regards social security. Given the disparities in the social security legislation of the Member States, such an extension or transfer may be to the worker's advantage in terms of social security or not, according to circumstance. It follows that, in principle, any disadvantage, by comparison with the situation of a worker who pursues all his activities in one Member State, resulting from the extension or transfer of his activities into or to one or more other Member States and from his being subject to additional social security legislation is not contrary to [Articles 45 and 49 TFEU] if that legislation does not place that worker at a disadvantage as compared with those who pursue all their activities in the Member State where it applies ...' (see para 51). This was also reiterated in Case C-387/01 *Harald Weigel and Ingrid Weigel v Finanzlandesdirektion für Vorarlberg* [2004] ECR I-9445, para 55; Case C-365/02 *Proceedings brought by Marie Lindfors* [2004] ECR I-7183, para 34; Case C-403/03 *Egon Schempp v Finanzamt München V* [2005] ECR I-6421, para 45; Case C-293/06 *Deutsche Shell GmbH v Finanzamt für Großunternehmen in Hamburg* [2008] ECR I-1129, para 43. However, it should be mentioned that these cases concerned national taxation. In light of this, one could question whether it was reasonable to have recourse to the free movement of workers rationale because of the disadvantage that arose as a result of the mere application of Dutch law pursuant to the *lex loci laboris* rule. After all, it was Mrs Bosmann's choice to take up a job in the Netherlands. If she had not done so, she would have not been at a disadvantage. Such a disadvantage was the result of the disparity in the social security legislations applied in two Member States. The Court held on several occasions that Member States retain the power to organise their social security system, and in the absence of harmonisation measures at Union level, determine the conditions under which social security benefits are granted. See in this respect, Case 238/82 *Duphar BV and other v The Netherlands State* [1984] ECR 523, para 16; Case C-70/95 *Sodemare SA, Anni Azzuri Holding SpA and Anni Azzurri Rezzato Srl v Regione Lombardia* [1997] ECR I-3395, para 27; Case C-158/96 *Raymond Kohll v Union des caisses de maladie* [1998] ECR I-1931, para 17; Case C-444/05 *Aikaterini Stamatelaki v NPDD Organismos Asfaliseos Eleftheron Epangelmation (OAE)* [2007] ECR I-3185, para 23.

despite that similar to other Union choice-of-law rules it is premised upon a neutral connecting factor. Specifically, the reasoning of the Court in *Bosmann* appears to imply that a Union choice-of-law rule adopted under Article 48 TFEU is not immune from being subject to scrutiny under the principle of equal treatment on grounds of movement, if its application leads to a difference in the national substantive law applied to migrant and non-migrant Union citizens.

### 3.1.2. Subordination of the *lex loci laboris* rule

Not only does *Bosmann* seem to extend the equal treatment requirement on grounds of movement with regard to the *lex loci laboris* rule, but it also appears to subordinate it to Article 45 TFEU taken in conjunction with Article 48 TFEU. An important factor in this respect is the finding of the Court that the application of the provisions of Regulation 1408/71 could not entail the loss by migrant workers of their rights to social security benefits or the reduction of the amount of these benefits.<sup>103</sup> In this way, it could be argued that the Court deviated from the previous understanding of the role of the *lex loci laboris* rule and other choice-of-law rules under Regulation 1408/71 (now Regulation 883/2004).<sup>104</sup>

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<sup>103</sup> Case C-352/06 *Brigitte Bosmann v Bundesagentur für Arbeit – Familienkasse Aachen* [2008] ECR I-3827, para 29.

<sup>104</sup> See in this respect Case 302/84 *A. A. Ten Holder v Direction de la Nieuwe Algemene Bedrijfsvereniging* [1986] ECR I-1821; Case 60/85 *M. E. S. Luijte v Raad van Arbeid* [1986] ECR I-2365. In both cases, the Court rejected the possibility of the application of the law of the Member State of residence that was not *designated* as applicable by the Regulation. In doing so, the Court found that ‘the provisions [of Regulation 1408/71] constitute a complete system of conflict rules the effect of which is to divest the legislature of each Member State of the power to determine the ambit and the conditions for the application of its national legislation’. The Court continued that a Member State was not entitled to determine the extent to which its own legislation or that of another Member State was applicable, since it was under the obligation to comply with the provisions of Union law in force.

### 3.1.2.1. *No substantial effect on the lex loci laboris rule*

Notwithstanding the fact that *Bosmann* contradicts the very wording of Regulation 1408/71 (now Regulation 883/2004), one could certainly be hesitant to read too much into the reasoning of the Court, by drawing any general conclusion with regard to the role of the *lex loci laboris* rule in the context of the coordination of national social security systems. It could be argued that the reasoning of the Court in *Bosmann* was very much focused on the specific circumstances of the case and was not intended in any way to enunciate a clear statement of principle. Relying on the factual background of the case, it seems that the Court aimed at not letting Mrs Bosmann to be deprived of the right to a child benefit under German law that provided more generous social security protection. In this respect, an essential factor appears to be the general wording of the relevant German rule, which covered all residents irrespective of their place of employment. From the reasoning of the Court, it could be understood that the *lex loci laboris* rule could not be given effect in such a case, since its application would result in excluding the person at issue from the scope of national law.<sup>105</sup>

It is fair to assume that the decision of the Court might have been different, if the German rule did not have such a wide scope and was specifically worded in light of Regulation 1408/71. The German rule, for instance, could state that *a child benefit was granted to all residents except those who were subject to the*

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<sup>105</sup> Case C-352/06 *Brigitte Bosmann v Bundesagentur für Arbeit – Familienkasse Aachen* [2008] ECR I-3827, para 31.

*legislation of another Member State in accordance with Regulation 1408/71.*<sup>106</sup> In this scenario, it is likely that the Court would give effect to the *lex loci laboris* rule. It is true that the difference between the positions taken by the Court in this scenario and *Bosmann* could seem rather puzzling. After all, in both situations, in essence, the person is subject to a disadvantage as a result of the application of the *lex loci laboris* rule. In both situations, the application of the *lex loci laboris* rule by the German authorities, either invoking the Regulation itself or the national rule that refers to it, leads to the loss by Mrs Bosmann of the right to receive a child benefit under German law, which she would have retained if she had stayed in Germany. However, in contrast to *Bosmann*, in the present scenario, according to the wording of the German rule, Mrs Bosmann would not fall within its scope because of her employment in the Netherlands. In this respect, as the Court held in *Bosmann*, Union law would not compel the German authorities to grant a child benefit to Mrs Bosmann. Furthermore, the disadvantage faced by Mrs Bosmann is also likely to be justified on objective grounds. For example, this could be the fact that the Regulation aims to preserve the financial balance of national welfare systems<sup>107</sup> or the fact that Mrs Bosmann was no longer in a comparable position to claim the treatment provided to those who are employed and resident in Germany.<sup>108</sup> The compatibility of the *lex loci laboris* rule in such a scenario also

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<sup>106</sup> Yves Jorens and Jean-Philippe Lhernould (eds), 'Towards a new framework for applicable legislation – News forms of mobility, coordination principles and rules of conflict', Think Tank Report 2008, Training and Reporting on European Social Security (Project DG EMPL/E/3 – VC/2007/0188), 26 <[http://www.tress-network.org/tressnew/public/europeanreport/thinktank\\_mobility.pdf](http://www.tress-network.org/tressnew/public/europeanreport/thinktank_mobility.pdf)> accessed 19 September 2011.

<sup>107</sup> See eg Case C-158/96 *Raymond Kohll v Union des caisses de maladie* [1998] ECR I-19131, para 41; Case C-368/98 *Abdon Vanbraekel and Others v Alliance nationale des mutualités chrétiennes (ANMC)* [2001] ECR I-5363, para 47; Case C-120/95 *Nicolas Decker v Caisse de maladie des employés privés* [1998] ECR I-1831, para 39; Case C-157/99 *B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473, para 72.

<sup>108</sup> See in this respect Case C-212/06 *Government of the French Union and Wallon Government v Flemish Government* [2008] ECR I-1683, Opinion of Advocate General Sharpston, para 78. According to Advocate General Sharpston, in light of the principle of equality enshrined in

finds support in the facts of the *Flemish Insurance* case.<sup>109</sup> Being subject to an infringement procedure opened up by the Commission in light of Regulation 1408/71, the Flemish Union made certain amendments to the newly introduced insurance scheme. According to one of them, the scheme was not applicable to persons residing within the Flemish region, who pursuant to Regulation 1408/71 were subject to the social security scheme of another Member State.<sup>110</sup> This amendment was not subject to any further infringement proceedings nor considered in the judgment.

### 3.1.2.2. *Extending the 'binary' approach to the lex loci laboris rule*

Having said that, however, the position taken by the Court in *Bosmann* could also be understood as a confirmation of the fact that the applicability of the *lex loci laboris* rule is subordinated to the Treaty provisions on free movement of persons. The Court's reasoning seems to endorse the idea that notwithstanding its nature, the *lex loci laboris* rule does not take an absolute priority in every single case, since any disadvantage imposed as a consequence of its application cannot be disregarded. In particular, it suggests that the *lex loci laboris* rule is not indifferent with regard to the exercise of the Treaty free movement rights to the extent that any adverse effect of its application is accepted.<sup>111</sup> In this respect, it could be argued that in light of the Treaty provisions on free movement of persons the

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Regulation 1408/71, the Member State in whose territory equality is to be achieved should be the State where the place of work is situated.

<sup>109</sup> Case C-212/06 *Government of the French Union and Walloon Government v Flemish Government* (Flemish Insurance) [2008] ECR I-1683. The issue in that case related to the insurance scheme introduced by the Flemish Union of Belgium for persons whose autonomy was reduced by a serious and prolonged disability.

<sup>110</sup> *ibid* para 10.

<sup>111</sup> Oxana Golynger, 'Co-ordination of Social Security Scheme in the European Union: The Rashomon effect in *Bosmann*' (2009) 16 *Journal of Social Security Law* 91, 99.

exclusive nature and scope of the *lex loci laboris* rule are limited to the extent that the rule is not applicable if its application disadvantages a migrant worker. In other words, the applicability of the *lex loci laboris* rule depends on the effect it produces in a specific situation that should comply with the Treaty provisions on free movement of persons.

The *Bosmann* ruling echoes the ‘binary’ approach developed by the Court in the context of the cases involving Union citizenship and health care provisions enshrined in Union secondary legislation.<sup>112</sup> In particular, one could even go further arguing that in *Bosmann* the Court extended the ‘binary’ approach with regard to the part of Regulation 1408/71 and now Regulation 883/2004, which embody provisions that determine the applicable national social security legislation. The ‘binary’ approach concerns the relationship between Union primary and secondary law. Under this approach, the requirements provided by Union secondary law are not regarded by the Court as conclusive or exhaustive. Instead, according to the Court, they are required to be interpreted in light of the

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<sup>112</sup> I borrowed the terms ‘binary approach’ and ‘binary technique’ from Eleanor Spaventa, *Free movement of persons in the European Union -Barriers to movement in their constitutional context* (Kluwer Law International 2007) 140. See also Eleanor Spaventa, ‘The impact of Articles 12, 18, 39 and 43 of the EC Treaty on the coordination of social security system’ in Yves Jorens (ed.), *50 years of Social Security Coordination Past – Present – Future* (Report of the conference celebrating the 50th Anniversary of the European Coordination of Social Security, European Commission, 2009), 118 <[ec.europa.eu/social/BlobServlet?docId=5338&langId=en](http://ec.europa.eu/social/BlobServlet?docId=5338&langId=en)> accessed 19 September 2011. With regard to health care, see Case C-158/96 *Raymond Kohll v Union des caisses de maladie* [1998] ECR I-1931; Case C-368/98 *Abdon Vanbraekel and Others v Alliance nationale de mutualités chrétiennes (ANMC)* [2001] ECR I-5363; Case C-157/99 *B. S. M. Geraets-Smits v Stichting Ziekenfonds VGZ and -H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473; Case C-372/04 *The Queen, on the application of Yvonne Watts v Bedford Primary Care Trust and Secretary of State for Health* [2006] ECR I-4325. With regard to Union citizenship, see Case C-184/99 *Rudy Grzerczyk v Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve* [2001] ECR I-6193; Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091; Case C-228/07 *Jörn Petersen v Landesgeschäftsstelle des Arbeitsmarktservice Niederösterreich* [2008] ECR I-6989.

demands of Union primary law.<sup>113</sup> Thus, a rule or measure can comply with the provisions of Union secondary law, but that does not guarantee its compliance with Union primary law. For instance, in the notable case of *Baumbast*,<sup>114</sup> the refusal to grant a person the right of residence, based on the fact that the conditions set out in Directive 90/364 were not completely met,<sup>115</sup> was found by the Court to be a disproportionate interference with the right to reside provided under Article 21 TFEU.<sup>116</sup> As a result, using the ‘binary’ technique, the Court extended the right to reside to the person, who, however, did not completely fulfil the black letter provisions of the Directive clearly worded by the Union legislator.<sup>117</sup>

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<sup>113</sup> Michael Dougan and Eleanor Spaventa, ‘Educating Rudy and the (non-) English patient: A double-bill on residency rights under Article 18 EC’ (2003) 28 *European Law Review* 699, 705. See also Eleanor Spaventa, *Free movement of persons in the European Union* (n 112) 121. On the general relationship between Union secondary legislation and the Treaty free movement provisions, see Karsten Engsig Sorensen, ‘Reconciling secondary legislation with the Treaty rights of free movement’ (2011) 36 *European Law Review* 339.

<sup>114</sup> Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091.

<sup>115</sup> Directive 90/364/EEC of 28 June 1990 on the right of residence [1990] OJ L 180/26. This Directive made the right to reside conditional upon having sufficient resources and comprehensive health insurance. It was replaced by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77.

<sup>116</sup> Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091, para 93. The issue in that case related to the refusal by the UK authorities to renew the residence permit of the German national living in the UK. The refusal was based on the fact that he did not have a comprehensive health insurance cover as required by the conditions set out in Directive 90/364/EEC. Even though Mr Baumbast had health insurance in Germany, he did not have an insurance cover for emergency treatment in the UK. More on this case, see Eleanor Spaventa, *Free movement of persons in the European Union* (n 112) specifically Chapters 6 and 7; Michael Dougan, ‘The constitutional dimension to the case-law on Union citizenship’ (2006) 31 *European Law Review* 613, 632-640; Michael Dougan and Eleanor Spaventa (n 113). For other examples where the Court used the ‘binary’ approach, see eg Case C-157/99 *B. S. M. Geraets-Smits v Stichting Ziekenfonds VGZ and -H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473; Case C-385/99 *VG. Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA and E.E.M. van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen* [2003] ECR I-4509; Case C-25/02 *Katharina Rinke v Ärztekammer Hamburg* [2003] ECR I-8349; Case C-208/07 *Petra von Chamier-Glisczinski v Deutsche Angestellten-Krankenkasse* [2009] ECR I-6095.

<sup>117</sup> Eleanor Spaventa, ‘Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects’ (2008) 45 *Common Market Law Review* 13, 26.

Taken from this perspective, it is apparent that in light of *Bosmann* the fact that a rule or measure is deemed lawful pursuant to the *lex loci laboris* rule does not imply the same under the Treaty provisions on free movement of persons. The rule is subject to scrutiny under these Treaty provisions and the result of its application is required to comply with them in so far as the specific case is concerned. It should be mentioned, however, that under the ‘binary’ approach, the compatibility of Union secondary law with Union primary law is not questioned. In *Bosmann*, the Court certainly did not rule that the *lex loci laboris* rule itself was contrary to the Treaty provisions on free movement of persons, nor even considered that question.<sup>118</sup> Otherwise, it would have meant that Regulation 1408/71 was required to be set aside as being incompatible with the hierarchically superior Treaty provision at issue.<sup>119</sup>

### **3.2. *Bosmann* and Union choice-of-law rules under Article 81 TFEU\***

Relying on this, one could be of the opinion that, as a general rule, Union choice-of-law rules, even those adopted under Article 81 TFEU, are subordinated to the principle of equal treatment on grounds of movement.<sup>120</sup> In particular, it could be

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\* The findings in this section will be published in the Maastricht Journal of European and Comparative Law.

<sup>118</sup> This also would be at odds with the Court’s ruling in Case C-249/04 *José Allard v Institut national d’assurances sociales pour travailleurs indépendants (INASTI)* [2005] ECR I-4535. In this case, the Court held that Article 13 of Regulation 1408/71 that enshrined the *lex loci laboris* rule was not liable to hamper or to render less attractive the exercise of the fundamental freedoms guaranteed by the Treaty, but on the contrary, it contributed to facilitating the exercise of these freedoms.

<sup>119</sup> In this regard, see Michael Dougan and Eleanor Spaventa (n 113) 705.

<sup>120</sup> It appears that the Treaty provisions on free movement of persons could be invoked in the context of relationships between private parties. See in this respect, Case 36/74 *B.N.O Walrave and L.J.H. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie et Federación Española Ciclismo* [1974] ECR 1405; Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139; Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others* [2007] ECR I-11767; Case C-438/05 *International Transport Workers’ Federation and Finish Seamen’s Union v Viking Line ABP and*

argued that a Union choice-of-law rule adopted under Article 81 TFEU cannot be applied, if the mere application of the national substantive law pursuant to it results in a difference in treatment in terms of the applicable law imposed on those who have exercised the Treaty free movement rights and those who have not. The Union choice-of-law rule at issue would not be declared invalid, but is more likely to be set aside in so far as the specific case is concerned. This line of reasoning might not be surprising if one takes into account the fact that Union choice-of-law rules under Article 81 TFEU are adopted in the form of Regulations, which are required to comply with and interpreted in light of the relevant Treaty provisions.<sup>121</sup> This also in a certain way finds support, for instance, in the Preambles to the Rome I and Rome II Regulations, which as already mentioned in the first chapter, stipulate that ‘the Regulation should not prejudice the application of other instruments laying down provisions designed to contribute to the proper functioning of the internal market in so far as they cannot be applied in conjunction with the law *designated* by the rules of this Regulation. The application of provisions of the applicable law *designated* by the rules of this Regulation should not restrict the free movement of goods and services as regulated by [Union] instruments’.<sup>122</sup>

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*OÜ Viking Line Eesti* [2007] ECR I-10779; Case C-94/07 *Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV* [2008] ECR I-5939.

<sup>121</sup> Case 112/77 *August Töpfer & Co. GmbH v Commission* [1978] ECR 1019, para 19; Case C-47/90 *Établissements Delhaize frères et Compagne Le Lion SA v Promalvin SA and AGE Bodegas Unidas SA* [1992] ECR I-3669, para 26; Case C-315/92 *Verband Sozialer Wettbewerb eV v Clinique Laboratoires SNC et Estée Lauder Cosmetic GmbH* [1994] ECR I-317, para 12.

<sup>122</sup> Preamble 35 of the Rome II Regulation and Preamble 40 of the Rome I Regulation (italics added). Having said that, however, one might question whether the first part refers to the Treaty free movement provisions or only Union secondary legislation. Furthermore, it is also questionable whether the last part concerns the substance of the provisions of the law *designated* by these Regulations or their mere application in light of these Regulations.

### *3.2.1. Aim of Union choice-of-law rules under Article 81 TFEU*

On close analysis, however, the issue might not be as straightforward. The clear subordination of Union choice-of-law rules adopted under Article 81 TFEU to the principle of equal treatment on grounds of movement because of their effect in a specific case seems questionable. To start with, such an approach with regard to these rules appears to be at odds with the objective assigned to them by the Union legislator. This is evidently outlined, for instance, in the Preambles to the Rome I and II Regulations. Recital 6 of both Preambles includes 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’. ‘Legal certainty in the European judicial area’ as a general objective is also emphasised in Recital 16 of the Rome I Regulation. In contrast to the Rome I Regulation, Recitals 13, 14 and 16 of the Rome II Regulation further specify the need for unified choice-of-law rules: ‘[to] avert the risk of distortions of competition between [Union] litigants’; ‘to do justice in individual cases’; ‘[to] ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage’. The Preambles to the Rome I and Rome II Regulations clearly emphasise the importance of unified Union choice-of-law rules for the functioning of the internal market. Union choice-of-law rules adopted under Article 81 TFEU are intended to ensure certainty over the applicable law and predictability of litigation in the context of cross-border relationships. So long as substantive laws of Member

States remain divergent, certainty over which national substantive law is applicable to a given cross-border relationship is essential in order to facilitate cross-border activities in the internal market. For instance, a party to a contractual relationship needs rules to guide it when entering into the relationship, when performing it, and when a dispute with another party threatens.<sup>123</sup> Having unified choice-of-law rules means that there is no need for private parties to familiarise themselves with every national substantive law linked to the cross-border relationship at issue, but only the national substantive law that is declared applicable. Therefore, it could be argued that the *smooth* exercise of the Treaty free movement rights in a certain way depends on the existence of unified choice-of-law rules.

Considering their aim, the clear subordination of Union choice-of-law rules adopted under Article 81 TFEU to the principle of equal treatment on grounds of movement also risks creating a tension between the choices made by the Court and the Union legislator.<sup>124</sup> In other words, one might simply assume that the Court does not show enough respect to the choice made by the Union legislator.<sup>125</sup>

The unification of national choice-of-law rules is regarded as an alternative to the harmonisation of national private (substantive) law rules. At present, there is no

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<sup>123</sup> Peter Hay, Ole Lando and Roland Rotunda, 'Conflicts of Laws as a Technique for Legal Integration' in Mauro Cappelletti, Monica Secombe and Joseph Weiler (eds), *Integration Through Law: Europe and American Federal Experience* (Walter de Gruyter 1985) 167.

<sup>124</sup> Michael Dougan, 'Cross-educational mobility and the exportation of student financial assistance' (2009) 33 *European Law Review* 723, 729.

<sup>125</sup> A P van der Mei and Ger Essers, 'Case C-352/06 *Brigitte Bosmann v Bundesagentur für Arbeit – Familienkasse Aachen* [2008] ECR I-3827' (2009) 46 *Common Market Law Review* 959, 965 (note). However, to what extent this should be the case seems questionable. If the Court indeed was required to respect the choice made by the Union institutions, then there would be no need for the procedure enshrined in Article 263 TFEU, under which the Court reviews the legality of measures adopted by the Union institutions. At the same time, however, such a position taken by the Court is desirable, considering the role of Union choice-of-law rules in ensuring certainty over the applicable law and predictability of litigation in the context of cross-border relationships and a limited choice of connecting factors, which application would be compatible with the Treaty free movement provisions.

unity of the private (substantive) law rules that are applicable in Member States. As has been pointed out by the Commission, the harmonisation of these rules is not ‘a short term prospect’,<sup>126</sup> which, in turn, suggests that the fully-fledged harmonisation of national private (substantive) law rules can hardly be expected in the foreseeable future.<sup>127</sup> Thus, the existence of differences between private (substantive) law rules applied in Member States necessitates the adoption of unified choice-of-law rules. The unification of choice-of-law rules has an advantage over the harmonisation of private (substantive) law rules, since, as it is argued by the scholarship, in comparison to the latter the former seems to cause only a small *disturbance* in national legal systems.<sup>128</sup> As a result, Member States might be less reluctant to allow the Union legislative acts enacting unified choice-of-law rules.

In addition, the importance of Union choice-of-law rules is also emphasised by the fact that they are adopted in the form of Regulations, which, as is well known, are ‘binding in their entirety and directly applicable’<sup>129</sup> in Member States. This ensures the uniform and consistent application of these rules by national authorities, in particular national courts dealing with cross-border disputes. Taking this into consideration, by subordinating Union choice-of-law rules to the principle of equal treatment on grounds of movement because of the effect of the mere application of the *designated* national substantive law, the Court would

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<sup>126</sup> The Explanatory Memorandum in Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations, COM [2003] 427 final.

<sup>127</sup> Oliver Remien, ‘European Private International Law, the European Union and its Emerging Area of Freedom, Security and Justice’ (2001) 38 *Common Market Law Review* 53, 64. See also Horatia Muir Watt, ‘Experiences from Europe: Legal Diversity and the Internal Market’ (2003-2004) 39 *Texas International Law Journal* 429, 440-447. In the author’s opinion, the full harmonisation of national substantive rules is not desirable.

<sup>128</sup> Peter Hay, Ole Lando and Roland Rotunda (n 123) 169.

<sup>129</sup> Article 288 TFEU.

question the choice of a connecting factor made by the Union legislator, which is there for a reason. A choice should be made in order to ensure the uniform application of the same national substantive law with regard to the same cross-border relationship irrespective of the forum.

### 3.2.2. *Equal treatment on grounds of movement*

More importantly, it is debatable whether Union choice-of-law rules adopted under Article 81 TFEU could be caught by the principle of equal treatment on grounds of movement because of the effect of the application of the *designated* national substantive law in a specific case, given that the law itself is in substance compatible with Article 18 TFEU and the Treaty free movement provisions. As mentioned earlier, choice-of-law rules only determine the law applicable to a cross-border relationship. In particular, these rules *designate* the applicable law based on connecting factors, which varied from Member State to Member State prior to the introduction of Article 81 TFEU. Union choice-of-law rules adopted under Article 81 TFEU, in turn, are based on single specific connecting factors, which national courts are required to apply. This guarantees that the law applicable to a cross-border relationship is the same irrespective of the forum. These connecting factors are chosen specifically in light of the Treaty free movement provisions. This appears rather obvious, considering not only the very aim of these rules, but also the so-called ‘internal market requirement’ stipulated in Article 81 TFEU.<sup>130</sup> According to it, Union choice-of-law rules can be adopted when they are necessary for the proper functioning of the internal market. In light

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<sup>130</sup> Andrew Dickinson, ‘European Private International Law: Embracing New Horizons or Mourning the Past’ (2005) 1 *Yearbook of Private International Law* 197, 211.

of Article 26 TFEU, this means that the Union legislator is required to demonstrate that the proposed unified choice-of-law rules are necessary for the cross-border movement of goods, services, people, and capital.<sup>131</sup> This, in turn, suggests that these rules are indeed designed in light of the requirements of the Treaty free movement provisions. For instance, according to Article 4 of the Rome I Regulation, a contract for the sale of goods and the provision of services is governed by the law of the place where the seller and service provider have their habitual residence, respectively. The choice of the place of the seller's or service provider's habitual residence as a connecting factor appears to reflect the shift towards the application of the regulatory choice of the Member State of origin as regards goods or services themselves,<sup>132</sup> which is established since the *Cassis de Dijon* ruling.<sup>133</sup>

One might cast doubt on the relevance of this argument, pointing out that if this was a sufficient factor, the internal market legislation would no longer be subject to scrutiny under the Treaty free movement provisions. This finds backing, for instance, in the 'binary' approach discussed earlier with regard to the relationship between Union secondary and primary law – i.e. the compliance with black-letter provisions of Union secondary legislation does not *per se* entail the compliance with the Treaty provisions.<sup>134</sup> However, it is hard to believe that this approach

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<sup>131</sup> Ibid.

<sup>132</sup> See eg Nick Bernard, *Multilevel Governance in the European Union* (Kluwer Law International 2002) 15-60.

<sup>133</sup> Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649. With regard to services, see eg Joined Cases 110 and 111/78 *Ministère public and 'Chambre syndicale des agents artistiques et impresarii de Belgique' ASBL v Willy van Wesemael and Others* [1979] ECR 35; Case 279/80 *Criminal proceedings against Alfred John Webb* [1981] ECR 3305.

<sup>134</sup> Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091, para 93. See also the decision of the Court in Case C-157/99 *B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen*

could be applicable with regard to Union choice-of-law rules enshrined in Regulations adopted under Article 81 TFEU. To begin with, the ‘binary’ approach has been established and so far mainly applied in the context of the cases concerning health care provisions and Union citizenship.<sup>135</sup> Therefore, it remains unclear whether it could be extended across a wider range of Union secondary measures.<sup>136</sup> Furthermore, in all those cases the issue related to a relationship between a private party and a Member State, whilst Union choice-of-law rules adopted under Article 81 TFEU deal with cross-border relationships between private parties. This difference is essential, since the application of the ‘binary’ approach as regards Union choice-of-law rules adopted under Article 81 TFEU would not only negate their objective, but also might affect the position of a private party, which could be either the defendant or plaintiff. Finally, this could be due to the nature of Union choice-of-law rules. In those Union citizenship and health care cases, the provisions of Union secondary legislation at issue regulated matters of substance. In particular, the provisions that were given effect by national authorities were considered to be an impediment to free movement in the Union in so far as the cases at hand were concerned. In contrast, Union choice-of-

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[2001] ECR I-5473; Case C-385/99 *VG. Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA and E.E.M. van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen* [2003] ECR I-4509. More on this case-law, see Eleanor Spaventa, ‘Public Services and European Law: Looking for Boundaries’ (2004) 5 *Cambridge Yearbook of European Legal Studies* 271, 276-280.

<sup>135</sup> With regard to health care, see eg Case C-158/96 *Raymond Kohll v Union des caisses de maladie* [1998] ECR I-1931; Case C-368/98 *Abdon Vanbraekel and Others v Alliance nationale de mutualités chrétiennes (ANMC)* [2001] ECR I-5363; Case C-157/99 *B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473; Case C-372/04 *The Queen, on the application of Yvonne Watts v Bedford Primary Care Trust and Secretary of State for Health* [2006] ECR I-4325. With regard to Union citizenship, see Case C-184/99 *Rudy Grzerczyk v Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve* [2001] ECR I-6193; Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091; See also Case C-228/07 *Jörn Petersen v Landesgeschäftsstelle des Arbeitsmarktservice Niederösterreich* [2008] ECR I-6989.

<sup>136</sup> Michael Dougan ‘The constitutional dimension to the case-law on Union citizenship’ (n 116) 640.

law rules adopted under Article 81 TFEU do not provide any substantive solutions, but merely *designate* the applicable national substantive law.

Due to the territorial connecting factors that Union choice-of-law rules adopted under Article 81 TFEU are mainly based upon,<sup>137</sup> it is possible that the application of these rules might lead to a difference in treatment in terms of the applicable law imposed on an internal market participant. For instance, the application of the substantive law of Member State A to liability arising out of a cross-border tort pursuant to the relevant Union choice-of-law rule could put one of the parties at a disadvantage, which might not be the case if, let us say, the substantive law of Member State B was applicable. In this respect, however, it is doubtful whether such a disadvantage could be sufficient to trigger the equal treatment requirement. If the substantive law of Member State A is *per se* compatible with Article 18 TFEU and the Treaty free movement provisions, the disadvantage at issue is likely to be regarded as a mere result of disparities between national substantive laws.<sup>138</sup> Moreover, in the present context, the party is also unlikely to satisfy the

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<sup>137</sup> So far, a Union choice-of-law rule based on nationality as a connecting factor is only enshrined in Articles 5 and 8 of the Rome III Regulation. As one of the options provided, *spouses can choose the law of a State of which one of them is a national as governing their divorce or legal separation*. In the absence of a choice made, the law of the State of which both spouses are nationals at the time the court is seised could be the applicable law.

<sup>138</sup> In this respect, see the formula developed by the Court in Case 14/68 *Walt Wilhelm and Others v Bundeskartellamt* [1969] ECR 1, para 13. According to the Court, the principle of equal treatment ‘is not concerned with any disparities in treatment or the distortions, which may result from divergences existing between the laws of the various Member States, so long as the latter affect all persons subject to them, in accordance with objective criteria and without regard to their nationality’. This was confirmed in Case 1/78 *Patrick Christopher Kenny v Insurance Officer* [1978] ECR 1489, para 18; Joined Cases 185/78 to 204/78 *Criminal proceedings against J. van Dam en Zonen and Others* [1979] ECR 2345, para 10; Case 155/80 *Summary proceedings against Sergius Oebel* [1981] ECR 1993, para 10; Case 308/86 *Criminal proceedings against R. Lambert* [1988] ECR 4369, para 22; Joined Cases C-251/90 and C-252/90 *Procurator fiscal, Elgin v Kenneth Gordon Wood and James Cowie* [1992] ECR I-2873, para 19; Case C-379/92 *Criminal proceedings against Matteo Peralta* [1994] ECR I-3453, para 34; Case C-177/94 *Criminal proceedings against Gianfranco Perfili* [1996] ECR I-161, para 17. In the context of disparities existing between national tax systems, see eg Case C-387/01 *Harald Weigel and Ingrid Weigel v Finanzlandesdirektion für Vorarlberg* [2004] ECR I-9445, para 55; Case C-365/02 *Proceedings brought by Marie Lindfors* [2004] ECR I-7183, para 34; Case C-403/03 *Egon Schempp v*

comparability test to trigger the equal treatment requirement.<sup>139</sup> Because of the system established by a Regulation enshrining unified choice-of-law rules under Article 81 TFEU, the situation involving the party at issue would not be comparable to the situation where the substantive law of Member State B is declared applicable.<sup>140</sup> In other words, it is unlikely that they would be considered to be similarly placed to warrant similar treatment.

These arguments could certainly be confronted referring to *Bosmann*. In this case, as mentioned earlier, the mere application of Dutch law pursuant to the *lex loci laboris* rule appears to be contrary to the principle of equal treatment on grounds of movement, since as a result of it Mrs Bosmann having exercised the Treaty free movement right was treated differently than those who remained resident and employed in Germany.<sup>141</sup> In addition, contrary to the reasoning given by AG Mazák, Mrs Bosmann could claim a child benefit under German law similar to

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*Finanzamt München V* [2005] ECR I-6421, para 45; Case C-293/06 *Deutsche Shell GmbH v Finanzamt für Großunternehmen in Hamburg* [2008] ECR I-1129, para 43. In a similar way, with regard to disparities between national social security legislations, see eg Case 238/82 *Duphar BV and other v The Netherlands State* [1984] ECR 523, para 16; Case C-70/95 *Sodemare SA, Anni Azzuri Holding SpA and Anni Azzurri Rezzato Srl v Regione Lombardia* [1997] ECR I-3395, para 27; Joined Cases C-393/99 and C-394/99 *Institut national d'assurances sociales pour travailleurs indépendants (Inasti) v Claude Hervein and Hervillier SA (C-393/99) and Guy Lorthiois and Comtexbel SA (C-394/99)* [2002] ECR I-2829, para 51; Case C-444/05 *Aikaterini Stamatelaki v NPDD Organismos Asfaliseos Eleftheron Epangelmaton (OAEE)* [2007] ECR I-3185, para 23; Case C-158/96 *Raymond Kohll v Union des caisses de maladie* [1998] ECR I-1931, para 17.

<sup>139</sup> However, it is necessary to mention that the comparability of two situations is often taken for granted by the Court and if it is considered, it often takes place as part of the justification process. See in this respect Eleanor Spaventa *Free movement of persons in the European Union* (n 112) 17.

<sup>140</sup> See eg Case C-352/06 *Brigitte Bosmann v Bundesagentur für Arbeit – Familienkasse Aachen* [2008] ECR I-3827, Opinion of Advocate General Mazák, para 80.

<sup>141</sup> In this respect, see eg Case 143/87 *Christopher Stanton and SA belge d'assurances 'L'Étoile 1905' v Institut national d'assurances sociales pour travailleurs indépendants (Inasti)* [1988] ECR 3877, para 14; Case C-464/02 *Commission v Kingdom of Denmark* [2005] ECR I-7929, para 34; Case C-464/05 *Maria Geurts and Dennis Vogten v Administratie van de BTW, registratie en domeinen, Belgische Staat* [2007] ECR I-9325, para 18; Case C-353/06 *Proceedings brought by Stefan Grunkin and Dorothee Regina Paul* [2008] ECR I-7639, para 21; Case C-544/07 *Uwe Rüffler v Dyrektor Izby Skarbowej we Wrocławiu Ośrodek Zamiejscowy w Wałbrzychu* [2009] ECR I-3389, para 64; Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* (CJEU, 22 December 2010), para 53; Case C-391/09 *Malgożata Runevič-Vardyn, Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others* (CJEU, 12 May 2011), para 68.

those that were resident and employed in Germany. Despite these facts, the possible applicability of the *Bosmann-esque* approach to Union choice-of-law rules adopted under Article 81 TFEU should be considered with caution. First, this is because of the fact that the issue in *Bosmann* concerned a cross-border relationship involving a Member State and a private party. Second, more importantly, the position taken by the Court in that case was based on the specific objective of Article 48 TFEU, which allows the Union legislator to adopt measures to improve the conditions of employed or self-employed migrant workers. Since Regulation 1408/71 was adopted based on Article 48 TFEU, according to the Court, the *lex loci laboris* rule could not have an adverse effect on Mrs Bosmann. Article 81 TFEU, in turn, allows the Union legislator to adopt unified choice-of-law rules in order to develop judicial cooperation between Member States in civil matters having cross-border implications. In contrast to Article 48 TFEU, Article 81 TFEU, in essence, does not have an objective of protecting a particular group of internal market participants. Its objective is rather general - it aims to facilitate free movement in the internal market by providing certainty over the applicable law and predictability of litigation in the context of cross-border relationships.<sup>142</sup>

### **3.3. Different approach for Union choice-of-law rules under Article 81 TFEU**

In light of the arguments raised above, it is fair to argue that a different approach should be adopted with regard to Union choice-of-law rules adopted under Article

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<sup>142</sup> See eg Preamble 6 of the Rome I and Rome II Regulations.

81 TFEU that deal with cross-border relationships between private parties.<sup>143</sup> These Union choice-of-law rules fall within the scope of Article 18 TFEU and the Treaty free movement provisions. However, the *Bosmann-esque* subordination of these rules to the principle of equal treatment on grounds of movement depending on the effect they produce in specific circumstances does not sit well with the policy behind these rules, which is to ensure certainty over the applicable law and predictability of litigation in the internal market. In particular, this could jeopardise the effectiveness of these rules and, more importantly, affect the position of a private party that would genuinely expect the application of the *designated* national substantive law, which is *per se* compatible Article 18 TFEU and the Treaty free movement provisions.<sup>144</sup> Certainly, any possible disadvantage faced by internal market participants as a result of the application of these rules cannot be excluded. In this respect, nevertheless, first, it is questionable whether such a disadvantage could trigger the equal treatment requirement. Second, even if, for instance, the latter is the case, it is reasonable to expect that the requirement of legal certainty would be considered if not given effect as an objective ground for justification.<sup>145</sup> The acceptance of such a disadvantage in so far as a specific

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<sup>143</sup> Stefania Bariatti, 'Restrictions resulting from the EC Treaty provisions for Brussels I and Rome I' in Johan Meeusen, Marta Pertegás and Gert Straetmans (eds), *Enforcement of International Contracts in the European Union. Convergence and divergence between Brussels I and Rome I* (Intersentia 2004) 85. The author is of the opinion that the notion of discrimination would have to be construed in a different and more restrictive way when it sets limits to Union choice-of-law rules.

<sup>144</sup> See eg the Court's emphasis on the principle of legal certainty as an objective of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Case C-281/02 *Andrew Owusu v N.B. Jackson, trading as 'Villa Holidays Bal-Inn Villas' and Others* [2005] ECR I-1383, para 38. See also Case C-129/92 *Owens Bank Ltd v Fulvio Bracco and Bracco Industria Chimica SpA* [2004] ECR I-117, para 32; Case C-440/97 *GIE Groupe Concorde and Others v The Master of the vessel 'Suhadiwarno Panjan' and Others* [1999] ECR I-6307, para 23; Case C-256/00 *Besix SA v Wasserreinigungsbau Alfred Kretzschmar GmbH & Co. KG (WABAG) and Planungs- und Forschungsgesellschaft Dipl. Ing. W. Kretzschmar GmbH & KG (Plafog)* [2002] ECR I-1699, para 24.

<sup>145</sup> Case C-347/06 *ASM Brescia SpA v Comune di Rodengo Saiano* [2008] ECR I-5641, para 64. The Court in that case held that a difference in treatment could be justified in light of objective circumstances, such as the necessity of complying with the principle of legal certainty. With

case is concerned is the price to be paid in return to ensure certainty over the applicable law and predictability of litigation in the context of cross-border relationships.

This leaves us with Union choice-of-law rules that deal with cross-border relationships involving a Member State and a private party such as those enshrined in Regulation 883/2004. The situation with regard to these choice-of-law rules is different due to the fact that the importance of certainty over the applicable law and predictability of litigation does not play a similar significant role as such. If these rules, in a specific case, result in an outcome that is deemed to be contrary to the principle of equal treatment on grounds of movement, the idea that setting aside these rules in light of it risks undermining certainty over the applicable law and predictability of litigation could hardly be sufficient in this context. This is because of the fact that in contrast to Union choice-of-law rules adopted under Article 81 TFEU, the primary objective of Union choice-of-law rules adopted under Article 48 TFEU, for instance, is the protection of a particular group of internal market participants, i.e. migrant workers, rather than certainty over the applicable law and predictability of litigation in the internal market in general. This is evident in the Court's interpretation in *Bosmann* of the *lex loci laboris* rule specifically in light of Article 48 TFEU and Preamble 1 to Regulation 1408/71. As the Court held, Article 48 TFEU aimed to facilitate free movement of workers and Regulation 1408/71, in turn, coordinated national social security legislations to contribute towards the improvement of workers' 'standard of living

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regard to the principle of legal certainty, see also Joined Cases 205 to 215/82 *Deutsche Milchkontor GmbH and Others v Germany* [1983] ECR 2633, para 30; Case C-143/93 *Gebroeders van Es Douane Agenten BV v Inspecteur der Invoerrechten en Accijnzen* [1996] ECR I-431, para 27; Case C-158/07 *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep* [2008] ECR I-8507, para 67.

and conditions of employment'.<sup>146</sup> In contrast to the Rome I or Rome II Regulations, for instance, neither Regulation 1408/71 nor Regulation 883/2004 enshrines certainty over the applicable law and predictability of litigation as an objective. This line of argumentation might explain the difference in the conclusions reached by AG Mazák and the Court in *Bosmann*. It seems that AG Mazák's reasoning was premised on the idea that the *lex loci laboris* rule was intended to provide certainty over the applicable national social security legislation, which served to the interests of migrant workers as well as Member States. In contrast, the Court's reasoning, in turn, seems to be based on the idea that the main role of the *lex loci laboris* rule is the protection of migrant workers, i.e. ensuring that migrant workers are not deprived of social security cover because of the simultaneous application of the legislation of two or more Member States or that they are not required to pay double social security contributions.

#### **4. Interim conclusion**

In this chapter, I argued that even national and Union choice-of-law rules themselves fall within the scope of the principle of equal treatment, despite the fact that they only *designate* the applicable national substantive law without touching upon any matters of substance.

Notwithstanding this fact, national choice-of-law rules would not be incompatible with the principle of equal treatment and, therefore, require objective justification,

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<sup>146</sup> Case C-352/06 *Brigitte Bosmann v Bundesagentur für Arbeit* [2008] ECR I-3827, paras 29-30. This is also enshrined in the Preamble to Regulation 883/2004.

if nationality and territoriality, which they are usually based upon, are only used as neutral connecting factors to determine the applicable law.

As far as Union choice-of-law rules adopted under Article 81 TFEU are concerned, these rules are intended to ensure certainty over the applicable law and predictability of litigation in the context of cross-border relationships between private parties. Thus, setting aside them pursuant to the principle of equal treatment on grounds of movement because of the effect they produce in a specific case could impact upon the effectiveness of achieving their aim, which is crucial for private parties engaged in cross-border contractual, non-contractual or other civil law relationships. One certainly cannot deny that the mere application of the *designated* national substantive law in accordance with these rules could place one of the parties to a cross-border relationship at a disadvantage. Despite that, I argued that such a disadvantage is hardly likely to trigger the equal treatment requirement and even if it is the case, it is reasonable to expect that Union choice-of-law rules adopted under Article 81 TFEU are objectively justified in light of their aim.

## Chapter III

### THE PRINCIPLE OF EQUAL TREATMENT AND PARTY AUTONOMY

In the first chapter, it was demonstrated that the *designated* national substantive law cannot be applied, if it is discriminatory contrary to Article 18 TFEU or the Treaty free movement provisions. The fact that it is applicable by virtue of a choice-of-law rule cannot affect this outcome. However, in this respect, one could question whether the outcome would be the same if a discriminatory rule, for instance, is part of the law chosen by private parties to govern their contract. In particular, it is not clear whether that rule could be applicable, even though it imposes discriminatory treatment on one of the parties to a contractual relationship contrary to the Treaty free movement provisions and whether the principle of party autonomy could play any role in this regard. Here, I will consider the Treaty free movement provisions as applicable in the present context, despite the fact that, as will be demonstrated, not all of these Treaty provisions, in particular Article 34 TFEU, can be invoked ‘horizontally’. This is because of the fact that in this context it is, in essence, a national rule applicable in a contractual context that is subject to scrutiny under the Treaty free movement provisions, rather than a specific condition or term imposed by a private party. Therefore, I will touch upon the horizontal applicability of the Treaty free movement provisions only when I discuss the possible scrutiny of a contractual term under these Treaty provisions.

In this chapter, I will first focus on the principle of party autonomy and its role in the Union legal order. In particular, it is necessary to examine its place in Union secondary legislation and the Court's case-law; how it operates and what limitations are attached to it. Further, I will look at the relationship between the principle of party autonomy and the Treaty free movement provisions in light of the ordo-liberal approach that these Treaty provisions themselves guarantee the principle of party autonomy across borders. In this context, I will then examine whether the principle of party autonomy could play a role in the scrutiny of the law chosen by private parties under the principle of equal treatment. In this respect, I will distinguish between rules of the chosen law that are mandatory in an inter-State context (hereafter also 'mandatory rules') and those, for instance, default rules that are not. In the final part, I will discuss the scrutiny of a contractual term under the Treaty free movement provisions.

### **1. The rationale of the principle of party autonomy**

The principle of party autonomy means that private parties are free to choose the law governing the cross-border contractual, non-contractual or other civil law relationships they are involved in.<sup>1</sup> The very nature of that freedom is derived from the principle of contractual freedom.<sup>2</sup> In other words, the principle of party autonomy mirrors the principle of contractual freedom on the choice-of-law

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<sup>1</sup> William J Woodward, 'Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy' (2001) 54 *SMU Law Review* 697, 711. On the historical development of the principle of party autonomy, see Ernest G Lorenzen, 'Validity and Effects of Contracts in the Conflict of Laws' (1920-21) 30 *Yale Law Review* 53; Ian A Baxter, 'International Business and Choice of Law' (1987) 36 *International & Comparative Law Quarterly* 92.

<sup>2</sup> A Thomson, 'A Different Approach to Choice of Law in Contract' (1980) 43 *Modern Law Review* 650, 650. See also Frank Vischer, 'General Course on Private International Law' (1992) 232 *Recueil des Cours* 9, 126; Mo Zhang, 'Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law' (2006) 20 *Emory International Law Review* 511, 552.

level.<sup>3</sup> In light of contractual freedom, private parties are free to decide, among others, whether or not to enter into a contract, to include or exclude a particular contractual term or to dissolve or continue a contractual relationship.<sup>4</sup> In the same vein, private parties are also entitled to choose the applicable law.<sup>5</sup> The importance of that freedom lies in the fact that the private parties to cross-border relationships are generally better equipped to decide the law that is the most suitable to govern their contractual, non-contractual or other civil law relationship than *abstract* choice-of-law rules.<sup>6</sup> In addition, the choice made by private parties eliminates beforehand any uncertainty pertaining to the law governing the cross-border relationship they are involved in<sup>7</sup> which, in turn, protects their legitimate expectations.<sup>8</sup> The freedom to choose the governing law allows private parties to foretell with accuracy, for instance, their contractual or non-contractual rights and obligations.<sup>9</sup>

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<sup>3</sup> ‘Appendix A: A Letter from Friedrich K Juenger to Harry C Sigman, Esq (23 June, 1994)’ (1995) 28 *Vanderbilt Journal of Transnational Law* 445, 449.

<sup>4</sup> Mo Zhang, ‘Contractual Choice of Law in Contracts of Adhesion and Party Autonomy’ (2008) 41 *Akron Law Review* 123, 132.

<sup>5</sup> Mo Zhang, ‘Party Autonomy and Beyond’ (n 2) 552.

<sup>6</sup> H L E Verhagen, ‘The Tension between Party Autonomy and European Union Law: Some Observations on *Ingmar GB Ltd v. Eaton Leonard Technologies Inc.*’ (2002) 51 *International & Comparative Law Quarterly* 135, 143.

<sup>7</sup> *ibid.*

<sup>8</sup> A. Thomson (n 2) 655. See also Christopher L Ingrim, ‘A Choice-of-law Clauses: Their Effect on Extraterritorial Analysis – A Scholar’s Dream, A Practitioners Nightmare’ (1994-95) 28 *Creighton Law Review* 663, 664; Mattias Lehmann, ‘Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws’ (2008) 41 *Vanderbilt Journal of Transnational Law* 381, 392; David Hricik, ‘Infinite Combinations: Whether the Duty of Competence Requires Lawyers to Include Choice of Law Clauses in Contracts They Drafted for Their Clients’ (2004) 12 *Willamette Journal of International Law & Dispute Resolution* 241, 257-58.

<sup>9</sup> Mo Zhang, ‘Contractual Choice of Law in Contracts of Adhesion’ (n 4) 130-131.

## 2. Party autonomy in the Union legal order

The freedom to choose the governing law is firmly entrenched not only in national legal systems, but also in the Union legal order.<sup>10</sup> It is explicitly mentioned in Union secondary legislation that embodies unified choice-of-law rules.<sup>11</sup> For instance, Article 3 of the Rome I Regulation provides that ‘a contract shall be governed by the law chosen by the parties’.<sup>12</sup> The choice of the governing law is required to be made expressly or clearly demonstrated by the terms of a contract or the circumstances of the case.<sup>13</sup> Private parties can also opt for the chosen law to be applicable to the whole or only part of a contract.<sup>14</sup> The freedom to choose the governing law is also provided with regard to non-contractual obligations. For instance, according to Article 14 of the Rome II Regulation, ‘the parties may agree to submit non-contractual obligations to the law of their choice’.<sup>15</sup> In particular, the choice can be made either ‘by an agreement entered into after the event giving rise to the damage occurred’(ex post) or ‘where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the

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<sup>10</sup> Axel Flessner and Hendrik Verhagen, *Assignment in European Private International Law: Claims as Property and the European Commission’s ‘Rome I Regulation* (Sellier – European Law Publishers 2006) 21. See also Stefania Bariatti, ‘Restrictions resulting from the EC Treaty provisions for Brussels I and Rome I’ in Johan Meeusen, Marta Pertegás and Gert Straetmans (eds), *Enforcement of International Contracts in the European Union. Convergence and divergence between Brussels I and Rome I* (Intersentia 2004) 90. With regard to the principle of contractual freedom in the Union legal order, see Jürgen Basedow, ‘Freedom of Contracts in the European Union’ (2008) 6 *European Review of Private Law* 901.

<sup>11</sup> See Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (‘Rome I Regulation’) [2008] OJ L 177/6; 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 Regulation’) [2007] OJ L 199/40; Regulation 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (‘Rome III Regulation’) [2010] OJ L 343/10.

<sup>12</sup> Paragraph 1 of Article 3 of the Rome I Regulation. This provision reaffirmed the freedom to choose the governing law embodied in Article 3 of 1980 Rome Convention on the law applicable to the contractual obligations (consolidated version) [1998] OJ C 027/34. Hereafter the latter will be referred as ‘the Rome Convention’.

<sup>13</sup> Para 2 of Article 3 of the Rome I Regulation.

<sup>14</sup> *ibid.*

<sup>15</sup> Paragraph 1 of Article 14 of the Rome II Regulation.

event giving rise to the damage occurred' (ex ante).<sup>16</sup> The inclusion of this provision in the Rome II Regulation is crucial taking into account the fact that the principle of party autonomy emerged very slowly in the context of cross-border non-contractual relationships.<sup>17</sup> Inherently linked to contractual freedom, the party autonomy principle was mainly associated with contractual relationships between private parties and had hardly anything to do with the relationships between private parties arising out of torts or other non-contractual obligations.<sup>18</sup>

The principle of party autonomy is also included in the recently adopted the Rome III Regulation, which embodies a set of choice-of-law rules to determine the law governing divorce and legal separation. Thus, spouses can choose the law applicable to their divorce or legal separation, provided that it is one of the following: the law of the State where they habitually reside at the time the agreement is concluded; the law of the State where they were last habitually resident, if one of them still resides there at the time the agreement is concluded; the law of the State of nationality of either spouse at the time the agreement is concluded; and finally the law of the forum.<sup>19</sup>

In addition to Union secondary legislation, one can also find a reference to the principle of party autonomy in the case law. Take for instance *Alsthom*

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<sup>16</sup> *ibid.* See also Thomas K Graziano, 'General Principles of Private International Law of Tort in Europe' in Jürgen Basedow, Harald Baum and Yuko Nishitani (eds), *Japanese and European Private International Law in Comparative Perspective* (Mohr Siebeck 2008) 250.

<sup>17</sup> Adeline Chong, 'Choice of Law for Unjust Enrichment/Restitution and the Rome II Regulation', (2008) 57 *International & Comparative Law Quarterly* 863, 874.

<sup>18</sup> See also Mo Zhang, 'Party Autonomy in Non-Contractual Obligations: Rome II and its Impact on Choice of Law' (2009) 39 *Seton Hall Law Review* 861, 864.

<sup>19</sup> Article 5 of the Rome III Regulation.

*Atlantique*.<sup>20</sup> The issue in that case related the French rule that imposed strict liability on manufactures and traders for the supply of goods with latent defects. In particular, according to it, a vendor was liable for any latent defects, even if it was not aware of them, unless the exception from such liability was specifically stipulated. Alsthom Atlantique, a French company, sued Sulzer, another French company, on the ground that the latter provided malfunctioning engines for boats, which Alsthom Atlantique, in turn, supplied to Holland & America Tours, a Dutch company. The defendant argued that the application of the rule at issue was contrary to Article 35 TFEU, since a similar rule was not applied in other Member States. According to the defendant, this was capable of distorting competition and free movement of goods in the internal market. It is not clear from the facts whether the contracting parties at issue had included in their contract a clause specifying the choice of the applicable law. The Court found that this rule was not contrary to Article 35 TFEU.<sup>21</sup> In this respect, the Court held that the French rule applied to all trade relations governed by French law and did not have the purpose or effect of restricting the patterns of export and thereby, favouring domestic production or domestic market.<sup>22</sup> Furthermore, the Court also added in an obiter dictum that private parties to an international contract of sale were generally free to determine the law applicable to their contractual relationships and could therefore avoid being subject to French law.<sup>23</sup>

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<sup>20</sup> Case C-339/89 *Alsthom Atlantique SA v Compagnie de construction mécanique Sulzer SA* [1991] ECR I-107.

<sup>21</sup> *ibid* para 16.

<sup>22</sup> *ibid* para 15

<sup>23</sup> *ibid*.

Similarly, the principle of party autonomy was also involved in *Commission v. CO.DE.MI*.<sup>24</sup> The issue in that case related to the contract signed between the European Commission and CO.DE.MI, an Italian company, for the construction by the latter of two separate buildings within the precincts of the Ispra establishment. Due to a disagreement between the parties, CO.DE.MI stopped the work and closed the site. The Commission brought proceedings before the Court to declare the contract terminated and order CO.DE.MI to pay a compensation for the damaged caused. One of the issues raised before the Court was the applicability of the choice-of-law clause enshrined in the contract. According to this clause, the contract should be governed by Belgian law. The defendants argued that it did not accept that clause and it should be regarded as a derogation from Italian law, which was otherwise applicable, since the construction site was in Italy and the contract was signed there. The Court first held that the choice-of-law clause was an integral part of the contract.<sup>25</sup> The Court continued that neither certain references to the Italian Civil Code in the contract nor the alleged attitude of the parties could prevail over the word of the choice-of-law clause and permit the inference that the parties intended to be regulated by Italian law.<sup>26</sup> Furthermore, the Court also added that the place where a contract was signed could have no effect on the determination of the applicable law, since the ‘contractual provisions expressing the common intention of the parties must take precedence over any other criterion which might be used only where the contract

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<sup>24</sup> Case 318/81 *Commission v CO.DE.MI. SpA* [1985] ECR 3693.

<sup>25</sup> *ibid* para 20.

<sup>26</sup> *ibid*.

is silent on a particular point'.<sup>27</sup> On this basis, the Court concluded that Belgian law was the law governing the contract at issue.<sup>28</sup>

### **3. Limitations to the principle party autonomy under Union law**

The freedom to choose the governing law is not, however, unrestricted. A general rule is that the law chosen by private parties cannot be applied if it is contrary to the mandatory rules of the forum or another country concerned; or the public policy of the forum. According to Article 3 (3) of the Rome I Regulation,<sup>29</sup> the law chosen by private parties shall not prejudice the application of the provisions of the law of the country, where all other elements relevant to the situation at the time are located and which cannot be derogated by an agreement.<sup>30</sup> This concerns a domestic contract – a contract, where all elements, except the choice of the governing law and the forum, are linked to one country.<sup>31</sup> Such a contract, thus, falls within the scope of the mandatory rules of that country.<sup>32</sup> In other words, contracting parties cannot ignore the mandatory rules of the country to which their contract is actually linked to by deliberately opting for the law of another country that has no link whatsoever with their contract. Article 3 (3) of the Rome I Regulation imposes a duty to apply not only mandatory rules of private law nature but also those of public law nature.<sup>33</sup>

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<sup>27</sup> *ibid* para 21.

<sup>28</sup> *ibid* para 22.

<sup>29</sup> The Rome I Regulation reaffirmed the same provision laid down in the Rome Convention. In this regard, see Michael Wilderspin, 'The Rome I Regulation: Communitarisation and Modernisation of the Rome Conventions' 9 *ERA-Forum* 2008.

<sup>30</sup> Paragraph 3 of Article 3 of the Rome I Regulation.

<sup>31</sup> Christopher Tillman, 'The Relationship between Party Autonomy and the Mandatory Rules in the Rome Convention' (2002) *Journal of Business Law* 45, 50.

<sup>32</sup> *ibid*.

<sup>33</sup> *ibid* 52.

The Rome I Regulation also ensures the application of Union mandatory rules in the context of purely intra-Union cross-border relationships.<sup>34</sup> Article 3 (4) of the Regulation provides that:

if all other elements relevant to the situation are located in one or more Member States, the choice of the applicable law of the country other than that of a Member State shall not prejudice the application of the provisions of [Union] law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by an agreement.<sup>35</sup>

This was included to solve the problem related to the limited scope of Article 3 (3) of the 1980 Rome Convention, which, in essence, was the same provision as Article 3 (3) of the Rome I Regulation.<sup>36</sup> In particular, Union mandatory rules could not be applied pursuant to Article 3 (3) of the 1980 Rome Convention, if private parties had chosen the law of a third country, whilst all the elements of the cross-border contractual relationship at issue were linked to Member States only.<sup>37</sup> As a result, Article 3 (4) of the Rome I Regulation ensures that contracting

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<sup>34</sup> Andrea Bonomi, 'The Rome I Regulation on the Law Applicable to Contractual Obligations. Some General Remarks' (2008) 10 *Yearbook of Private International Law* 165, 172.

<sup>35</sup> Paragraph 4 of Article 3 of the Rome I Regulation. See also Paragraph 3 of Article 14 of the Rome II Regulation, which provides that 'where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the Member States, the parties' choice of the law applicable other than that of a Member State shall not prejudice the application of provisions of [Union] law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement'.

<sup>36</sup> Michael Wilderspin (n 29) 264.

<sup>37</sup> Andrea Bonomi (n 34) 172. For instance, the *Gran-Canaria-Fälle* cases decided by the German Federal Court of Justice, involved the right of a consumer to withdraw from a contract concluded outside business premises, provided by Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L 372/31. That right was invoked in the context of the timeshare agreement relating to an apartment in Gran Canaria signed between the German lessee and the lessor who was established at the Isle of Man. The choice-of-law clause in the contract referred the law of the Isle of Man. The German Federal Court of Justice upheld the validity of that clause. As a result, the lessee could not rely on the right to withdraw from a contract enshrined in the Directive, which had been implemented by Germany and Spain. See Bundesgerichtshof [Federal Court of Justice], 19 March 1997, IPRspr., 1997, n. 34. More on this case, see Jürgen Basedow, 'Consumer Contracts and Insurance Contracts in a Future Rome I – Regulation' in Johan Meeusen, Marta Pertegás and Gert Straetmans (eds), *Enforcement of International Contracts in the European Union. Convergence and divergence between Brussels I and Rome I* (Intersentia 2004) 276-277; Ole Lando, 'The Eternal Crisis' in Jürgen Basedow,

parties cannot escape the scope of the relevant mandatory rules under Union law by choosing the law of a third country as the law governing their contract when in fact their contract has no link whatsoever with that country.

The Rome I Regulation also guarantees special protection for consumers and employees. Under Article 6 of the Regulation a choice-of-law clause in a contract signed with a consumer cannot deprive him/her of the protection afforded by the mandatory provisions of the law of the place of his/her habitual residence.<sup>38</sup> Similarly, Article 8 of the Rome I Regulation stipulates that a choice-of-law clause in an employment contract cannot deprive an employee of the protection afforded to him/her by the mandatory provisions of the law of the place which is applicable in the absence of the choice made by private parties.<sup>39</sup> The rationale of these provisions lies in the fact that consumers and employees are in a weaker bargaining position from a socio-economic point of view.<sup>40</sup> Articles 6 and 8 of the Rome I Regulation do not invalidate the choice made by private parties, but merely declares the relevant mandatory rules as applicable.<sup>41</sup>

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Klaus J Hopt and Hein Kötz (eds), *Festschrift für Ulrich Drobnig zum siebzigsten Geburtstag* (Mohr Siebeck 1998) 370.

<sup>38</sup> Paragraph 2 of Article 6 of the Rome I Regulation. This provision does not concern a contract signed between two consumers. See in this respect Report on the Convention on the law applicable to contractual obligations by Mario Giuliano and Paul Lagarde [1980] OJ C 282. In addition, this rule applies only with regard to a consumer who resides in a Member State. See in this respect Fausto Pocar, 'Protection of Weaker Parties in the Rome Convention and the Rome I Proposal' in n Jürgen Basedow, Harald Baum and Yuko Nishitani (eds), *Japanese and European Private International Law in Comparative Perspective* (Mohr Siebeck 2008) 129.

<sup>39</sup> Paragraph 1 of Article 8 of the Rome I Regulation. This could be the law of the place in which or, failing that, from which the employee habitually carries out his/her work in performance of a contract. If that law applicable cannot be determined by this rule, a contract is governed by the law of the country where the place of business through which the employee was engaged is situated. However, if a contract is more closely connecting to the national law other than the two mentioned above, it should subject to that law.

<sup>40</sup> Christopher Tillman (n 31) 53.

<sup>41</sup> Jens Rinze, 'The Scope of Party Autonomy under the 1980 Rome Convention on the Law Applicable to Contractual Obligations' (1994) *Journal of Business Law* 412, 422 and 424.

Furthermore, pursuant to Article 9 of the Rome I Regulation mentioned in the first chapter, for instance, the choice of the governing law can also be limited, giving effect to the so-called overriding mandatory provisions. These provisions apply irrespective of the governing law chosen by private parties.<sup>42</sup> According to Article 9 (2) of the Rome I Regulation, effect can be given to the overriding mandatory provisions of the law of the forum. Under Article 9 (3) of the Rome I Regulation, in turn, this also applies to the overriding mandatory rules of a third country. However, this is confined to the country where the obligations arising out of a contract have to be or have been performed and which render the performance of a contract as unlawful.<sup>43</sup> Overriding mandatory provisions are also mentioned in the Rome II Regulation. According to Article 16 of the Rome II Regulation in the context of non-contractual obligations the otherwise applicable national substantive law should not 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 non-contractual obligations.<sup>44</sup>

Apart from mandatory rules, the application of the governing law chosen by private parties can also be limited on the basis of the public policy exception. Article 21 of the Rome I Regulation provides that ‘the application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*order public*) of the

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<sup>42</sup> Susanne Knofel, ‘Mandatory rules and Choice of Law: A Comparative Approach to Article 7 (2) of the Rome Convention’, (1999) *Journal of Business Law* 239, 245. See also Jens Rinze (n 41) 426.

<sup>43</sup> Paragraph 3 of Article 9 of the Rome I Regulation.

<sup>44</sup> Article 16 of the Rome II Regulation.

forum'.<sup>45</sup> Under this provision, the governing law chosen by private parties can be held to be inapplicable. This provision is usually used in extraordinary cases, where the fundamental issues of the public policy of the forum are involved.<sup>46</sup> For instance, pursuant to the similar reference under the Rome II Regulation, the otherwise applicable national substantive law that requires the award of excessive non-compensatory exemplary or punitive damages may be regarded as being contrary to the public policy of the forum.<sup>47</sup>

#### **4. The principle of party autonomy in light of the ordo-liberal approach**

The principle of party autonomy firmly established in the Union legal order is defined as one of the cornerstones of the Union system of choice-of-law rules in matters relating to cross-border contractual, non-contractual and other civil law obligations.<sup>48</sup> Considering its role in facilitating cross-border relationships,<sup>49</sup> one might wonder how the freedom available to private parties engaged in cross-border contractual, non-contractual or other civil law relationships to choose the governing law relates to the Treaty free movement rights.

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<sup>45</sup> See also Article 25 of the Rome II Regulation, which states that 'The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum'. Article 12 of the Rome III Regulation that stipulates that the 'application of a provision of the law *designated* by virtue of this Regulation may be refused only if such application is manifestly incompatible with the public policy of the forum' (italics added).

<sup>46</sup> Jens Rinze (n 41) 430.

<sup>47</sup> Recital 32 of the Rome II Regulation.

<sup>48</sup> Preamble 11 of the Rome I Regulation.

<sup>49</sup> See in this respect Axel Flessner and Hendrik Verhagen, *Assignment in European Private International Law: Claims as Property and the European Commission's 'Rome I Regulation'* (Sellier European Law Publishers 2006) 21.

There is a lack of consensus in the academic literature in this respect. The proponents of the ordo-liberal ideas on the European integration process argue that the Treaty free movement rights guarantee and extend the freedom to choose the governing law across borders.<sup>50</sup> According to this approach, the Treaty free movement rights are the basic tools in the process of the creation and completion of the internal market.<sup>51</sup> This is because the latter was intended to be based on the activity of private parties,<sup>52</sup> which have not only contractual freedom, but also the freedom to choose the governing law.<sup>53</sup>

In light of this, national rules that are mandatory in an inter-State context are distinguished from other national rules for the purpose of scrutiny under the Treaty free movement provisions.<sup>54</sup> In particular, according to this approach, only national rules that are mandatory in an inter-State context, which affect the exercise of contractual freedom and the freedom to choose the governing law could be regarded as an obstacle to free movement.<sup>55</sup> These are the rules that could be caught, for instance, by Article 34 TFEU in light of *Dassonville* and

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<sup>50</sup> See eg Horatia Muir Watt, 'Experiences from Europe: Legal Diversity and the Internal Market' (2003-2004) 39 *Texas International Law Journal* 429, 440; See also Peter-Christian Müller-Graff, 'Basic Freedoms – Extending Party Freedom across Borders' in Stefan Grundmann, Wolfgang Kerber and Stephen Weatherill (eds), *Party Autonomy and the Role of Information in the Internal Market* (Walter de Gruyter 2001); Stefan Grundmann, 'The Concept of the Private Law Society: After 50 Years of European and European Business Law' (2008) 16 *European Review of Private Law* 553.

<sup>51</sup> See Stefan Grundmann, 'Information, Party Autonomy and Economic Agents in European Contract Law' (2002) 39 *Common Market Law Review* 269, 270.

<sup>52</sup> See Stefan Grundmann, 'The Structure of European Contract Law' (2001) 4 *European Review of Private Law* 505, 510.

<sup>53</sup> See Stefan Grundmann, Wolfgang Kerber and Stephen Weatherill (eds), 'Party Autonomy and the Role of Information in the Internal Market – an Overview' in Stefan Grundmann, Wolfgang Kerber and Stephen Weatherill (eds), *Party Autonomy and the Role of Information in the Internal Market* (Walter de Gruyter 2001) 5.

<sup>54</sup> The difference between these rules is discussed in the first chapter.

<sup>55</sup> See Peter von Wilmowsky, *Europäisches Kreditsicherungsrecht* (Mohr Siebeck 1996) 44. The starting point for the author is that the use of divergent connecting factors in different national choice-of-law rules increases uncertainty in cross-border transactions and restricts the freedom of private parties to choose the most efficient legal regime. However, this does not seem to be so in case of Union choice-of-law rules embodied, for instance, in the Rome I Regulation.

*Cassis de Dijon*.<sup>56</sup> In contrast, other national rules that are mandatory only in a domestic context are not seen as limiting the freedom to choose the governing law, and, therefore, could hardly impede the exercise of the Treaty free movement rights.<sup>57</sup> This is deduced from an extensive interpretation of the Court's finding in *Alsthom Atlantique*,<sup>58</sup> where the Court in the context of Article 35 TFEU, in an obiter dictum, held that the parties to an international contract of sale were generally free to determine the law applicable to their contractual relationship and could therefore avoid being subject to the national law at issue.<sup>59</sup> Thus, in the context of scrutiny under the Treaty free movement provisions, the advocates of this approach place a particular emphasis on the discretion available to private parties engaged in cross-border relationships. In particular, national rules, which are not mandatory in an inter-State context, are less likely to restrict the exercise of the Treaty free movement rights, since private parties can avoid their scope by choosing the law of another Member State to govern their contract. As far as national rules that are mandatory in an inter-State context, the freedom available

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<sup>56</sup> See Stefan Grundmann 'The Structure of European Contract Law' (n 52) 517. Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 837; Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

<sup>57</sup> See Horatia Muir Watt, 'Experiences from Europe' (n 50) 443; Stefan Leible, 'Fundamental Freedoms and European Contract Law' in Stefan Grundmann (ed), *Constitutional Values and European Contract Law* (Kluwer Law International 2008) 69.

<sup>58</sup> See Stefania Bariatti (n 10) 90-91; Stefan Grundmann, 'EC Consumer and EC Competition Law: How Related Are They? Examining the Existing EC Contract Law Sources' in Hugh Collins (ed), *The Forthcoming EC Directive on Unfair Commercial Practices: Contract, Consumer and Competition Law Implications* (Kluwer Law International 2004) 212; Stefan Grundmann, 'Introduction' in Massimo C Bianca and Stefan Grundmann (eds), *EU Sales Directive: Commentary* (Intersentia 2002) 26; Norbert Reich, 'A Common Frame of Reference (CFR) – Ghost or Host for Integration?' (2006) 7 ZERP-Diskussionspapier, 15-16 < [www.gbv.de/dms/zbw/520228960.pdf](http://www.gbv.de/dms/zbw/520228960.pdf)> accessed 19 September 2011; Horatia Muir Watt, 'Experiences from Europe' (n 50) 440; Horatia Muir Watt, 'The Challenge of Market Integration for European Conflicts Theory' in Arthur Hartkamp, Martijn Hesselink, Ewoud Hondius and Others (eds), *Towards a European Civil Code, Third fully revised and expanded edition* (Kluwer Law International 2004) 199.

<sup>59</sup> Case C-339/89 *Alsthom Atlantique SA v Compagnie de construction mécanique Sulzer SA* [1991] ECR I-107, para 15. The rule at issue was mandatory only in a domestic context.

to private parties is limited, since the applicability of these rules cannot be excluded by choosing the law of another Member State to govern a contract.<sup>60</sup>

However, not all agree with this approach. There are others who disagree with the argument that the Treaty free movement rights themselves guarantee contractual freedom or the freedom to choose the applicable law across borders.<sup>61</sup> This does not mean that the Treaty free movement rights have no connection with the principles of contractual freedom and party autonomy. They concur that these principles accepted in the national legal systems are taken for granted in the Union legal order.<sup>62</sup> In particular, as Israël, for instance, points out, the Treaty free movement provisions do not, *per se*, guarantee the principle of party autonomy across borders, but the exclusion or restriction of the freedom to choose the governing law, however, could result in an obstacle to trade in the internal market.<sup>63</sup>

In essence, those who disagree with the ordo-liberal approach do not share the same ideas with regard to the role of private parties in the process of the creation and completion of the internal market. This is one of the elements of the ordo-

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<sup>60</sup> See Horatia Muir Watt, 'Experiences from Europe' (n 50) 443; Stefan Grundmann, 'European Contract Law(s) of What Colour?' (2005) *European Review of Contract Law* 185, 189; Martijn Hesselink, 'Non-mandatory rules in European Contract Law' (2005) 1 *European Review of Contract Law* 44, 75; Horatia Muir Watt, 'The Challenge of Market Integration for European Conflicts Theory' (n 58) 199.

<sup>61</sup> See Jacobien W Rutgers, 'The European Economic Constitution, Freedom of Contract and the DCFR' (2009) 2 *European Review of Contract Law* 95, 97.

<sup>62</sup> *ibid.* The argument is presented in Nils Jansen and Reinhard Zimmermann, 'Restating the Acquis Communautaire? A Critical Examination of the "Principles of the Existing EC Contract Law"' (2008) 71 *Modern Law Review* 505, 518.

<sup>63</sup> Jona Israël, *European Cross-Border Insolvency Regulation: a Study of Regulation 1346/2000 on Insolvency Proceedings in light of a Paradigm of Co-operation and a Comitatus Europaea* (Intersentia 2005) 127.

liberal perception of so-called ‘European economic constitution’.<sup>64</sup> Developed after the Second World War,<sup>65</sup> the ordo-liberal school of thought aims at ‘the creation of a free market, liberal economy, protected through constitutional principles’.<sup>66</sup> As Maduro points out, ordo-liberals believe in a true market economy, where the power of a State is excluded, paving the way to voluntary market transactions and where constitutional protection prevents state intervention and protects undistorted competition.<sup>67</sup> These are, in turn, the essential factors of so-called ‘private law society’ based on contractual freedom.<sup>68</sup> On this basis, for ordo-liberals the Union has the aim of constitutionalising a free market economy with undistorted competition.<sup>69</sup> Specifically, they consider the Treaty as establishing ‘a framework for a common market as a self-organising system’.<sup>70</sup> This system allows ‘an unimpeded self-coordination of economic actors through market transactions’ and ‘self-control of economic actors through competition’.<sup>71</sup> According to ordo-liberals, the Treaty free movement rights have the status of fundamental rights and are the cornerstones of ‘European economic

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<sup>64</sup> See Stefan Grundmann, ‘The Structure of European Contract Law’ (n 52) 515; Jona Israël *European Cross-Border Insolvency Regulation: a Study of Regulation 1346/2000 on Insolvency Proceedings in light of a Paradigm of Co-operation and a Comitatus Europaea* (Intersentia 2005) 126; Jacobien W Rutgers, *International Reservation of Title Clauses: a Study of Dutch, French and German Private International Law in light of European Law* (T. M. C. Asser Press 1999) 174; Jacobien W. Rutgers, ‘The European Economic Constitution’ (n 61) 98.

<sup>65</sup> See David J Gerber, ‘Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the “New” Europe’ (1994) 42 *American Journal of Comparative Law* 25.

<sup>66</sup> See Miguel P Maduro, ‘Reforming the Market of the State? Article 30 and the European Constitution: Economic Freedom and Political Rights’ (1997) 3 *European Law Journal* 55, 61.

<sup>67</sup> *ibid.*

<sup>68</sup> See Wolf Sauter, ‘The Economic Constitution of the European Union’ (1998) 4 *Columbia Journal of European Law* 27, 47.

<sup>69</sup> See Miguel P Maduro (n 66) 62; J. W. Rutgers, *International Reservation of Title Clauses* (n 64) 174; More on ordo-liberalism, see Christian Joerges, ‘The Market without the State? The ‘Economic Constitution’ of the European Union and the Rebirth of Regulatory Politics’ (1997) 1 *European Integration Online Papers* < <http://eiop.or.at/eiop/pdf/1997-019.pdf>> accessed 19 September 2011.

<sup>70</sup> Manfred E Streit and Werner Mussler, ‘The Economic Constitution of European Union: From “Rome” to “Maastricht”’ (1995) 1 *European Law Journal* 5, 14.

<sup>71</sup> *ibid.*

constitution'.<sup>72</sup> Thus, they play a major role in setting the limits imposed on the exercise of a State power and define the boundaries between public and private spheres.<sup>73</sup> With regard to general competences, in the ordo-liberal point of view, the Union was granted supranational powers only to establish the common market.<sup>74</sup> As a result, other Union sectoral policies, which go beyond pure market integration, are regarded as 'flaws in the liberal economic constitution'.<sup>75</sup>

It is rather difficult to decide whether to agree or disagree with the ordo-liberal approach that the Treaty free movement provisions extend the principle of party autonomy across borders. This is because of the significance attached by ordo-liberals to the role of the Treaty free movement rights in the integration process. In particular, according to the ordo-liberal school of thought, the Treaty free movement provisions set strict constraints on state intervention in the internal market.<sup>76</sup> One might certainly agree with this argument, but to what extent this is the case, however, is not quite obvious. One thing being that the actual scope of the Treaty free movement provisions has not been clearly defined yet. This specifically relates to the definition of the notion of non-discriminatory restriction that could be caught by the Treaty free movement provisions.<sup>77</sup> For instance, in

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<sup>72</sup> See Miguel P Maduro (n 66) 62 and 64.

<sup>73</sup> *ibid* 64; See also Brigitta Lurger, 'The Future of European Contract Law between Freedoms of Contract, Social Justice, and Market Rationality' (2005) 1 *European Review of Contract Law* 442, 452.

<sup>74</sup> See Wolf Sauter (n 68) 51.

<sup>75</sup> *ibid* 51.

<sup>76</sup> On this point of view, see Wolf Sauter, *Competition Law and Industrial Policy in the EU* (Clarendon Press 1997), 42; Miguel P Maduro (n 66) 63.

<sup>77</sup> More on non-discriminatory restrictions in the context of free movement of persons, see Case C-19/92 *Dieter Kraus v Land Baden-Württemberg* [1993] ECR I-1663; Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and Others and Union des associations européennes de football (UEFA) v Jean Marc Bosman* [1995] ECR I-4921; Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165; Joined Cases C-369/96 and C-376/96 *Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL (C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL (C-376/96)* [1999] ECR I-8453; Case C-

the context of free movement of goods, *Dassonville* broadly defines the scope of Article 34 TFEU and there are recent rulings such as *Commission v Italy* and *Mickelsson and Roos* that raise questions over whether *Keck* is still good law.<sup>78</sup> Similarly, in case of services, one, for instance, could mention *Gebhard*, which broadened the scope of Article 56 TFEU, extending it to include non-discriminatory barriers that prohibit or further impede the activities of service providers established in other Member States.<sup>79</sup> The position taken by the Court in these rulings could be understood as reflecting the ordo-liberal argument concerning strict constraints imposed on state intervention in the internal market. At the same time, however, not all observers, for instance, agree that *Commission v Italy* and *Mickelsson and Roos* should be seen as a departure from the limited discrimination test under the *Keck* jurisprudence.<sup>80</sup> Similarly, there still remains uncertainty about the actual scope of Article 56 TFEU. In contrast to *Gebhard*, in *Mobistar* and *Viacom*, for instance, the Court took a rather limited *Keck*-esque approach by excluding a national tax from the scope of Article 56 TFEU, since it

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108/96 *Criminal proceedings against Dennis Mac Quen, Derek Pouton, Carla Godts, Youssef Antoun and Grandvision Belgium SA, being civilly liable, intervener: Union professionnelle belge des médecins spécialistes en ophtalmologie et chirurgie oculaire* [2001] ECR I-837; Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279; Case C-294/00 *Deutsche Paracelsus Schulen für Naturheilverfahren GmbH v Kurt Gräbner* [2002] ECR I-6515; Case C-79/01 *Payroll Data Services (Italy) Srl, ADP Europe SA and ADP GSI SA* [2002] ECR I-8923; Case C-442/02 *CaixaBank France v Ministère de l'Économie, des Finances et de l'Industrie (CaixaBank)* [2004] ECR I-8961.

<sup>78</sup> Case C-110/05 *Commission v Italy* (motorcycle trailers) [2009] ECR I-519, para 58; Case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* [2009] ECR I-4273, para 28; Case C-265/06 *Commission v Portugal* (tinted film) [2008] ECR I-2245, para 31-36. See in this respect, Eleanor Spaventa, 'Leaving Keck behind? The free movement of goods after the rulings in *Commission v Italy* and *Mickelsson and Roos*' (2009) 34 *European Law Review* 914; Jukka Snell, 'The Notion of Market Access: A Concept or a Slogan' (2010) 47 *Common Market Law Review* 437; Luca Prete, 'Of Motorcycle Trailers and Personal Watercrafts: the Battle over *Keck*' (2008) 35 *Legal Issues of Economic Integration* 133; Peter Pecho, 'Good-bye Keck?: A Comment on the Remarkable Judgment in *Commission v Italy*, C-110/05' (2009) 36 *Legal Issues of Economic Integration* 257.

<sup>79</sup> Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, para 37.

<sup>80</sup> See eg Pal Wenneras and Ketil Boe Moen, 'Selling arrangements, keeping Keck' (2010) 35 *European Law Review* 387.

equally affected domestic and foreign providers of services.<sup>81</sup> This, in turn, seems to demonstrate the relatively limited scope of these Treaty free movement provisions. In particular, as much as the ability of Member States to legislate might be limited under *Dassonville*, *Commission v Italy* and *Mickelsson and Roos*, pursuant to *Keck*, *Mobistar* and *Viacom*, they are still free to enact rules as long as domestic and foreign providers of goods and services are treated equally in law and in fact.

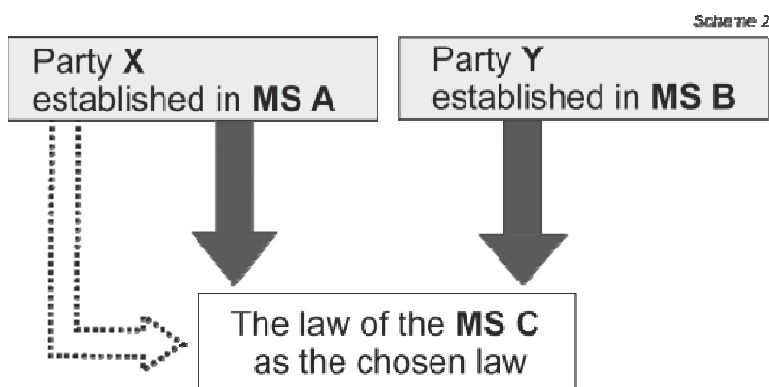
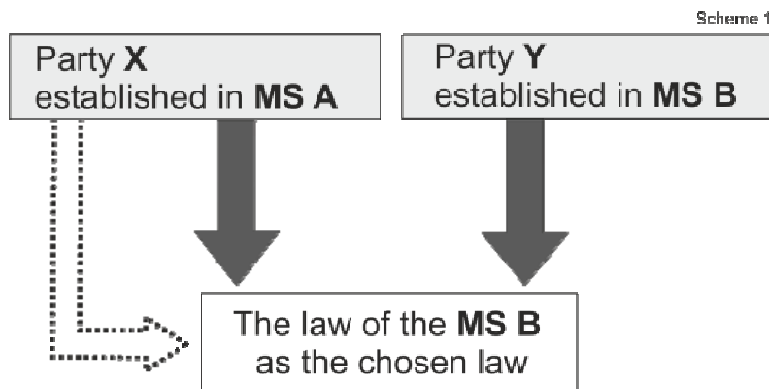
That said, one thing is clear that the exercise of the Treaty free movement rights is very much interlinked with the exercise of contractual freedom and the freedom to choose the governing law. Any limitations of the latter would restrict free movement in the internal market. For instance, providers of goods and services would find it difficult to engage in cross-border activities between Member States without the freedom to decide whether to enter into a contractual relationship or agree specific contractual terms or clauses. In this respect, therefore, it is necessary to consider whether the discretion of private parties to choose the governing law can have any effect on scrutiny under the principle of equal treatment.

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<sup>81</sup> Case C-134/03 *Viacom Outdoor Srl v Giotto Immobilier SARL* [2005] ECR I-1167, para 37-38; Joined Cases C-544/03 and C-545/03 *Mobistar SA v Commune de Fléron and Belgacom Mobile SA v Commune de Schaerbeek* [2005] ECR I-7723, para 29-31.

## 5. Rules of the chosen law under scrutiny

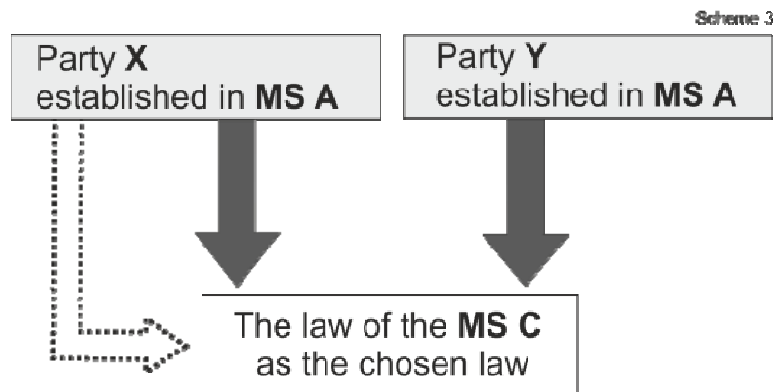
The law chosen by private parties, unless otherwise stipulated,<sup>82</sup> governs all aspects relating to their contract. In this respect, all rules that are part of that law apply to the contract, including those that are mandatory in an inter-State context and those, such as default rules, that are not.<sup>83</sup> One could distinguish three separate scenarios here. They are demonstrated in Schemes 1, 2 and 3 below.



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<sup>82</sup> See eg Article 3 of the Rome I Regulation that allows private parties to choose the law applicable to the whole or only part of a contract. See also Peter M North, *Essays in Private International Law* (Clarendon Press 1993) 38.

<sup>83</sup> See Aubrey L Diamond, 'Harmonization of Private International Law Relating to Contractual Obligations' (1986) 199 *Recueil Des Cours* 233, 293; Peter Nygh, *Autonomy in International Contracts* (Oxford University Press 1999) 217.



Two private parties (X and Y) established in Member States A and B respectively could opt, for instance, for the law of Member State B to govern their contractual relationship (Scheme 1). Within this contractual relationship, party X could be involved in some form of cross-border activity: i.e. it could, for instance, supply goods or provide services to party Y. It is also possible that the same contracting parties choose the law of a third Member State as the law applicable to their contract (Scheme 2). Under the Rome I Regulation, their contract does not necessarily need to be linked to that law based on a factor other than the choice made by the parties at issue. In other words, the choice-of-law clause referring to the law of that third Member State is sufficient for its application. And finally, these parties could be established in the same Member State. Being involved in a similar contract of sale or provision of services, they could select the law of a different Member State to be the governing law (Scheme 3). Similar to the second scenario, under the Rome I Regulation, there is no requirement that their contract is linked to the law of that Member State based on a factor other than their choice-of-law clause. Suppose that in all three scenarios, contracting party X, which

supplies goods or provides services, is not in favour of the application of a particular rule of the chosen law because of its allegedly discriminatory effect.

Prior to going into the possible role of the principle of party autonomy in the present context, it is necessary, first, to address the applicability of the principle of equal treatment under Articles 34 and 56 TFEU in each of these scenarios. This specifically concerns scenario 3. In contrast to other two, in this scenario, one could question whether the contractual relationship at issue would actually fall within the Treaty to come within the scope of Articles 34 and 56 TFEU, giving the fact that there is no cross-border element other than the choice-of-law clause agreed by the contracting parties. Without the parties' choice of the law of a different Member State, their contractual relationship would constitute a purely internal situation and, therefore, would not itself trigger the Treaty free movement provisions.<sup>84</sup> Despite that, however, in light of Article 3 (4) of the Rome I

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<sup>84</sup> With regard to free movement of goods, see eg Case 286/81 *Criminal proceedings against Oosthoek's Uitgeversmaatschappij BV* [1982] ECR 4575, para 9; Case 355/85 *Mr Driancourt, Commissioner of Police, Thouars, carrying out the duties of Public Prosecutor v Michel Cognet* [1986] ECR 3231, para 11; Joined Cases C-321/94, C-322/94, C-323/94 and C-324/94 *Criminal proceedings against Jacques Pistre (C-321/94), Michèle Barthes (C-322/94), Yves Milhau (C-323/94) and Didier Oberti (C-324/94)* [1997] ECR I-2343, para 44; Case C-448/98 *Criminal proceedings against Jean-Pierre Guimont* [2000] ECR I-10663, para 20; Case C-71/02 *Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH* [2004] ECR I-3025, para 19. It is necessary to mention that in the context of Article 34 TFEU, an important factor is the existence of an impediment to intra-Union trade. More on this, see Alina Tryfonidou, 'The outer limits of Article 28 EC: Purely internal situations and the development of the Court's approach through the years' in at Catherine Barnard and Okeoghene Odudu (eds), *The Outer Limits of European Law* (Hart Publishing 2009); Peter Oliver and Stefan Enchelmaier, 'Free movement of goods: Recent developments in the case law' (2007) 44 *Common Market Law Review* 649. With regard to free movement of persons, see eg Case 115/78 *J. Knoors v Secretary of State for Economic Affairs* [1979] ECR 399, para 24; Case 175/78 *La Reine v Vera Ann Saunders* [1979] ECR 1129, para 11; Case 52/79 *Procureur du Roi v Marc J.V.C. Debauve and Others* [1980] ECR 443, paragraph 9; Joined Cases 35 and 36/82 *Elestina Esselina Christina Morson v State of the Netherlands and Head of the Plaatselijke Politie within the meaning of the Vreemdelingenwet; Sweradje Jhanjan v State of the Netherlands* [1982] ECR 3723, para 16; Joined Cases C-54/88, C-91/88 and C-14/89 *Criminal proceedings against Eleonora Nino and Others* [1990] ECR I-3537, paragraph 10; Case C-332/90 *Volker Steen v Deutsche Bundespost* [1992] ECR I-341, paragraph 9; Case 204/87 *Criminal proceedings against Guy Bekaert* [1988] ECR 2029, paragraph 10-12; Case C-266/96 *Corsica Ferries France SA v Gruppo Antichi Ormeggiatori del porto di Genova Coop. arl, Gruppo Ormeggiatori del Golfo di La Spezia Coop. arl and Ministero dei Trasporti e della Navigazione* [1998] ECR I-3949, para 40; Case C-384/93 *Alpine Investments BV v Minister van*

Regulation, the choice of the governing law appears to be sufficient for the application of the relevant Union rules.<sup>85</sup> In particular, under this provision, it seems that a forum court, sitting for instance in the Member State of the contracting parties' establishment, can actually refuse to enforce the law of a different Member State, if it contradicts the relevant provisions under Union law. Even though Article 3 (4) of the Rome I Regulation only mentions provisions of Union law 'implemented' by the forum, it seems rather illogical to confine it to Union secondary legislation and exclude Union primary law from its scope. Therefore, it is fair to argue that in all three scenarios a forum court can, at least theoretically, invoke the principle of equal treatment against the application of a rule of the law chosen by the contracting parties.

This, in turn, brings us to another important issue in the present context, which is the likelihood of a rule that is part of the chosen law to be discriminatory in nature or effect. In contrast to scenario 1, in scenarios 2 and 3 the law of Member State C would not be applicable if not the choice made by the contracting parties. In this respect, considering the remoteness of the link between the contract at issue and the chosen law, it is rather difficult to envisage how a rule that is part of that law can, for instance, directly or indirectly discriminate against contracting party X on grounds of nationality. In other words, it is questionable how a forum court would

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*Financiën* [1995] ECR I-1141, para 30; Case C-108/98 *RI. SAN. Srl v Comune di Ischia, Italia Lavoro SpA and Ischia Ambiente SpA*. [1999] ECR I-5219, paragraph 23; Case C-70/95 *Sodemare SA, Anni Azzuri Holding SpA and Anni Azzurri Rezzato Srl v Regione Lombardia* [1997] ECR I-3395, para 37.

<sup>85</sup> This in a certain way finds support in the case-law, according to which national courts can request a preliminary ruling concerning the law of another Member State. See in this respect, Case 20/64 *SARL Albatros v Société des pétroles et des combustibles liquides (Sopéco)* [1965] ECR 29, p 34; Case 261/81 *Walter Rau Lebensmittelwerke v De Smedt PVBA* [1982] ECR I-3961, para 9; Case C-150/88 *Kommanditgesellschaft in Firma Eau de Cologne & Parfümerie-Fabrik, Glockengasse n. 4711 v Provide Srl*. [1989] ECR I-3891, para 12; Case C-47/90 *Établissements Delhaize frères et Compagnie Le Lion SA v Promalvin SA and AGE Bodegas Unidas SA* [1992] ECR I-3669, para 9.

establish the possible discriminatory effect of a rule of the Member State at issue when there is no actual connection with its territory through the exercise of any Treaty free movement right. Party X might face a certain disadvantage as a result of the application of a rule of the chosen law, which might not be the case, for example, if the law of the Member State where it is established was applied. This, however, does not appear to be sufficient to be caught under the Treaty free movement provisions.

This concerns discrimination both on grounds of nationality and movement. On the one hand, such a disadvantage simply seems to be the result of a mere difference in substance between the rules applied in two Member States. As the Court reiterated on several occasions, not every difference in treatment constitutes discrimination contrary to the Treaty free movement provisions.<sup>86</sup> Contracting party X, thus, would simply have to accept any disadvantage, which directly emanates from the exercise of the freedom to choose the governing law. On the other hand, more importantly, because of the absence of the actual exercise of any Treaty free movement right involving the territory of the Member State at issue, the effect of a rule of that Member State on free movement in the internal market is also most likely to be considered to be too uncertain and indirect.<sup>87</sup>

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<sup>86</sup> See eg Case 14/68 *Walt Wilhelm and Others v Bundeskartellamt* [1969] ECR I, para 13; Case 1/78 *Patrick Christopher Kenny v Insurance Officer* [1978] ECR 1489, para 18; Cases 185/78 to 204/78 *Criminal proceedings against J. van Dam en Zonen and Others* [1979] ECR 2345, para 10; Case 155/80 *Summary proceedings against Sergius Oebel* [1981] ECR 1993, para 10; Case 308/86 *Criminal proceedings against R. Lambert* [1988] ECR 4369, para 22; Joined Cases C-251/90 and C-252/90 *Procurator fiscal, Elgin v Kenneth Gordon Wood and James Cowie* [1992] ECR I-2873, para 19; Case C-379/92 *Criminal proceedings against Matteo Peralta* [1994] ECR I-3453, para 34; Case C-177/94 *Criminal proceedings against Gianfranco Perfili* [1996] ECR I-161, para 17.

<sup>87</sup> See eg Case 69/88 *H. Krantz GmbH & Co. v Ontvanger der Directe Belastingen and Netherlands State* [1990] ECR I-583, para 11; Case C-93/92 *CMC Motorradcenter GmbH v Pelin Baskiciogullari* [1993] ECR I-5009, para 12; Case C-379/92 *Criminal proceedings against Matteo Peralta* [1994] ECR I-3453, para 24; Case C-96/94 *Centro Servizi Spediporto Srl v Spedizioni Marittima del Golfo Srl* [1995] ECR I-2883, para 41; Joined Cases C-418/93, C-419/93, C-420/93, C-421/93, C-460/93, C-461/93, C-462/93, C-464/93, C-9/94, C-10/94, C-11/94, C-14/94, C-15/94,

This, however, cannot be said with regard to scenario 1. The probability of a rule that is part of the chosen law (Member State B) to be discriminatory contrary to Articles 34 or 56 TFEU cannot be discarded. This is obviously because of the fact that there is the actual exercise of a Treaty free movement right involving the territory of that Member State, the rule of which is under consideration. In this context is where the question of the possible role of the party autonomy principle over scrutiny under the principle of equal treatment becomes relevant.

### 5.1. Mandatory rules of the chosen law

In the context of scenario 1, let us first consider rules that are mandatory in an inter-State context. These rules can be of public and private law nature.<sup>88</sup>

Mandatory rules of public law nature are rules the main purpose of which is a

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C-23/94, C-24/94 and C-332/94 *Semeraro Casa Uno Srl v Sindaco del Comune di Erbusco (C-418/93)*, *Semeraro Mobili SpA v Sindaco del Comune di Erbusco (C-419/93)*, *RB Arredamento Srl v Sindaco del Comune di Stezzano (C-420/93)*, *Città Convenienza Milano Srl v Sindaco del Comune di Trezzano sul Naviglio (C-421/93)*, *Città Convenienza Bergamo Srl v Sindaco del Comune di Stezzano (C-460/93)*, *Centro Italiano Mobili Srl v Sindaco del Comune di Pineto (C-461/93)*, *Il 3C Centro Convenienza Casa Srl v Sindaco del Comune di Roveredo in Piano (C-462/93)*, *Benelli Confezioni SNC v Sindaco del Comune di Capena (C-464/93)*, *M. Quattordici Srl v Commissario straordinario del Comune di Terlizzi (C-9/94)*, *Società Italiana Elettronica Srl (SIEL) v Sindaco del Comune di Dozza (C-10/94)*, *Modaffari Srl v Sindaco del Comune di Trezzano sul Naviglio (C-11/94)*, *Modaffari Srl v Comune di Cinisello Balsamo (C-14/94)*, *Cologno Srl v Sindaco del Comune di Cologno Monzese (C-15/94)*, *Modaffari Srl v Sindaco del Comune di Osio Sopra (C-23/94)*, *M. Dieci Srl v Sindaco del Comune di Madignano (C-24/94)* and *Consorzio Centro Commerciale "Il Porto" v Sindaco del Comune di Adria (C-332/94)* [1996] ECR I-2975, para 32; Case C-134/94 *Esso Española SA v Comunidad Autónoma de Canarias* [1995] ECR I-4223, para 24; Joined Cases C-140/94, C-141/94 and C-142/94 *DIP SpA v Comune di Bassano del Grappa*, *LIDL Italia Srl v Comune di Chioggia and Lingral Srl v Comune di Chioggia* [1995] ECR I-3257, para 29; Case C-266/96 *Corsica Ferries France SA v Gruppo Antichi Ormeggiatori del porto di Genova Coop. arl, Gruppo Ormeggiatori del Golfo di La Spezia Coop. arl and Ministero dei Trasporti e della Navigazione* [1998] ECR I-3949, para 31; C-412/97 *ED Srl v Italo Fenocchio* Case [1998] ECR I-3845, para 11; Case C-44/98 *BASF AG v Präsident des Deutschen Patentamts* [1999] ECR I-6269, para 16; Case C-190/98 *Volker Graf v Filzmoser Maschinenbau GmbH* [2000] ECR I-493, para 25; Case C-211/08 *Commission v Kingdom of Spain* [2010] ECR I-5267, para 72.

<sup>88</sup> George A Bermann, 'Public Law in the Conflicts of Laws' (1986) 34 *American Journal of Comparative Law* (Supplement) 157, 164-165; More on this see eg Kurt Lipstein, 'Conflict of Public Laws – Vision and Realities' in Ronald H Graveson, Karl F Kreuzer, Andre Tuncand Others (eds), *Festschrift für Imre Zajtay* (Mohr Siebeck 1982).

State's direct regulation in the public interest of various aspects of its social or economic policies.<sup>89</sup> This category includes, among others, rules on antitrust, securities, export controls, products liability and environmental regulation.<sup>90</sup> The importance of these rules with regard to public welfare and economic order has extended them to relationships between private parties.<sup>91</sup> Mandatory rules of private (contract) law nature, in turn, are rules that promote fairness in the context of relationships between private parties and, therefore, protect their interests.<sup>92</sup> For instance, these rules are referred to in Articles 6 and 8 of the Rome I Regulation that provide special protection for consumers and employees.<sup>93</sup>

In *Arblade*,<sup>94</sup> though not specifically in the context of contractual relationships, the Court ruled that national mandatory rules are also required to comply with Union law. In particular, the Court held that the classification of a particular rule as public-order legislation did not mean that it was exempt from the requirement to comply with Treaty provisions.<sup>95</sup> According to the Court, if this was indeed the

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<sup>89</sup> George A. Bermann (n 88) 162.

<sup>90</sup> Horatia Muir Watt, 'Choice of Law in Integrated and Interconnected Markets: A Matter of Political Economy' (2002-2003) 9 *Columbia Journal of European Law* 383, 384; George A Bermann (n 88) 162.

<sup>91</sup> Frank Vischer (n 2) 150.

<sup>92</sup> See George A Bermann (n 88) 162.

<sup>93</sup> See Jens Rinze (n 41) 421 and 424. See also Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial SA v Roció Murciano Quintero (C-240/98) and Salvat Editores SA v José M. Sánchez Alcón Prades (C-241/98)*, *José Luis Copano Badillo (C-242/98)*, *Mohammed Berroane (C-243/98) and Emilio Viñas Feliú (C-244/98)* [2000] ECR I-49401, para 25.

<sup>94</sup> Joined Cases C-369/96 and C-376/96 *Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL (C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL (C-376/96)* [1999] ECR I-8453.

<sup>95</sup> *ibid* para 31. This finding was also confirmed in Case C-165/98 *Criminal proceedings against André Mazzoleni and Inter Surveillance Assistance SARL, as the party civilly liable, third parties: Eric Guillaume and Others* [2001] ECR I-2189. See in this respect Horatia Muir Watt, 'The Challenge of Market Integration for European Conflicts Theory' (n 58) 199. The compatibility of national mandatory rules with the Treaty free movement provisions was also examined by the Court, for instance, in Case C-36/01 *Omega Spielhallen- und Automatenaufstellungs v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-960; Case C-244/06 *Dynamic Medien Vertriebs GmbH v Avides Media AG* [2008] ECR I-505.

case, the primacy and uniform application of Union law would be undermined.<sup>96</sup> Thus, it is clear that national mandatory rules both of public and private law nature can also fall within the scope of the principle of equal treatment. Those that impose discriminatory treatment would be incompatible with the principle of equal treatment and, therefore, require objective justification.

In this respect, one could question, however, whether this outcome could be any different, if such a discriminatory rule is part of the law chosen by private parties. The choice of the governing law made by private parties to a contract is hardly likely to be taken as a basis for the application of a discriminatory mandatory rule. Otherwise, it would be contrary to the very objective of the principle of equal treatment. As mentioned earlier, a particular rule falls within the scope of the principle of equal treatment because of its effect on free movement in the internal market.<sup>97</sup> In this regard, the fact that a rule is applicable by virtue of a choice-of-law clause stipulated in a contract cannot exempt it from being caught by the principle of equal treatment. After all, a rule does not cease to be discriminatory just because it is part of the governing law chosen by private parties.

The principle of party autonomy also does not appear to be a sufficient ground for objective justification. This is because whether contracting parties had exercised the freedom to choose the governing law could not make any difference in the present context, if a rule is mandatory in an inter-State context and is applicable

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<sup>96</sup> Joined Cases C-369/96 and C-376/96 *Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL (C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL (C-376/96)* [1999] ECR I-8453, para 31.

<sup>97</sup> Jacobien W Rutgers, 'Free Movements and Contract Law' (2008) 3 *European Review of Contract Law* 474, 476. See also Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 837; Joined Cases C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097.

on its own terms. In particular, the contracting parties in scenario 1 would simply be obliged to meet the requirements imposed by a mandatory rule of Member State B, even without choosing the law of that Member State as the law governing their contract. This is because, the rule is part of the national law to which the cross-border relationship at issue is linked. Thus, it seems correct to argue that the principle of party autonomy could hardly play any role in the context of the scrutiny of mandatory rules under the principle of equal treatment, due to the fact that they would be in any way applicable to a given a cross-border contractual relationship, based on a factor other than a choice-of-law clause agreed by private parties.

## **5.2. Default rules of the chosen law**

Default rules are not mandatory in an inter-State context. These are private (contract) law rules enacted to facilitate private parties in their contractual relationships. These rules do not pursue any public interest.<sup>98</sup> Among others, one could mention, for instance, rules that define the quality expected from a service provider; rules that detail reasons why a party may terminate a contractual relationship; or rules that determine the consequences of a late delivery.<sup>99</sup> These rules aim to reduce costs incurred in the context of contractual relationships.<sup>100</sup> In particular, they save time and expenses when private parties negotiate specific

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<sup>98</sup> Sandrine Clavel, 'Regulatory Function of Choice of Law Rules Applying to Contracts for Services in the European Union' in Fabrizio Cafaggi and Horatia Muir Watt (eds), *The Regulatory Function of European Private Law* (Edward Elgar 2009) 67.

<sup>99</sup> Martijn W Hesselink, 'Non-Mandatory Rules in European Contract Law' in Jan M Smits and Sophie Stijns (eds.), *Inhoud en werking van de overeenkomst naar Belgisch en Nederlands recht* (Intersentia 2005) 101. See also Martijn W Hesselink, 'The Principles of European Contract Law: Some Choices Made by the Lando Commission' (2001) 1 *Global Jurist Frontiers* 1, 54.

<sup>100</sup> Ugo Mattei, 'Efficiency and Equal Protection in the New European Contract Law: Mandatory, Default and Enforcement Rules' (1998-1999) 39 *Virginia Journal of International Law* 527, 538. See also Sandrine Clavel (n 98) 67.

contractual terms.<sup>101</sup> Unlike mandatory rules, default rules do not apply on their own terms. They are applicable to a contract pursuant to a choice-of-law rule or a choice-of-law clause agreed by private parties.<sup>102</sup> Thus, only default rules of the law chosen by contracting parties would be applicable to their contract.<sup>103</sup>

Private parties are free to opt out of a default rule of the chosen law.<sup>104</sup> This means that when agreeing a choice-of-law clause, private parties can exclude a contract from the scope of a default rule that is part of the chosen law.<sup>105</sup> Once excluded, this rule is usually replaced by a specific contractual term. Since a default rule of the chosen law is not applicable on its own terms, it is not binding upon contracting parties.<sup>106</sup> However, if contracting parties have not set aside it, it is binding as part of the governing law.<sup>107</sup> Thus, in contrast to mandatory rules, the applicability of default rules of the chosen law is subject to a wider discretion available to private parties in the context of contractual relationships.

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<sup>101</sup> See Martijn W Hesselink, 'Non-Mandatory Rules in European Contract Law' (n 99) 102; See also Melvin A. Eisenberg, 'The Theory of Contracts' in Peter Benson (ed), *The Theory of Contract Law: New Essays* (Cambridge University Press 2001) 227.

<sup>102</sup> This also concerns rules that are mandatory only in a domestic context, i.e. situations where all factors except a choice-of-law clause agreed by private parties are related to one country.

<sup>103</sup> Jacobien W. Rutgers, 'The Rule of Reason and Private Law or the Limits to Harmonization' in Annette Schrauwen (ed), *The Rule of Reason: Rethinking Another Classic of European Law* (Europa Law Publishing 2005) 152.

<sup>104</sup> See Ole Lando and Hugh Beale (eds), *Principles of European Contract Law: Part I and II, Combined and Revisited, Prepared by the Commission of European Contract Law* (Kluwer Law International 1999) 101. See also Christopher R Drahozal, 'Contracting Around: Default Rules, Mandatory Rules and Judicial Review of Arbitral Awards' (2002-2003) 3 *Pepperdine Dispute Resolution Law Journal* 419, 420.

<sup>105</sup> See Souichirou Kozuka, 'The Economic Implications of Uniformity in Law' in Jürgen Basedow, Toshiyuki Kono and Giesela Rühl (eds), *An Economic Analysis of Private International Law* (Mohr Siebeck 2006) 84. See also Matthias E Storme, 'Freedom of Contract: Mandatory and Non-Mandatory Rules in European Contract Law' (2007) 15 *European Review of Private Law* 233, 237.

<sup>106</sup> Martijn W Hesselink, 'Non-Mandatory Rules in European Contract Law' (n 99) 101.

<sup>107</sup> See John O'Brien and Raymond Smith, *Conflict of Laws* (2<sup>nd</sup> ed, Cavendish Publishing 1999) 336. See also Christopher A Riley, 'Designing Default Rules in Contract Law: Consent, Conventionalism, and Efficiency' (2000) 20 *Oxford Journal of Legal Studies* 367, 367.

### 5.2.1. *Ordo-liberal approach and default rules*

According to the ordo-liberal approach discussed earlier, default rules are not subject to scrutiny under the Treaty free movement provisions.<sup>108</sup> The proponents of this approach, putting a particular emphasis on the role of the principle of party autonomy in the internal market, point out that in a contractual context only the compatibility of national rules that are mandatory in an inter-State context is scrutinised in light of the Treaty free movement provisions.<sup>109</sup> In contrast, default rules, which are not mandatory in an inter-State context, can escape scrutiny under the Treaty free movement provisions.<sup>110</sup> This is because the mere application of these rules to a given contract is a direct consequence of the choice made by private parties.<sup>111</sup> In particular, the reason is that if contracting parties have not set aside these rules, the Treaty free movement provisions cannot be used to correct parties' choice.<sup>112</sup>

In light of this, one could argue that because of their specific nature, default rules are not subject to scrutiny and, therefore, caught by the principle of equal treatment enshrined in the Treaty free movement provisions. It could be understood that these rules are not scrutinised under the principle of equal

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<sup>108</sup> See eg Horatia Muir Watt, 'Experiences from Europe' (n 50) 440; Jürgen Basedow, 'A Common Contract Law for the Common Market' (1996) 33 *Common Market Law Review* 1169, 1174; Stefan Grundmann, 'EC Consumer and EC Competition Law: How Related Are They? Examining the Existing EC Contract Law Sources' in Hugh Collins (ed), *The Forthcoming EC Directive on Unfair Commercial Practices: Contract, Consumer and Competition Law Implications* (Kluwer Law International 2004) 212; Oliver Remien, *Zwingendes Vertragsrecht und Grundfreiheiten des EG-Vertrages* (Mohr Siebeck 2003) 186-192.

<sup>109</sup> See Stefan Grundmann, 'European Contract Law(s) of What Colour?' (n 60) 188-189.

<sup>110</sup> See Horatia Muir Watt, 'Choice of Law in Integrated and Interconnected Markets: A Matter of Political Economy' (2002-2003) 9 *Columbia Journal of European Law* 383, 390-391; Stefan Leible (n 57) 68. See also Stefan Grundmann, 'European Contract Law(s) of What Colour?' (n 60) 189.

<sup>111</sup> See Stefan Grundmann, 'The Structure of European Contract Law' (n 52) 513-514.

<sup>112</sup> *ibid* 514.

treatment, giving the fact that contracting parties are able to avoid falling within their scope. On the flip side, this also seems to suggest that contracting parties would not be able to invoke the principle of equal treatment against the application of a default rule that is part of the national law they have chosen to govern their contract without explicitly opting out of the scope of that rule. In this way, a default rule of the chosen law would be binding on contracting parties, regardless of the possible consequences its application might entail.

### 5.2.2. *Default rules are also subject to scrutiny*

At the same time, however, there are compelling reasons one might be tempted to disagree with such a conclusion. To begin with, it is fair to argue that national default (or non-mandatory) rules themselves falling within the Treaty can obviously come within the scope of the Treaty free movement provisions. In particular, putting aside the role of private parties over their scope for a moment, a national default rule regulating a given cross-border relationship, for instance, pursuant to a choice-of-law rule can also be subject to scrutiny under the principle of equal treatment.<sup>113</sup> Similar to other national rules, an important factor in this respect is its effect on free movement in the internal market, regardless of its domestic classification.<sup>114</sup>

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<sup>113</sup> See Case C-339/89 *Alstom Atlantique SA v Compagnie de construction mécanique Sulzer SA* [1991] ECR I-107, Opinion of Advocate General Van Gerven, footnote 15. According to Advocate General Van Gerven, the effect of Article 35 TFEU cannot vary whether the rule is mandatory or not.

<sup>114</sup> See Case 82/71 *Ministère public de Italian Republic v Società agricola industria latter (SAIL)* [1972] ECR I-119, para 5; Case C-20/92 *Anthony Hubbard (Testamentvollstrecker) v Peter Hamburger* [1993] ECR I-3777, para 19. This also finds support in Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629, para 17.

Now, let us consider whether this could also be said, specifically, about a default rule that is part of the chosen law. The issue in this context certainly appears to be more complex, since the applicability of a particular default rule to a given cross-border relationship is very much dependent on the discretion available to private parties. Two issues, however, could be raised here.

On the one hand, it is doubtful whether the freedom granted to private parties in a cross-border relationship could play a role in finding the discriminatory effect of a default rule that is part of the chosen law. In particular, the mere question of whether a default rule is discriminatory does not seem to be affected by the fact that the application of that rule is subject to the discretion available to private parties over its scope. An essential factor, here, is the effect of the rule at issue on free movement in the Union, rather than in what way it is applied.<sup>115</sup> A discriminatory effect of a rule is not confined to specific factual circumstances, though it is often established based on them. That is to say, if a rule is found to be discriminatory, it would not cease to be so in a slightly different context. Considering that, a rule would not be less or no longer discriminatory just because private parties are free to exclude their contract from its scope. This certainly concerns direct discrimination on grounds of nationality, but could also be extended to indirect one. However, having said that, it is necessary to mention that finding whether a rule at issue is indirectly discriminatory on grounds of nationality is not always as straightforward as it is the case with rules that are directly discriminatory on grounds of nationality. This could be affected, for

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<sup>115</sup> For further analysis of a discriminatory effect of national rules, see Nicolas Bernard, 'Discrimination and Free Movement in EC Law' (1996) 45 *International Comparative Law Quarterly* 82.

instance, as mentioned earlier, by the fact that not every difference in treatment is considered by the Court to be contrary to the principle of equal treatment.

On the other hand, it is also questionable whether the party autonomy principle can be taken as a justifying factor for the application of, for example, an indirectly discriminatory default rule that is part of the chosen law.<sup>116</sup> Private parties are free to choose the governing law and they normally agree to do so, based on their own considerations. This also applies to the exercise of the discretion to exclude or not to exclude a contract from the scope of any given default rule of the chosen law. Having consented to the choice of the governing law without the exercise of this discretion, they are regarded as bound by the contract they have agreed.<sup>117</sup> As a general rule, the will of private parties is usually taken as a main factor by a forum court hearing a dispute in holding them to the promises they have made.<sup>118</sup> Thus, the conclusion one could draw here is that contracting parties are simply required to accept the consequences arising therefrom.

However, at the same time, to hold that the mere choice by private parties not to set aside an allegedly discriminatory default rule is a sufficient justifying factor for its application also does not seem to be persuasive enough. To start with, this might in a certain way imply that a party to a cross-border contractual relationship itself would have to assess the actual effect of the relevant default rules and act upon it. Certainly, at this stage, a party would expectedly be more concerned with the question of whether in general the application of a given default rule is or not

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<sup>116</sup> Direct discrimination on grounds of nationality is justified only based on express Treaty derogations, which is why it is difficult to see how the principle of party autonomy could play any role in this respect.

<sup>117</sup> Christopher A Riley (n 107) 370.

<sup>118</sup> *ibid.*

in its interest, rather than the specific question of whether it is compatible or not with the relevant Union rules. If a default rule does not serve its interest, a party might simply opt out of it. This would mean that the otherwise applicable default rule would have to be replaced with a specific contractual term instead, which would obviously require the consent of another party (or parties) to the same cross-border contractual relationship. But, this could not be an easy task, since, as it is pointed out by the scholarship, in practice it is often very difficult for parties to find an agreement on the law governing their contract and, in particular, the exclusion of certain default rules.<sup>119</sup> Thus, one could easily subject the absence of a special arrangement with regard to default rules of the chosen law to the mere lack of a consensus between contracting parties. Furthermore, a party could also be in a weaker bargaining position in comparison to the other one and, as a result, could be offered a contract already including a choice-of-law clause without any special arrangement with regard to default rules of the chosen law. Taking the above-mentioned into consideration, it is doubtful whether the absence of a special contractual term setting aside a given default rule of the chosen law indeed reflects the actual intention of contracting parties.

It is also important to mention that the issue of the compatibility of a default rule of the chosen law could arise at a later stage - not necessarily when a choice-of-law clause is agreed by contracting parties. In this respect, if a contract has not been excluded from the scope of a given default rule, it is not reasonable to expect a party to accept every possible disadvantage arising as a result of the application of that rule, regardless of the discretion available to it pursuant to the party

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<sup>119</sup> Christian Twigg-Flesner, *The Europeanisation of Contract Law* (Routledge Cavendish 2008) 24. See also Brigitta Lurger, *Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union* (Springer 2002) 274.

autonomy principle. In a similar vein, it is also appears to be inconsistent with the internal market rationale to preclude any possibility to raise before a forum court sitting in a Member State the issue of the compatibility of a given default rule with the relevant Treaty free movement provisions and, if necessary to ask the court to request a preliminary ruling on the matter. This finds support in the general argument that otherwise a number of national rules would easily escape scrutiny under the Treaty free movement provisions, when they actually have an adverse effect on free movement in the internal market.<sup>120</sup>

On this basis, it is fair to argue that default rules of the chosen law can be subject to scrutiny under the principle of equal treatment. The right of a forum court to give effect to the latter emanates from Article 3 (4) of the Rome I Regulation and the obligation of loyal cooperation under Article 4 TEU.

### 5.2.3. *Alsthom Atlantique and default rules*

As far as the Court's obiter dictum in *Alsthom Atlantique* is concerned, it can hardly be accepted as an unequivocal confirmation of the fact that default rules of the chosen law can escape scrutiny under the Treaty free movement provisions. First of all, it is not clear how the obiter dictum was of any relevance with regard to the factual background in *Alsthom Atlantique*.<sup>121</sup> The case involved a French rule on liability, which was applied in the context of the contractual relationship between two French companies. This rule was mandatory only in a domestic

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<sup>120</sup> Marc Fallon and Johan Meeusen, 'Private International Law in the European Union and the Exception of Mutual Recognition' (2002) 4 *Yearbook of Private International Law* 37, 56.

<sup>121</sup> Jan Smits, *The Making of European Private Law: Towards a Ius Commune Europaeum as a Mixed Legal System* (Intersentia 2002) 10.

context.<sup>122</sup> Thus, the contracting parties at issue could not set aside the rule at issue. The Court's obiter dictum, in turn, however, concerns the freedom to choose the governing law in the context of a cross-border contract of sale.<sup>123</sup>

Furthermore, it seems less convincing to apply the obiter dictum to Article 34 TFEU. The obiter dictum in *Alsthom Atlantique* was held in the context of the compatibility of a national contract law rule with Article 35 TFEU, the scope of which is very narrow in comparison with Article 34 TFEU. The Court has not reiterated it with regard to Article 34 TFEU or other Treaty free movement provisions.<sup>124</sup> For instance, in *CMC Motorradcenter*,<sup>125</sup> the issue concerned the comparability with Article 34 TFEU of the German rule that required a party to disclose to the other one all the necessary information that might affect their contractual relationship. This rule was applied to CMC Motorradcenter, an unauthorised motorcycle dealer, which sold to Mrs Baskiciogullari a motorcycle purchased from the German importer. CMC Motorradcenter did not inform Mrs Baskiciogullari that German authorised dealers generally refused to repair motorcycles that had been the subject of parallel imports. The Court found that the German rule on compulsory disclosure of information was compatible Article 34 TFEU.<sup>126</sup> In particular, the Court held that the application of this rule was not liable to hinder trade between Member States, since its effect was too uncertain and indirect.<sup>127</sup>

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<sup>122</sup> For the mandatory nature of the rule, see Case C-339/89 *Alsthom Atlantique SA v Compagnie de construction mécanique Sulzer SA* [1991] ECR I-107, para 4. From paragraph 15 of the judgment, it can be inferred that the rule was not internationally enforced.

<sup>123</sup> Case C-339/89 *Alsthom Atlantique SA v Compagnie de construction mécanique Sulzer SA* [1991] ECR I-107, para 15.

<sup>124</sup> See Christian Twigg-Flesner (n 119) 24; Marc Fallon and Johan Meeusen (n 120) 54.

<sup>125</sup> Case C-93/92 *CMC Motorradcenter GmbH v Pelin Baskiciogullari* [1993] ECR I-5009.

<sup>126</sup> *ibid* para 13.

<sup>127</sup> *ibid* para 12.

Similar to *Alsthom Atlantique*, on the one hand, the issue in *CMC Motorradcenter* concerned the application of a non-mandatory rule of contract law nature and, on the other hand, there was no choice of the governing law agreed by the parties involved.<sup>128</sup> Despite that, in contrast to *Alsthom Atlantique*, the Court did not touch upon the principle of party autonomy in its reasoning. However, in light of the similarities between these two cases, it would seem reasonable to expect the Court, at least, to mention the principle of party autonomy, especially assuming that in *Alsthom Atlantique* it was indeed given a special role in the context of scrutiny under the Treaty free movement provisions as argued by the proponents of the ordo-liberal approach.<sup>129</sup>

## **6. Contractual term agreed by private parties**

As mentioned earlier, when private parties opt out of a default rule of the chosen law, it is usually replaced by a specific contractual term. In this respect, it might also be relevant to consider the relationship between a contractual term and the principle of equal treatment.<sup>130</sup> This might further shed some light on the role of the principle of contractual freedom, in turn, in the context of scrutiny under the Treaty free movement provisions.

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<sup>128</sup> The rule at issue was ‘non-mandatory’ in the sense it would not be applied if the parties to a contract had chosen the law of another State as the governing law.

<sup>129</sup> Apostolos Gkoutzini, ‘Free Movement of Services in the EC Treaty and the Law of Contractual Obligations Relating to Banking and Financial Services’ (2004) 41 *Common Market Law Review* 119, 128.

<sup>130</sup> As will be demonstrated below, Articles 45, 49 and 56 TFEU seem to produce a horizontal direct effect.

The applicability of a contractual term and a default rule of the chosen law could be compared in terms of the discretion granted to private parties. This is in a sense that the applicability of both is very much subject to the will of private parties. In other words, it is up to contracting parties to opt out of a particular default rule of the chosen law and, in a similar way, agree on having a specific term in a contract. At the same time, however, they are substantially different in terms of scrutiny under the Treaty free movement provisions. In case of a default rule, regardless of the discretion available to private parties over its scope, it is in essence a national rule that is scrutinised. In contrast, contractual terms are a result of the exercise of contractual freedom - i.e. these are, for instance, specific conditions or obligations *designed* by private parties themselves without any involvement of national rules. This, in turn, requires a specific approach, since the greater is scrutiny under the Treaty free movement provisions, the more limitations could be imposed on the exercise of contractual freedom.

### **6.1. *Horizontal direct effect***

When dealing with contractual terms, first of all, it is necessary to distinguish between, on the one hand, Article 34 TFEU and, on the other hand, Articles 45, 49 and 56 TFEU. This is because, in accordance with the existing case-law, a horizontal direct effect seems only possible in the context of the latter.

In *Sapod Audic*,<sup>131</sup> the Court excluded a contractual term from the scope of Article 34 TFEU. The issue in this case concerned the French rule that required producers

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<sup>131</sup> Case C-159/00 *Sapod Audic v Eco-Emballages SA*. [2002] ECR I-5031.

and importers to contribute to or organise the disposal of their packaging waste. To this end, they were obliged to enter into a contract with a body officially entrusted to handle the disposal of waste. Such a contract had to stipulate the estimated volume of waste to be taken, the fee and, in particular, the way the packaging would be identified. With regard to the latter condition, however, the rule did not require the use of any specific symbol, mark or label. In order to comply with this rule, Sapod Audic, a company marketing poultry, signed an agreement with Eco-Emballages, an officially entrusted body. It was stipulated in the agreement that Sapod Audic would use the ‘Green Dot’ logo to identify its packaging. One of the questions referred to the Court concerned the compatibility of that contractual term with Article 34 TFEU.<sup>132</sup> In this respect, the Court held that the general requirement to identify the packaging under the rule at issue had taken the form of an obligation to mark the packaging with the ‘Green Dot’ logo stipulated in the contract between the parties at issue.<sup>133</sup> The Court then continued that since it was a contractual term binding the parties, the obligation to use the ‘Green Dot’ logo could not be regarded as a barrier to trade under Article 34 TFEU. This is because, according to the Court, it was not imposed by a Member State, but agreed between individuals.<sup>134</sup> In this way, the Court confirmed its finding in the previous case-law that only public measures, i.e. measures taken by Member States, are caught by Article 34 TFEU.<sup>135</sup>

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<sup>132</sup> In this respect, Sapod Audic argued that because of Eco-Emballages’s monopoly, foreign producers were obliged to use the ‘Green Dot’ logo, which incurred substantial difficulties and rendered it difficult to import products to France.

<sup>133</sup> Case C-159/00 *Sapod Audic v Eco-Emballages SA*. [2002] ECR I-5031, para 74.

<sup>134</sup> *ibid.*

<sup>135</sup> See eg Case 311/85 *ASBL Vereniging van Vlaamse Reishureaus v ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* [1987] ECR I-3801, para 30. See also Joined Cases 177 and 178/82 *Criminal proceedings against Jan van de Haar and Kaveka de Meern BV* [1984] ECR I-1797, para 12. See also Case C-325/00 *Commission v Germany* [2002] ECR I-9977, para 14-21.

In contrast to Article 34 TFEU, one would not face such an issue, if a particular contractual term is scrutinised under the principle of equal treatment enshrined in the other Treaty free movement provisions, in particular, Articles 45, 49 and 56 TFEU. It appears that actions or measures taken by private parties could also be caught by these Treaty provisions.<sup>136</sup>

*Walrave* is the first case,<sup>137</sup> where the Court hinted at the possibility of these Treaty free movement provisions to be invoked against another private party.<sup>138</sup> One of the questions raised was whether Articles 18, 45 and 56 TFEU could be invoked against the rules adopted by the International Cycling Union. In this regard, the Court held that ‘prohibition of such discrimination does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision for services’.<sup>139</sup> The Court further added that the objective in ensuring free movement in the internal market would be compromised, if national barriers could

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<sup>136</sup> See eg Case 36/74 *B.N.O Walrave and L.J.H. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie et Federación Española Ciclismo* [1974] ECR 1405; Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139; Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others* [2007] ECR I-11767; Case C-438/05 *International Transport Workers’ Federation and Finish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779; Case C-94/07 *Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV* [2008] ECR I-5939.

<sup>137</sup> Case 36/74 *B.N.O Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie et Federación Española Ciclismo* [1974] ECR 1405.

<sup>138</sup> The horizontal direct effect of a Treaty provision means that this provision regulates the relationship between individuals. Specifically, an individual in order to safeguard its rights can rely on it against another individual before national courts. The vertical direct effect of a Treaty provision, in turn, means that this provision regulates the relationship between a State and an individual. The latter in order to safeguard its rights can rely on this Treaty provision against public authorities before national courts. See in this respect Case 223/86 *Pesca Valentia Limited v Ministry for Fisheries and Forestry, Ireland and the Attorney General* [1988] ECR 83, para 20. See also Eva J Lohse, ‘Fundamental Freedoms and Private Actors – towards and ‘Indirect Horizontal Effect’ (2007) 13 *European Public Law* 159.

<sup>139</sup> *ibid* para 17. This finding was reiterated by the Court in Case 13/76 *Gaetano Donà v Mario Mantero* [1976] ECR I-1333, para 17; Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and Others and Union des associations européennes de football (UEFA) v Jean Marc Bosman* [1995] ECR I-4921, para 82.

be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations, which did not come under public law.<sup>140</sup> Although the Court applied Articles 18, 45 and 56 TFEU to the rules of an international sporting association, which is distinct from public authorities, it remained unclear as to what extent private parties could be liable under these provisions.

A hint at the possible horizontal direct effect of Articles 45, 49 and 56 TFEU could also be observed in *Haug-Adrion*.<sup>141</sup> The issue in that case concerned the clause stipulated in the insurance contract between Mr Haug-Adrion, a German national and the German insurance company. According to that provision, Mr Haug-Adrion was provided with a third-party liability insurance cover without the highest rate of no-claims bonus, because his car was registered under a customs registration plate. According to the Court, this contractual term was compatible with the principle of equal treatment under Articles 45, 49 and 56 TFEU, since the type of insurance offered was not based on grounds of nationality.<sup>142</sup> Notwithstanding the conclusion reached by the Court, the ruling seems to be important in the present context. The contractual term between two private parties was subject to scrutiny under Articles 45, 49 and 56 TFEU. If the clause was found to be discriminatory, it would be caught by the principle of equal treatment under these Treaty provisions. This argument finds backing in the Court's reasoning in *Haug-Adrion*, where it held that the principle of equal treatment is intended 'to eliminate *all measures* which (...) treat a national of another Member State more severely or place him in a situation less advantageous, from a legal or

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<sup>140</sup> *ibid* para 18.

<sup>141</sup> Case 251/83 *Eberhard Haug-Adrion v Frankfurter Versicherungs-AG* [1984] ECR I-4277.

<sup>142</sup> *ibid* para 16.

factual point of view, than that of one of the Member State's own nationals in the same circumstances'.<sup>143</sup>

The scope of the principle of equal treatment as regards private parties was further clarified in the seminal case of *Angonese*.<sup>144</sup> Mr Angonese, an Italian national, whose mother tongue was German, was resident in the province of Bolzano. Having studied in Austria, he decided to take part in a competition for a post in a private bank in Bolzano. The bank refused to consider his application for the employment on the ground that he did not possess a certificate of bilingualism issued in the province of Bolzano. Mr Angonese challenged this requirement before the national court, which referred a question to the Court concerning its compatibility with Article 45 TFEU. Prior to dealing with this issue, the Court considered the question of whether Article 45 TFEU could be applied to private parties. In this respect, the Court recalled its finding in *Walrave and Defrenne*.<sup>145</sup> In the latter case, the Court held that Article 157 TFEU, which prohibits discrimination on grounds of sex, applied to contracts between private parties, even if the provision was formally addressed to Member States.<sup>146</sup> The Court stated that 'this, *a fortiori*, applies to Article 45 TFEU, which constitutes a specific application of the general prohibition of discrimination contained in Article 18 TFEU'.<sup>147</sup> On the basis of that the Court found that 'the prohibition of

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<sup>143</sup> *ibid* para 14 (italics added).

<sup>144</sup> Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139.

<sup>145</sup> Case 43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] ECR 455.

<sup>146</sup> *ibid* para 39. Article 157 TFEU embodies the principle of equal treatment on grounds of sex.

<sup>147</sup> Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139, para 35.

discrimination laid down in Article 45 TFEU must be regarded as applying to private persons as well'.<sup>148</sup>

The issue of the horizontal direct effect of the Treaty free movement provisions once again came before the Court in cases of *Viking* and *Laval*.<sup>149</sup> In both cases, the Court ruled on the question of whether Articles 49 and 56 TFEU could be invoked against trade unions. At the outset, the Court reiterated its previous finding that 'obstacles to freedom of movement of persons and freedom to provide services would be compromised if the abolition of State barriers could be neutralised by resulting from the exercise, by associations or organisations not governed by public law, of their legal autonomy'.<sup>150</sup> In *Laval*, merely based on this,<sup>151</sup> the Court found that the right of trade unions to take collective action was liable to make it less attractive or more difficult for undertakings established in

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<sup>148</sup> *ibid* para 36.

<sup>149</sup> Case C-438/05 *International Transport Workers' Federation and Finish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779. In this case, the issue concerned the industrial action planned by the International Transport Workers' Federation (ITF) and the Finish Seamen's Union of (FSU) against Viking, a company established in Finland. Viking operated several vessels, including the *Rosella*, which under the Finish flag, plied the route between Tallinn and Helsinki. So long as the *Rosella* was under the Finish flag, Viking was obliged to pay the crew wages applicable in Finland. Since the vessel was running at a loss, Viking sought to re-flag it by registering it in Estonia, where crew wages were lower than those paid in Finland. The *Rosella*'s crew were members of the FSU, which was affiliated to the ITF. One of the main policies of the ITF is the policy on the use of flags of convenience. It aims to establish a genuine link between the flag of a ship and the nationality of the owner. In light of it, the ITF and the FSU opposed Viking's re-flagging plans. The ITF requested its affiliated unions to refrain from entering into negotiations with Viking, while the FSU threatened to take an industrial action against it. The compatibility of these actions with Article 49 TFEU was raised before the Court. Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others* [2007] ECR I-11767. The issue in this case, in turn, concerned the collective action taken by the Swedish builders' union against a Latvian company, which had posted some of its Latvian workers to renovate a school in Vaxholm, Sweden. The Swedish builders' union started negotiations with Laval in order to extend the collective agreement to the posted workers. Since the negotiations failed, the Swedish builders' union blockaded Laval's building site. As a result, Laval's Swedish subsidiary went into bankruptcy. Relying on that, Laval brought an action before the Swedish court, claiming that the actions taken by the Swedish builders' union were contrary to freedom to provide services under Article 56 TFEU.

<sup>150</sup> Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others* [2007] ECR I-11767, para 98; Case C-438/05 *International Transport Workers' Federation and Finish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779, para 57.

<sup>151</sup> In contrast to *Viking*, the Court did not provide a detailed reasoning in *Laval*.

other Member States to provide services. Therefore, it constituted a restriction under Article 56 TFEU.<sup>152</sup> In *Viking*, however, the Court reiterated that:

the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down, and, second, that the prohibition on prejudicing a fundamental freedom laid down in a provision of the Treaty that is mandatory in nature, applies in particular to all agreements intended to regulate paid labour collectively.<sup>153</sup>

The Court found that Article 49 TFEU could be relied upon by a private undertaking against a trade or an association of trade union,<sup>154</sup> and the scope of that Treaty provision was not confined to associations or organisations, exercising regulatory tasks or having quasi-legislative powers.<sup>155</sup>

*Viking* and *Laval* demonstrate that Articles 49 and 56 TFEU could be relied upon by a private party against a trade union. In this way, it seems that the Court further extended the scope of Articles 49 and 56 TFEU. In *Wouters*,<sup>156</sup> the Court already found that the rules enacted by the Dutch Bar Council fell within the scope of these Treaty provisions. In particular, the Court held that the compliance with Articles 49 and 56 TFEU was necessary in the context of rules that were not

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<sup>152</sup> Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others* [2007] ECR I-11767, para 99.

<sup>153</sup> Case C-438/05 *International Transport Workers' Federation and Finish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779, para 58.

<sup>154</sup> *ibid* para 66. More on the reasoning and conclusion of the Court in these cases, see eg Taco van Peijpe, 'Collective Labour Law after *Viking*, *Laval*, *Rüffert*, and *Commission v Luxembourg*' (2009) 25 *International Journal of Comparative Law and Industrial Relations* 81; Jonas Malmberg and Tore Sigeman, 'Industrial Actions and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice' (2008) 45 *Common Market Law Review* 1115; A C L Davies, 'One step forward, two steps back? The *Viking* and *Laval* cases in the ECJ' (2008) 37 *Industrial Law Journal* 125.

<sup>155</sup> *ibid* para 65.

<sup>156</sup> Case C-309/99 *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, interveners: Raad van de Balies de Europese Gemeenschap* [2002] ECR I-1577.

public in nature, but were designed ‘to regulate, collectively, self-employment and the provision of services’.<sup>157</sup> Due to the regulatory role of the Dutch Bar Council,<sup>158</sup> the Court’s finding has not been regarded as establishing the horizontal direct effect of Articles 49 and 56 TFEU, but rather the extension of the vertical direct effect of these provisions.<sup>159</sup> In *Viking*, however, the Court ruled that a trade union was also bound by Articles 49 and 56 TFEU, even if there was no apparent regulatory role performed by it.<sup>160</sup> This was also backed by the finding of the Court that these Treaty provisions did not apply to associations or organisations, exercising regulatory tasks or having quasi-legislative powers.<sup>161</sup> As a result, one could argue that actions taken by trade unions, which have no regulatory roles, might also be incompatible with Articles 49 and 56 TFEU.

In contrast to Advocate General Maduro,<sup>162</sup> the Court, however, did not explicitly state that Articles 49 and 56 TFEU could produce a horizontal direct effect. Instead, the Court’s reasoning was based on *Walrave, Bosman* and *Wouters*, which concerned non-public law bodies, regulating in a collective manner gainful employment and the provision of services. The Court did not mention its finding in *Angonese*,<sup>163</sup> which raises a question of whether this could be regarded as a

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<sup>157</sup> *ibid* para 120.

<sup>158</sup> A C L Davies (n 154) 136.

<sup>159</sup> Catherine Barnard, *The Substantial Law of the EU: the Four Freedoms* (Oxford University Press 2007) 284.

<sup>160</sup> A C L Davies (n 154) 136. The author argues that trade unions do not impose rules of their own similar to professional associations. See also Katherine Apps, ‘Damages Claims against Trade Unions after *Viking* and *Laval*’ (2009) 34 *European Law Review* 141, 147.

<sup>161</sup> Case C-438/05 *International Transport Workers’ Federation and Finish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779, para 65.

<sup>162</sup> Case C-438/05 *International Transport Workers’ Federation and Finish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779, Opinion of Advocate General Maduro, para 56.

<sup>163</sup> Katherine Apps (n 160) 147.

change in the Court's approach concerning the horizontal direct effect of the Treaty provisions on free movement of persons.

Notwithstanding the fact that *Angonese* was not referred to by the Court in *Laval* and *Viking*, it could be argued that the Court's reasoning in the latter has no bearing with respect to its finding in *Angonese*. To begin with, the situation involved in *Viking* and *Laval* was different than that in *Angonese*. In the former, the private parties in the proceedings were trade unions, which participate in the drawing up of collective agreements to regulate paid work collectively.<sup>164</sup> However, this was not the case in *Angonese*. Although, the action taken by the private bank at issue was based on the National Collective Agreement of Savings Banks, it exercised its freedom to choose the way to recruit its staff and, most importantly, it acted individually. This might be one of the reasons why the Court in *Viking* and *Laval* referred to *Walrave*, *Bosman* and *Wouters*, rather than *Angonese*.

More substantially, one also could point out that *Viking* did not involve discriminatory treatment, which however had a crucial role in the Court's reasoning in *Angonese*. Furthermore, the difference might also be the result of the possible differential approach taken by the Court with regard to, on the one hand, and Article 45 TFEU, on the other hand, Articles 49 and 56 TFEU. It could be argued that the Court was ready to establish the horizontal direct effect of the principle of equal treatment laid down under Article 45 TFEU, because of then

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<sup>164</sup> Case C-438/05 *International Transport Workers' Federation and Finish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779, para 65.

specific nature of the field concerning free movement of workers.<sup>165</sup> A great majority of workers falling within the scope of Article 45 TFEU are employed in the private sphere. Thus, they could be disadvantaged if the protection against discrimination on grounds of nationality was confined to the public or quasi-public sphere.<sup>166</sup> In addition, it could also be pointed out that those who fall within the scope of Article 45 TFEU are in a much weaker bargaining position in comparison to, for instance, those who fall within the scope of Articles 49 and 56 TFEU. This line of reasoning, in a certain way, finds support in the case of *Raccanelli*, which concerned Article 45 TFEU. The Court's reasoning in this case was built upon *Angonese*.

In *Raccanelli*,<sup>167</sup> the Court replied first by reiterating that that principle of equal treatment on grounds of nationality was worded in general terms and was not addressed specifically to Member States or bodies governed by public law.<sup>168</sup> In this respect, the Court referred to its finding in *Walrave* that the principle of equal

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<sup>165</sup> Case C-438/05 *International Transport Workers' Federation and Finish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779, Opinion of Advocate General Maduro, para 47.

<sup>166</sup> Stefaan Van den Bogaert 'Horizontality: The Court Attacks?' in Catherine Barnard and Joanne Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing 2002) 139.

<sup>167</sup> Case C-94/07 *Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV* [2008] ECR I-5939. The issue related to the practice of the Max Planck Institutes to enrol doctoral researchers, offering either a grant or an employment contract. The Max Planck Institutes are established under German private law in the form of an association operating in the public interest. The main difference between the two methods of enrolment was that the recipient of a grant was under no obligation to work for the institute and instead, could devote himself/herself entirely to a doctoral work. A grant recipient was also exempt from the income tax and was not affiliated to a social security system. In contrast, the recipient of an employment contract was under an obligation to work for the Institute, which employed him/her. He/she was liable to the income tax and had to pay social security contributions in respect of his/her employment. Mr Raccanelli, an Italian national, was enrolled as a doctoral researcher for three years at one of the Max Planck Institutes. For this purpose, he was awarded a grant. He claimed that he was in an employment relationship with the institute, though he was not awarded an employment contract, which according to him was reserved to doctoral students of German nationality. One of the questions referred to the Court was whether the Max Planck Institutes were bound by the principle of equal treatment enshrined in Article 45 TFEU.

<sup>168</sup> *ibid* para 42.

treatment on grounds of nationality applied not only to the actions taken by public authorities but also rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services.<sup>169</sup> Similar to the reasoning in *Angonese*, the Court then continued that the principle of equal treatment under Article 45 TFEU applied equally to all agreements intended to regulate paid labour collectively, as well as to contracts between individuals.<sup>170</sup>

## **6.2. Scrutiny under the principle of equal treatment**

In light of the above-mentioned, a contractual term cannot be altogether excluded from the scope of Articles 45, 49 and 56 TFEU.<sup>171</sup> It is possible that a given contractual term is caught by these Treaty provisions, because it either imposes discriminatory treatment on grounds of nationality or place of residence, or results in a difference in treatment on grounds of movement. However, it is reasonable to expect this to only occur in specific circumstances, taking into account the contractual nature of such differences in treatment and, specifically, the freedom of a party to agree or not any contractual term. In particular, one could distinguish two interlinked factors in this regard, in case of which a given contractual term is

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<sup>169</sup> *ibid* para 43.

<sup>170</sup> *ibid* para 45. *Defrenne* and *Angonese* were cited in this respect.

<sup>171</sup> In this respect, one could also mention Article 20 of the Services Directive (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market ('Services Directive') [2006] OJ L 376/36). It provides that 'Member States shall ensure that the general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria'. Even though Directives do not produce a horizontal direct effect, the effect of that provision on private parties through the doctrine of an incidental direct effect cannot be excluded. See in this respect, Case C-194/94 *CIA Security International SA v Signalson SA and Securitel SPRL* [1996] ECR I-2201; Case C-443/98 *Unilever Italia SpA v Central Food SpA* [2000] ECR I-7535.

most likely to be subject to scrutiny under the Treaty provisions on free movement of persons.

First, finding discriminatory treatment might depend on the bargaining position of both parties to a contractual relationship. That is to say, the likelihood of a particular contractual term to be found to be discriminatory increases, if the discriminated party is in a comparatively weaker bargaining position within a contractual relationship and has to accept the contractual terms put forward by the other party. Good examples here are contracts involving consumers, service recipients or employees. Even though this seems to be an important factor, it itself might not be sufficient in finding discriminatory treatment contrary to the Treaty provisions on free movement of persons. It is also necessary that there are no other equivalent possibilities in the market that the otherwise discriminated party can choose from. Thus, the second important factor here is the number of alternative offers in the market that allow the otherwise discriminated party to actually exercise its contractual freedom in agreeing or not the discriminatory contractual term imposed. Such freedom might be limited if either the other party is in a monopolistic position or because the discriminatory contractual term imposed is a common practice in the market.<sup>172</sup> Having no alternative choice, the otherwise discriminated party would have to agree the contractual term imposed, in which case the latter would produce the same effect as a discriminatory mandatory national rule.<sup>173</sup>

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<sup>172</sup> Michael Schillig, 'The Interpretation of European Private Law in light of Market Freedoms and EU Fundamental Rights' (2008) 15 *Maastricht Journal of European and Comparative Law* 285, 300.

<sup>173</sup> *ibid.*

Thus, in the absence of these two factors, it is very unlikely and even unnecessary that a particular contractual term agreed by two private parties is subject to scrutiny under the Treaty provisions of free movement of persons. This is because, in light of the principle of contractual freedom, on the one hand, contracting parties are free to put forward any contractual terms they deem necessary and, on the other hand, it is also up to them to agree any contractual terms offered within a specific contract based on their own considerations. In the latter case, if a given contractual term is not in its interest, a party is under no obligation to agree to it and, consequently, comply with it. In this way, the principle of contractual freedom itself appears to be an effective solution to deal with any disadvantages that could otherwise be imposed in the context of contractual relationships including those of cross-border nature.

This argumentation might at first sight seem to be relevant with regard to default rules, since as mentioned earlier, they are comparable to contractual terms based on the discretion available to private parties. However, there are two substantial reasons that require two different approaches in this respect. First, in contrast to default rules, the wider is the scope of the Treaty provisions on free movement of persons as regards contractual terms, the greater are the limitations imposed on contractual freedom. In particular, otherwise, this would mean that every contractual term in fact could be subject to scrutiny under the Treaty provisions on free movement of persons.<sup>174</sup> This cannot be said about default rules, which are national rules and irrespective of their domestic classification, in any way, come within the scope of the Treaty free movement provisions, provided that they fall

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<sup>174</sup> *ibid.*

within the Treaty. Second, in contrast to default rules, there are no national rules involved in the context of contractual terms. Therefore, there is no risk that the extensive role given to contractual freedom in the context of the latter might result in the outright exclusion of a number of national rules from the scope of the Treaty free movement provisions.<sup>175</sup>

## **7. Interim conclusion**

In this chapter, the discussion was centred on the possible effect of the principle of party autonomy in the context of scrutiny under the principle of equal treatment. It was argued that the law chosen by private parties to govern their contract can also come within the scope of the principle of equal treatment and cannot be applied if it imposes discriminatory treatment. In this respect, the fact that private parties have exercised their freedom to choose the governing law can hardly make any difference. What is important in the present context is the effect of the law on free movement in the Union rather than the discretion available to private parties. This conclusion concerns not only mandatory rules but also default rules of the chosen law. In particular, with regard to mandatory rules, the issue is rather straightforward. This is because, due to their nature, they could be applicable on their own terms, if they are part of the law that a cross-border contractual relationship is linked to based on a factor other than a choice made by private parties. As far as default rules of the chosen law are concerned, the issue seems to be more complex, mainly because their applicability is very much subject to the freedom available to private parties to opt out of the scope of these rules. However, in this regard it was submitted that default rules of the chosen law

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<sup>175</sup> Marc Fallon and Johan Meeusen (n 120) 56.

could also be subject to scrutiny under the principle of equal treatment, irrespective of the fact that it is up to private parties to decide whether these rules are applicable to their contact. This could also be extended to contractual terms, but only if there are factors that restrict the possibility to exercise contractual freedom. Otherwise, the principle of contractual freedom itself appears to be an adequate means to deal with any disadvantages imposed in the context of contractual relationships.

## Chapter IV

### THE PRINCIPLE OF EQUAL TREATMENT AS A CHOICE-OF-LAW RULE

So far I have examined the interaction of the principle of equal treatment with choice-of-law rules and the principle of party autonomy. It was argued that applicable substantive and choice-of-law rules can fall within the scope of the principle of equal treatment enshrined in Article 18 TFEU and in the Treaty free movement provisions. This is specifically based on the fact that rules are scrutinised in light of the principle of equal treatment because of their effect on free movement in the Union. Their nature, the reason of their applicability or the discretion available to private parties to cross-border relationships as such does not appear to play a role in this respect. Now, what remains to be explored is whether the role of the principle of equal treatment in the context of a cross-border relationship is confined to the scrutiny of the applicable substantive and choice-of-law rules or whether it goes beyond that. In particular, the question here is whether the functioning of the principle of equal treatment could be in any way compared to that of a choice-of-law rule.

In this chapter I examine the functioning of the principle of equal treatment in three different contexts approaching it from a choice-of-law perspective. I will start by briefly looking at the commonly occurring situations where those coming from other Member States are deprived of advantages available to their in-state equivalents, then moving to double burden situations, and finally, concluding with

the situations where a choice-of-law rule is at issue (*Garcia Avello*, *Bosmann*, *Boukhalfa* will be examined in this respect).

### **1. No advantages for those coming from other Member States**

The substantive law of a Member State is usually subject to scrutiny under the principle of equal treatment, if providers of goods or services, service recipients, employed or self-employed persons and, in general, Union citizens coming from other Member States are treated differently than their in-state equivalents. In particular, this takes place when, for instance, pursuant to the rules applied in a Member State those coming from other Member States are deprived of certain advantages (i.e. rights, freedoms, privileges or benefits) available to their in-state equivalents.<sup>1</sup> In such a scenario, the principle of equal treatment requires similar treatment of those coming from other Member States and their in-state equivalents.<sup>2</sup> In other words, according to the principle of equal treatment, a Member State must provide national treatment to those coming from other Member States, unless there are objective justifications for not doing so. In

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<sup>1</sup> Case 186/87 *Ian Willian Cowan v Trésor public* [1989] ECR 195; Case C-21/88 *Du Pont de Nemours Italiana SpA v Unità sanitaria locale N° 2 di Carrara* [1990] ECR 359; Case 167/73 *Commission v France* [1974] ECR 359; Case 2/74 *Jean Reyners v Belgium* [1974] ECR 631; Case 32/75 *Anita Cristini v Société nationale des chemins de fer français* [1975] ECR 1085; Case C-330/91 *The Queen v Inland Revenue Commissioner, ex parte Commerzbank AG* [1993] ECR I-4017; Case C-45/93 *Commission v Spain* (Museum admission) [1994] ECR I-911; Case C-237/94 *John O'Flynn v Adjudication Officer* [1996] ECR I-2617; Case C-224/01 *Gerhard Köbler v Austria* [2003] ECR I-10239; Case C-274/96 *Criminal proceedings against Horst Otto Bickel and Ulrich Franz* [1998] ECR I-7637; Case C-35/97 *Commission v France* [1998] ECR I-5325; Case C-55/00 *Elide Gottardo v Istituto nazionale della previdenza sociale (INPS)* [2002] ECR I-413; Case C-388/01 *Commission v Italy* (Italian museums) [2003] ECR I-721; Case C-43/02 *Proceedings brought by Diana Elisabeth Lindman* [2003] ECR I-13519.

<sup>2</sup> Catherine Barnard, *The Substantive Law of the EU: the Four Freedoms* (Oxford University Press 2007) 17-18; Christian Tietje, 'Freedom of Establishment' in Dirk Ehlers (ed), *European Fundamental Rights and Freedoms* (De Gruyter Recht 2007) 282. See also Case C-210/03 *Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health* [2004] ECR I-11893, para 70; Case C-101/08 *Audiolux SA and Others v Groupe Bruxelles Lambert SA (GBL) and Others, Bertelsmann AG and Others* [2009] ECR I-9823, para 54.

addition, the principle of equal treatment also obliges a Member State to guarantee different treatment, if they are not in a comparable situation vis-a-vis domestic ones.<sup>3</sup>

In the present context, the principle of equal treatment only opposes the application of a discriminatory national rule. It simply excludes the application of a rule that imposes discriminatory treatment. However, at the same time, the application of the principle of equal treatment does not result in the substitution of the law of a Member State with the law of another Member State, for instance, the Member State of origin. The cross-border situation at issue remains subject to the law of the first Member State. The absence of the *substitutive* effect is an essential aspect here, since it differentiates the principle of equal treatment from a choice-of-law rule. In contrast to the latter, the principle of equal treatment does not in any way lead to the application of another national law. Its effect is confined to the requirement that the applicable law is not discriminatory in nature or effect.<sup>4</sup>

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<sup>3</sup> See Case C-354/95 *The Queen v Minister for Agriculture, Fisheries and Food, ex parte, National Farmers' Union and Others* [1997] ECR I-4559, para 61; Case C-148/02 *Carlos Garcia Avello v État belge* [2003] ECR I-11613, para 31.

<sup>4</sup> This also concerns cases where the principle of equal treatment under Article 18 TFEU is applied in conjunction with Article 20 TFEU, which embodies Union citizenship. See Case C-184/99 *Rudy Grzerczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193; Case C-456/02 *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)* [2004] ECR I-7573; Case C-209/03 *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECR I-2119. However, it is necessary to mention that the right to equal treatment provided to Union citizens could be subject to a residence requirement. See Case C-138/02 *Brian Francis Collins v Secretary of State for Work and Pensions* [2004] ECR I-2703; Case C-158/07 *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep* [2008] ECR I-8507; Joined Cases C-22/08 and C-23/08 *Athanasios Vatsouras and Josif Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg 900* [2009] ECR I-4585.

## 2. Double burden on providers of goods and services

National rules that are caught by the Treaty free movement provisions are not only those that deprive, for instance, providers of goods or services, or employed and self-employed persons, companies and in general Union citizens coming from other Member States of certain advantages available to their in-state equivalents. National rules, which impose requirements that bear more heavily on providers of goods or services coming from other Member States, are also subject to scrutiny under the Treaty free movement provisions. In essence, these national rules are equally applicable to in-state and out-of-state providers of goods or services. However, the compliance with these rules is likely to put foreign providers of goods or services at a disadvantage. This is because, in contrast to domestic ones, they have already complied with similar rules imposed in the Member State of origin. In such a case, those who exercise the Treaty free movement rights face a double regulatory burden by being subject to the rules of the Member State of origin and that of destination (hereafter ‘double burden situations’).<sup>5</sup>

In the context of free movement of goods, these are the rules that impose additional product requirements on goods imported from other Member States. A leading case in this respect is *Cassis de Dijon*.<sup>6</sup> The ruling demonstrates that if any given product has already satisfied the similar rules of the Member State of

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<sup>5</sup> Eleanor Spaventa, ‘From Gebhard to Carpenter: towards a (Non-) Economic European Constitution’ (2004) 41 *Common Market Law Review* 743, 745.

<sup>6</sup> Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (*Cassis de Dijon*) [1979] ECR 649. In that case, the Court found that the minimum alcohol requirement was contrary to Article 34 TFEU, because it resulted in the exclusion from the national market of products from other Member States.

origin, it cannot be subject to the rules of the Member State of destination, unless this is justified under the Treaty express derogations or mandatory requirements. Otherwise, this would lead to a double burden imposed on imported products, since they would have to satisfy both the rules of the Member State of origin and those of the Member State of destination.<sup>7</sup>

A similar line of reasoning also applies to services. For instance, in *Webb*,<sup>8</sup> the issue concerned the Dutch rule that required a license for the provision of manpower in the Netherlands. This rule was applied to Webb, an English company, which held a licence under UK law for the provision of such a service. The Court found that the application of that rule would be excessive to the aim pursued, since the requirements to which the issue of a licence was subject coincided with the proofs and guarantees required in the Member State of origin.<sup>9</sup> According to the Court, in light of Article 56 TFEU, a Member State was required to take into account the evidence and guarantees already furnished by a service provider for the pursuit of its activities in the Member State of establishment.<sup>10</sup> Similarly, in *Vlassopoulou*,<sup>11</sup> the subject of the contention was the refusal by the German authorities to allow a Greek national to be admitted as a lawyer, based on the fact that she did not have the necessary qualification according to German law. According to the Court, a Member State was required to recognise the

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<sup>7</sup> Eleanor Spaventa, 'From Gebhard to Carpenter' (n 5) 745.

<sup>8</sup> Case 279/80 *Criminal proceedings against Alfred John Webb* [1981] ECR 3305.

<sup>9</sup> *ibid* para 20.

<sup>10</sup> *ibid*.

<sup>11</sup> Case C-340/89 *Irène Vlassopoulou v Ministerium für Justiz. Bundes- und Europaangelegenheiten Baden-Württemberg* [1991] ECR I-2357.

qualification obtained in another Member State, if it was equivalent to that required to access a profession.<sup>12</sup>

National rules that impose additional requirements on providers of goods or services coming from other Member States can be regarded to be indirectly discriminatory contrary to Articles 34 and 56 TFEU.<sup>13</sup> This is because, their application bears more heavily on foreign providers of goods or services that have already met the similar requirements under similar rules in the Member State of origin. In this respect, it appears that in light of the principle of equal treatment, the scope of the law of the Member State of destination becomes limited specifically as regards to a product or service itself, which is being subject to the law of the Member State of origin. Relying on this, one may wonder whether the functioning of the principle of equal treatment in this context could be analogised to that of a choice-of-law rule. In particular, it could be questioned whether the principle of equal treatment itself indirectly operates as a rule that limits the scope of the law of the Member State of destination and, at the same time, renders the law of the Member State of origin as applicable instead.

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<sup>12</sup> *ibid* para 19. It is necessary to mention, however, that apart from professional qualification requirements, a double burden is less likely to occur in the case of workers and establishment, since in these situations a Member State, where a person moves (to work in an employed or self-employed capacity), becomes the main, if not only, regulator. See in this respect Eleanor Spaventa, *Free movement of persons in the European Union: Barriers to movement in their constitutional context* (Kluwer Law International 2007) 78.

<sup>13</sup> See Joined Cases 110 and 111/78 *Ministère public and 'Chambre syndicale des agents artistiques et impresarii de Belgique' ASBL v Willy van Wesemael and Others* [1979] ECR 35; Case 279/80 *Criminal proceedings against Alfred John Webb* [1981] ECR 3305; Case 261/81 *Walter Rau Lebensmittelwerke v De Smedt PVBA* [1982] ECR 3961; Case 407/85 *Drei Glocken GmbH and Gertraud Kritzinger v USL Centro-Sud and Provincia autonoma di Bolzano* [1988] ECR 4233; Case C-358/95 *Tommaso Morellato v Unità sanitaria locale (USL) n. 11 di Pordenone* [1997] ECR I-1431; Case 178/84 *Commission v Germany* [1987] ECR 1227; Case 286/86 *Ministère public v Gérard Deserbais* [1988] ECR 4907; Case C-30/99 *Commission v Ireland* [2001] ECR I-4619; Case C-14/02 *ATRAL SA v État belge* [2003] ECR I-4431.

From a choice-of-law perspective, double burden situations have been interpreted differently by the scholarship. According to some, Articles 34 and 56 TFEU rule out the application of the law of the Member State of destination, but at the same time do not render the law of the Member State of origin as applicable.<sup>14</sup> Under this approach, the Member State of destination is required to take into account (or recognise) the rules complied with in the Member State of origin. Others, however, advocate a different approach.<sup>15</sup> Grundmann, for instance, argues that the inapplicability of the law of the Member State of destination based on the fact that a given product or service has already satisfied the law of the Member State of origin contains a rule on the (sole) applicability of the latter.<sup>16</sup> In particular, according to the author, the supplier acts on the basis of the law of the Member State of origin and from the inapplicability of the law of the Member State of destination it follows that the former remains the only applicable law.<sup>17</sup> A similar argument has also been put forward by Basedow,<sup>18</sup> though in his view the law of the Member State of destination can be applicable, if it is more liberal than that of the Member State of origin.<sup>19</sup> To take any side of the debate specifically with

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<sup>14</sup> See eg Michel Tison, 'Unravelling the General Good Exception: The Case of Financial Services' in Mads Andenas and Wulf-Henning Roth, *Services and Free Movement in EU Law* (Oxford University Press 2002) 370-371; Michel Van Huffel, 'The Legal Framework for Financial Services and the Internet' in Niamh Nic Shuibhne (ed), *Regulating the Internal Market* (Edward Edgar 2006) 159. More on this approach, see Jan Wouters, 'Choice-of-law and the Single Market for Financial Services' (1997) 4 *Maastricht Journal of European and Comparative Law* 161, 288-290.

<sup>15</sup> See eg Stefan Grundmann, 'Internal Market Choice-of-law: From Traditional Choice-of-law to an Integrated Two Level Order' in Angelika Fuchs, Horatia Muir Watt, Etienne Pataut and Others, *Les conflits de lois et le système juridique communautaire* (Dalloz-Sirey 2004); Luca G Radicati di Brozolo, 'L'influence sur les conflits de lois des principes de droit communautaire en matière de liberté de circulation' (1993) 82 *Revue Critique de Droit International Privé* 401; Jürgen Basedow, 'Der Kollisionsrechtliche Gehalt der Produktfreiheiten im Europäischen Binnenmarkt: Favor offerentis' (1995) 59 *Rechts Zeitschrift für Ausländisches und Internationales Privatrecht* 1.

<sup>16</sup> Stefan Grundmann, 'Internal Market Choice-of-law' (n 15) 9.

<sup>17</sup> *ibid.*

<sup>18</sup> Jürgen Basedow (n 15) 13-15.

<sup>19</sup> *ibid.* 13. More on the debate, see eg Jacobien W Rutgers, *International Reservation of Title Clauses: A Study of Dutch, French and German Private International Law in light of European Law* (T.M.C. Asser Press 1999) 204-205; Jona Israël, *European Cross-Border Insolvency*

regard to the possible choice-of-law effect of the principle of equal treatment in the context of double burden situations, two factors must be considered.

### **2.1. Delimiting national laws**

To start with, similar to a choice-of-law rule, in the context of double burden situations, the principle of equal treatment could indeed be regarded as a mechanism for solving *conflicts* of national laws. When a given product produced in or a given service authorised in a Member State is put on the market in another Member State, it would constitute a cross-border situation, linked to the law of both Member States. The law of each Member State might be applicable to the cross-border situation at issue.<sup>20</sup> The first Member State would require that its relevant rules are complied with, since the product is produced in or the service is authorised in its territory. Similarly, based on the fact that the product or service is offered in its territory, the second Member State might wish to apply its own rules. However, the cumulative application of both sets of national rules in the present context would be contrary to the internal market rationale.<sup>21</sup> Since the application of the law of the second Member State might disadvantage foreign providers of goods or services, its applicability in light of the principle of equal treatment with respect to a product or service itself appears to be excluded, unless it can be justified on objective grounds.

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*Regulation: a Study of Regulation 1346/2000 on Insolvency Proceedings in light of a Paradigm of Co-operation and a Comitatus Europaea* (Intersentia 2005) 124-127; Jan Wouters (n 14) 284-288.

<sup>20</sup> Mireille van Eechoud, *Choice of Law in Copyright and Related Rights* (Kluwer Law International 2003) 16.

<sup>21</sup> Marc Fallon and Johan Meeusen, 'Private International Law in the European Union and the Exception of Mutual Recognition' (2002) 4 *Yearbook of Private International Law* 37, 46.

In this way, similar to a choice-of-law rule, the principle of equal treatment could be seen as delimiting the scope of national laws, i.e. the law of the Member State of origin and that of destination. However, it is necessary to mention, first, that such an effect produced by the principle of equal treatment is essentially confined to national rules that are of public law nature. In particular, these are the rules concerning product requirements, prudential supervision or administrative authorisation.<sup>22</sup> The application of these rules by the Member State of destination imposes a double regulatory burden on foreign providers of goods or services, since they have already complied with similar rules in the Member State of origin. Thus, in essence, scrutiny under the principle of equal treatment in the present context does not seem to concern other national rules, specifically those of private law nature regulating contractual, non-contractual or other civil law relationships, the applicability of which is usually regulated by choice-of-law rules. The application of these rules is less likely to result in a double burden imposed on foreign providers of goods or services, since it would most probably be the first time they are required to comply with this type of rules.<sup>23</sup> Second, as discussed in

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<sup>22</sup> Jan-Jaap Kuipers, 'Cartesio and Grunkin Paul: Mutual Recognition as a Vested Rights Theory Based on Party Autonomy in Private Law' (2009) 2 *European Journal of Legal Studies* 66, 77. See also Fabrizio Cafaggi and Horatia Muir Watt, 'Introduction' in Fabrizio Cafaggi and Horatia Muir Watt (eds), *Making European Private Law: Governance Design* (Edward Elgar 2008) 17.

<sup>23</sup> As discussed in the first chapter, this type of rules can also come within the scope of the principle of equal treatment, provided that they fall within the Treaty. In particular, in the context of Article 34 TFEU, assuming that *Keck* is still good law, some national private law rules could also fall within the category of selling arrangements, though it is fair to argue that this only concerns rules that regulate the circumstances of marketing and distribution of products. See in this respect, Michael Schillig, 'The Interpretation of European Private Law in light of Market Freedoms and EU Fundamental Rights' (2008) 15 *Maastricht Journal of European and Comparative Law* 285, 290. Others, however, could also be regarded as products requirements. For instance, one could mention a national rule on non-conformity or hidden defects in sales, which notwithstanding its contract law nature could be caught under Article 34 TFEU. This is because of a specific requirement that could be imposed on an imported product in light of it. See in this respect, Martijn W Hesselink, 'Non-Mandatory Rules in European Contract Law' in Jan M Smits and Sophie Stijns (eds.), *Inhoud en werking van de overeenkomst naar Belgisch en Nederlands recht* (Intersentia 2005) 74. Those national private law rules that cannot be regarded as product requirements and do not relate to selling arrangements would fall within the scope of Article 34 TFEU as part of a third category of rules, which are referred to as 'residual' rules. See in this respect, Case C-473/98 *Kemikalieinspektionen v Toolex Alpha AB* [2000] ECR I-5681; Case

the first chapter, a choice-of-law rule delimiting national substantive laws, for instance, is intended to provide certainty over the applicable law,<sup>24</sup> which, however, cannot be said about the principle of equal treatment under Articles 34 and 56 TFEU. The latter, in turn, guarantees free movement of goods and services across borders.<sup>25</sup> In particular, in double burden situations the principle of equal treatment ensures that foreign providers of goods or services are not dissuaded from the exercise the Treaty free movement rights by the additional requirements imposed by the Member State of destination.<sup>26</sup>

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C-350/97 *Wilfried Monsees v Unabhängiger Verwaltungssenat für Kärnten* [1999] ECR I-2921; Case C-55/99 *Commission v France* [2000] ECR I -11499; Case C-320/03 *Commission of v Austria* [2005] ECR I-9871; Joined Cases C-158/04 and C-159/04 *Alfa Vita Vassilopoulos AE, formerly Trofo Super-Markets AE and Carrefour Marinopoulos AE v Elliniko Dimosio, Nomarchiaki Aftodioikisi Ioanninon* [2006] ECR I-8135. See also Anthony Arnall, Alan Dashwood, Michael Dougan and Others, *Wyatt and Dashwood's European Union Law* (Sweet & Maxwell 2006) 601. As residual rules, these rules would fall within the scope of Article 34 TFEU according to the broad *Dassonville* formula (if they affect, 'directly or indirectly, actually or potentially', intra-Union trade). See in this respect, Eleanor Spaventa, 'Leaving Keck behind?' The free movement of goods after the rulings in *Commission v Italy* and *Mickelsson and Roos*' (2009) 34 *European Law Review* 914, 920. Under the *Dassonville* formula, national private law rules as residual rules would need to be objectively justified. However, this is not the case if their effect on intra-Union trade is 'too uncertain and indirect'. See in this respect, Case C-69/88 *H. Krantz GmbH & Co. v Ontvanger der Directe Belastingen and Netherlands State* [1990] ECR I-583, para 11; Case C-93/92 *CMC Motorradcenter GmbH v Pelin Baskiciogullari* [1993] ECR I-5009, para 12; Case C-379/92 *Criminal proceedings against Matteo Peralta* [1994] ECR I-3453, para 24; Case C-96/94 *Centro Servizi Spediporto Srl v Spedizioni Marittima del Golfo Srl* [1995] ECR I-2883, para 41; C-412/97 *ED Srl v Italo Fenocchio* [1998] ECR I-3845, para 11; Case C-44/98 *BASF AG v Präsident des Deutschen Patentamts* [1999] ECR I-6269, para 16.

<sup>24</sup> Lorna E Gillies, *Electronic Commerce and International Private Law: A Study of Electronic Consumer Contracts* (Ashgate Publishing 2008) 7; James J Fawcett, 'Products Liability in Private International Law: a European Perspective' (1993) 238 *Recueil des Cours* 9, 132. See also Paul H Neuhaus, 'Legal Certainty Versus Equity in the Choice-of-law' (1963) 28 *Law and Contemporary Problems* 795.

<sup>25</sup> Joined Cases 92/92 and C-326/92 *Phil Collins v Imtrat Handelsgesellschaft mHbH and Patricia Im- und Export Verwaltungsgesellschaft mbH and Leif Emanuel Kraul v EMI Electrol a GmbH* [1993] ECR I-5145, Opinion of Advocate General Jacobs, para 9.

<sup>26</sup> For instance, in *Cassis de Dijon*, in light of the German rule at issue, a liqueur lawfully produced and marketed in France according to French law could be sold on the German market only if the product was called something else than a liqueur and had a new packaging. See in this respect Per Norberg, 'Non-discrimination as a Social and a Free Market Value' in Ann Numhauser-Henning (ed), *Legal Perspectives on Equal Treatment and Non-Discrimination* (Kluwer Law International 2001) 73.

## 2.2. Application of the law of the Member State of origin

As mentioned above, a choice-of-law rule delimits national substantive laws and does so by *designating* a particular national substantive law as applicable to a cross-border contractual, non-contractual or other civil law relationship. For instance, a choice-of-law rule could determine the law of the State where the work is performed (State of employment) as the law governing an employment contract. This contract could be linked to other national laws, i.e. the law of the State of the employee's residence or that of the employer's establishment, either of which could theoretically be applicable to it. However, pursuant to the choice-of-law rule at issue, only the law of the State of employment would be applied to the contract. In this way, the choice-of-law rule delimits the scope of the national laws to which the employment contract at hand is linked.

From this perspective, the principle of equal treatment in the context of double burden situations can hardly be compared to a choice-of-law rule. Although the principle of equal treatment can indeed limit the scope of the law of the Member State of destination, unlike a choice-of-law rule it does not, even indirectly, render the law of the Member State of origin as applicable. This is based on the very meaning of the term 'application of law'. In general, as Wróblewski points out, the term lacks any precisely fixed meaning either in legal language or in other languages associated with law.<sup>27</sup> However, from a choice-of-law perspective, the term 'application of law' is understood as a process whereby the legal standing of a cross-border legal relationship is considered by a forum court in light of the

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<sup>27</sup> Jerzy Wróblewski, *The Judicial Application of Law* (Zenon Bankowski and Neil MacCormick ed, Kluwer Academic Publisher 1992) 1.

relevant rules valid in a national legal system.<sup>28</sup> In double burden situations, when the rule, specifically that of public law nature, of the Member State of destination is found to impose an additional burden since a foreign supplier of goods or services has already complied with the law of the Member State of origin, the latter is not meant to be actually applied with regard to a product or service itself. Otherwise, the authorities in the Member State of destination would be in a position to consider whether a product or service has indeed complied with the law of the Member State of origin. This, in turn, would be inconsistent with the free movement of goods and services rationale in the internal market.

This line of reasoning seems to find support in the case of *Wirtschaft v Weinvertriebs*.<sup>29</sup> The issue in that case related to the import ban imposed by the German authorities on the vermouth imported from Italy, the alcoholic content of which was less than 16 %. Italian law required that the vermouth marketed in Italy had at least 16 % of alcoholic content. As an exception, the vermouth with less than 16 % of alcohol could be made for export. Under German law, as a general rule, no minimum alcoholic requirement was imposed. However, foreign wine-based beverages could only be imported to Germany if they complied with the law of the country of origin and could be marketed there. The question considered by the Court was whether it was compatible with Article 34 TFEU to ban the import of the Italian vermouth pursuant to the German rule, which, in turn, referred to Italian law, the law of the Member State of origin. The Court found that the import ban was discriminatory contrary to Article 34 TFEU, since the rule

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<sup>28</sup> John O'Brien and Raymond Smith, *Choice-of-law* (2nd edn, Cavendish Publishing 1999), 24; Jerzy Wróblewski (n 27) 1-2.

<sup>29</sup> Case 59/82 *Schutzverband gegen Unwesen in der Wirtschaft v Weinvertriebs-GmbH* [1983] ECR 1217.

at issue was only applied with regard to foreign wine-based beverages.<sup>30</sup> According to the Court, this outcome was not affected by the fact that the German rule referred to Italian law, because the discriminatory effect should be determined on the basis of the law of the Member State of destination, where the marketing of the product had taken place.<sup>31</sup>

The conclusion reached by the Court appears to demonstrate that the principle of equal treatment under Article 34 TFEU does not, even indirectly, result in the actual application of the law of the Member State of origin. If this was indeed the case, then in *Wirtschaft v Weinvertriebs*, not only German law that referred to Italian law as regards the minimum alcoholic requirement, but also the actual application of the latter by the German authorities would not be incompatible with Article 34 TFEU. In other words, the law of the Member State of destination would enshrine the outcome allegedly envisaged by the principle of equal treatment. Therefore, in double burden situations, what the authorities of the Member State of destination are required, however, is to recognise the fact that a product or service has already satisfied the relevant rules in the Member State of origin. According to Union secondary legislation and the Court's case-law, any doubts in this respect should be dealt by the Member State of origin.<sup>32</sup> For

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<sup>30</sup> *ibid* para 8.

<sup>31</sup> *ibid* para 9.

<sup>32</sup> With regard to goods, this seems to find support in Case 59/82 *Schutzverband gegen Unwesen in der Wirtschaft v Weinvertriebs-GmbH* [1983] ECR 1217. See also Case 94/83 *Criminal proceedings against Albert Heijn BV* [1984] ECR 3263. With regard to services, this seems to find support in Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market ('Services Directive') [2006] OJ L 376/36. According to Article 35 taken in conjunction with Article 18 of the Services Directive, a Member State willing to take measures relating to the safety of services provided in its territory is required first to ask the Member State of establishment to take measures with regard to the provider, supplying all relevant information on the service in question and the circumstances of the case.

instance, in *Biologische Producten*,<sup>33</sup> the Court held that a product could not be subject to an unnecessary technical or chemical analysis or laboratory test under the law of the Member State of destination where a similar analysis or test had already been carried out in the Member State of origin and its results were available to the authorities of the Member State of destination or might be placed at their disposal upon request.<sup>34</sup> Therefore, in light of Articles 34 and 56 TFEU, in order to avoid a double burden imposed on foreign providers of goods or services, a Member State must take into consideration the law of another Member State, if it wishes to apply its own law. The latter factor, i.e. the intention of a Member State to apply its own rules, is also essential in the present context. A Member State is obliged to take into account the law of another Member State only when it desires to take a measure with respect to an imported product or service pursuant to its own law.<sup>35</sup> That is when the measure becomes subject to scrutiny under the Treaty free movement provisions. If that is not the case, then no question of the recognition of the law of another Member State would arise.

### **3. National and Union choice-of-law rules at scrutiny**

The analysis so far has concerned the role of the principle of equal treatment taken in the context of double burden situations and those where those coming from other Member States are deprived of the advantages available to their in-state

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<sup>33</sup> Case 272/80 *Criminal proceedings against Frans-Nederlandse Maatschappij voor Biologische Producten BV* [1981] ECR 3277. The issue in that case related to the Dutch rule that prohibited the sale, storage or use of a plant protection product, which had not been approved pursuant to Dutch law. The rule was applied to the product imported from France, where it was lawfully marketed. See also Case C-293/94 *Criminal proceedings against Jacqueline Brandsma* [1996] ECR I-3159; Case 25/88 *Criminal proceedings against Esther Renée Bouchara, née Wurmser and Norlaine SA* [1989] ECR 1105; Case C-184/96 *Commission v France* [1998] ECR I-6197.

<sup>34</sup> Case 272/80 *Criminal proceedings against Frans-Nederlandse Maatschappij voor Biologische Producten BV* [1981] ECR 3277, para 14.

<sup>35</sup> Jona Israël (n 19) 129.

equivalents. In both contexts, the principle of equal treatment does not appear to require the substitution of the ‘discriminatory’ law of a Member State with the law of another Member State. In other words, it does not result in the actual application of the law of a different Member State. This could be taken as a general conclusion with regard to the question of the possible effect of the principle of equal treatment from a choice-of-law perspective. Having said that, however, it is also necessary to again touch upon *Garcia Avello*, *Bosmann*, *Boukhalfa*,<sup>36</sup> where only the mere application of a particular national law pursuant to a choice-of-law rule was subject to scrutiny under the principle of equal treatment. The question here is whether the role of the principle of equal treatment in this context can make any difference with regard to the conclusion expressed above.

### 3.1. *Garcia Avello*

At first sight, the principle of equal treatment could be seen to produce a *substitutive* effect in *Garcia Avello*. This means that in light of it, not only the Belgian rule, the application of which resulted in discriminatory treatment, is required to be set aside, but also, the relevant Spanish customary rule should be applied instead. In other words, the principle of equal treatment could be understood as precluding the application of Belgian law to the situation at hand and at the same time leading to the actual application of Spanish law to determine the name of the children at issue. Upon the careful analysis, however, this does not appear to be the case. The principle of equal treatment does not actually

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<sup>36</sup> Case C-148/02 *Carlos Garcia Avello v État belge* [2003] ECR I-11613; Case C-214/94 *Ingrid Boukhalfa v Bundesrepublik Deutschland* [1996] ECR I-2253; Case C-352/06 *Brigitte Bosmann v Bundesagentur für Arbeit – Familienkasse Aachen* [2008] ECR I-3827.

require the Belgian authorities to apply Spanish law, but merely recognise the name given under Spanish law and tradition. Two essential factors are necessary to mention in this regard. First, according to the facts of the case, before the matter came before the Belgian authorities, the children had already been registered under the name ‘Garcia Weber’ with the consular section of the Spanish embassy in Belgium. The refusal by the Belgian authorities to recognise that name in this respect led to disadvantageous treatment. In particular, this is where the issue of practical difficulties of having different names under the law of two Member States referred to by the Court comes to the forefront. It is quite possible that the children at issue might at some point decide to reside in Spain and it would be inconvenient for them to have, for instance, their educational qualification issued in the name different than that officially registered there.<sup>37</sup>

Second, a crucial factor in the present context appears to be the choice made by the parents for their children to bear a name according to Spanish law and tradition. As mentioned in the second chapter, the Court in the present ruling resorted to the party autonomy oriented approach with regard to names.<sup>38</sup> This means that there is no general obligation imposed on the authorities of a Member State to recognise the acts or decisions taken by those of another Member State concerning names similar to the system under the Brussels I Regulation.<sup>39</sup> Instead, there is a specific obligation, whereby a Member State is required to allow a person to make a choice between the conflicting decisions taken by the authorities

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<sup>37</sup> Eleanor Spaventa, *Free movement of persons in the European Union* (n 12) 124.

<sup>38</sup> Jan-Jaap Kuipers (n 22) 84.

<sup>39</sup> Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1.

of the Member States concerned.<sup>40</sup> Pursuant to that choice, a Member State is obliged to recognise the name given under the law of another Member State. Thus, if the situation in *Garcia Avello* had been the reverse, the Spanish authorities would also have been bound to recognise the name given under Belgian law.

The emphasis on the choice made by a person could also be observed in the subsequent case of *Grunkin Paul*,<sup>41</sup> which not only confirms the obligation of Member States to respect the choice made by a person in a cross-border situation involving names, but also demonstrates its wider scope. The obligation is not confined to situations where there is discrimination on grounds of nationality, but also concerns those involving discrimination on grounds of movement.<sup>42</sup> Furthermore, it is not necessary to have a cross-border situation involving a person with dual nationality. Instead, the obligation also applies, if a person, a national of Member State A, habitually resides in Member State B and if these Member States use nationality and habitual residence as a connecting factor to determine the law governing names, respectively.

However, notwithstanding the importance attached to it in *Garcia Avello* and *Grunkin Paul*, the obligation of a Member State to respect the choice made by a person in the present context is not without exception. First, as *Sayn-Wittgenstein* clearly illustrates, the refusal by a Member State to recognise a name registered in

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<sup>40</sup> Matthias Lehmann, 'What's in a Name? *Grunkin Paul* and Beyond' (2008) 10 *Yearbook of Private International Law* 135, 159.

<sup>41</sup> Case C-353/06 *Proceedings brought by Stefan Grunkin and Dorothee Regina Paul* [2008] ECR I-7639.

<sup>42</sup> See, Case C-353/06 *Proceedings brought by Stefan Grunkin and Dorothee Regina Paul* [2008] ECR I-7639, Opinion of Advocate General Sharpston, paras 68 and 69.

another Member State could be justified on public policy grounds.<sup>43</sup> In this case, the Austrian authorities refused to recognise a name, which included a title of nobility, used by an Austrian national residing in Germany. The person at issue had been using that name in her professional life during 15 years. Similar to *Garcia Avello* and *Grunkin Paul*, having acknowledged the possible practical difficulties the person could face, the Court, however, found that the refusal by the Austrian authorities could be justified pursuant to the Austrian law on abolition of nobility.<sup>44</sup> Second, as the Court held in *Runevič-Vardyn*,<sup>45</sup> the national authorities of a Member State are under the obligation to recognise the name given under the law of another Member State only if there is a risk of ‘serious inconvenience’ caused to those concerned at administrative, professional and private levels.<sup>46</sup> Thus, for instance, the Court did not consider the registration of the Polish name ‘Łukasz Paweł’ by the Lithuanian authorities as ‘Lukasz Paweł’ without a diacritical mark, which is not used in the Lithuanian language, as likely to cause actual and serious inconvenience for the person concerned.<sup>47</sup>

### **3.2. Bosmann**

In *Bosmann*, the principle of equal treatment could be seen as going beyond its traditional effect by rendering German law applicable to the situation involving Mrs Bosmann. The application of German law was possible in order to eradicate

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<sup>43</sup> Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* (CJEU, 22 December 2010). Another possible ground for objective justification is the protection of a national language. See in this respect Case C-391/09 *Malgožata Runevič-Vardyn, Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others* (CJEU, 12 May 2011).

<sup>44</sup> *ibid* para 94.

<sup>45</sup> Case C-391/09 *Malgožata Runevič-Vardyn, Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others* (CJEU, 12 May 2011).

<sup>46</sup> *ibid* para 76.

<sup>47</sup> *ibid* para 81.

the difference in treatment. It might seem that recourse to the principle of equal treatment indirectly resulted in the application of the national law that was not applicable in accordance with the *lex loci laboris* rule.

Even though German law could be applied in light of it, *Bosmann* hardly tells anything about the role of the principle of equal treatment from a choice-of-law perspective. To begin with, there was no actual change of the law governing Mrs Bosmann's social security protection. This is evident from the position taken by the Court in respect of the relationship between the Treaty provisions on free movement of workers and the *lex loci laboris* rule enshrined in Regulation 1408/71. Since the application of the *lex loci laboris* rule was held to be incompatible with Articles 48 TFEU, it was required to be set aside in so far as the case at hand was concerned. This opened up the possibility for the application of the national law other than that *designated* by the *lex loci laboris* rule. Despite that, however, this does not imply that German law replaced Dutch law as the law governing Mrs Bosmann's social security protection. The latter remained governed by the relevant rules under Dutch law. German law, in turn, was allowed to be applied *simultaneously* with Dutch law only in so far as the benefit at issue was concerned.

More generally, notwithstanding the possible far-reaching effect of the Court's reasoning in *Bosmann*, the simultaneous application of German and Dutch law did not create a legal problem. The latter, as mentioned in the first chapter, could occur, if, for instance, two different national substantive laws applied to the same

factual background contradict each other yielding conflicting results.<sup>48</sup> In the present context, it is true that German and Dutch law were different in substance in terms of the availability of a benefit for children aged over 18. However, the application of German law to Mrs Bosmann even though she was generally subject to Dutch law concerning her social security protection did not create a *conflict*. On the one hand, this is because of the fact that the possibility to receive the benefit pursuant to German law did not affect the applicability of Dutch law. On the other hand, the application of German law did not create any additional obligation imposed on either the German or Dutch authorities. In particular, the Dutch authorities were not required to apply German law nor pay a benefit that was not available under Dutch law. Similarly, the German authorities simply needed to pay the benefit, which Mrs Bosmann was entitled to under the conditions attached to it.

### **3.3. *Boukhalfa***

The careful analysis of *Boukhalfa* might reveal how the principle of equal treatment itself, though indirectly, seems to determine the governing law in the context of the cross-border situation at issue. The German choice-of-law rule was discriminatory on grounds of nationality, since pursuant to it, nationals of other Member States were treated differently than German nationals. In light of Article 45 TFEU, such directly discriminatory treatment cannot be accepted and possible justification based on one of the Treaty express derogations would be of no help.

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<sup>48</sup> J Georges Sauveplane, 'Renvoi' in Ulrich Drobnig and Konrad Zweigert (eds), *International Encyclopedia of Comparative Law*, Instalment 26 (Mohr Siebeck 1990) 12; Mireille van Eechoud, *Choice of Law in copyright and related rights: Alternatives to the Lex Protectionis* (Kluwer Law International 2003) 106.

As a result, Algerian law could not be the law governing Ms Boukhalfa's employment contract. However, the implication of the principle of equal treatment in the present context does not appear to be confined to that. In light of it, it appears that not only the applicable national law under scrutiny should be set aside, but the legal issue at hand should be governed by a different national law. In particular, in order to eradicate the difference in treatment, Ms Boukhalfa's employment contract should also be subject to German law similar to that of the staff having German nationality. Giving effect to the principle of equal treatment, German law was required to be the applicable national law. This, in turn, demonstrates the *substitutive* effect produced by the principle of equal treatment.

This effect, however, is not surprising, taking into consideration the fact that the rule under scrutiny in *Boukhalfa* was a choice-of-law rule. The rule *designated* the law applicable to the employment contracts of the staff working in German diplomatic representations. Based upon nationality as a connecting factor, the rule distinguished between those who had German nationality and those who had other nationalities in terms of the law applicable to their employment contracts, which was directly discriminatory contrary to the principle of equal treatment. To eradicate it, therefore, the law applicable to the employment contracts of German nationals was required to be applied to that of nationals of other Member States as well. In this respect, the principle of equal treatment, in essence, dealt with the choice-of-law rule at issue rather than the question of the applicable law as such. In other words, only the question of what choice-of-law rule could be applied to determine the applicable law was addressed under the principle of equal treatment. The *substitutive* effect produced by the principle of equal treatment

appears to be a direct consequence of the fact that Algerian law could not be applicable pursuant to the discriminatory choice-of-law rule. In such a context, if a difference in treatment is imposed through the application of a different national law *designated* by a choice-of-law rule based on nationality as a connecting factor, the substitution of that national law with the national law applicable to a comparably placed situation would be imminent. However, that is not to say that the substitution of the otherwise applicable national law would always occur whenever a choice-of-law rule based on nationality as a connecting factor is at scrutiny under the principle of equal treatment.<sup>49</sup>

Furthermore, one could be rather hesitant to draw any general conclusion taking into account the specific factual circumstances in *Boukhalfa*, to which the effect produced by the principle of equal treatment appears to be confined. The choice-of-law rule at issue was enshrined in the German legislation on diplomatic service and aimed to regulate the employment conditions of the staff working in the embassies or consulates abroad. Since it concerned a State institution, the rule was meant to preserve the *benefit* of the application of German law to German nationals only. In this respect, it is questionable whether a similar situation could occur, for instance, in a private sector – i.e. in a branch located in a third country of a company having its headquarters in a Member State and, more importantly, in a branch located in a Member State of a company established in another Member State. This is because of the fact that an individual employment contract under Union law is not regulated by a choice-of-law rule based on nationality as a connecting factor. According to the Rome I Regulation, which has a universal

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<sup>49</sup> This is more likely to depend on the specific factual background of a case at hand.

application,<sup>50</sup> private parties to an employment contract are free to choose the governing law.<sup>51</sup> If they have not done so, the employment contract is governed by the law of the country in which or, failing that, from which the employee habitually carries out his/her work in performance of the contract.<sup>52</sup> The same provision was also enshrined in the 1980 Rome Convention on the law applicable to contractual obligations which has been replaced by the Rome I Regulation.<sup>53</sup> As a result, as far as the applicable law is concerned, directly discriminatory treatment on grounds of nationality can hardly occur in a private sector similar to *Boukhalfa*.

#### 4. Interim conclusion

The principle of equal treatment under Article 18 TFEU and the Treaty free movement provisions requires the applicable substantive and choice-of-law rules to be non-discriminatory in nature and effect. This, however, is not sufficient to compare its effect to that of a choice-of-law rule. The principle of equal treatment does not explicitly or implicitly *designate* the applicable law in the sense understood from a choice-of-law perspective. The analysis of its functioning in the context of cross-border situations reveals that only the question of what *designated* or chosen national substantive law, or *designating* choice-of-law rules can be applied in the Union is addressed under the principle of equal treatment. If the *designated* or chosen national law or *designating* choice-of-law rule is caught

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<sup>50</sup> According to Article 2, ‘any law specified by this Regulation shall be applied whether or not it is the law of a Member State’.

<sup>51</sup> Article 6 (1) of Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (‘Rome I Regulation’) [2008] OJ L 177/6.

<sup>52</sup> Article 6 (2) of the Rome I Regulation.

<sup>53</sup> Article 6 of 1980 Rome Convention on the law applicable to the contractual obligations (consolidate version) [1998] OJ C 027/34.

by the principle of equal treatment, the latter does not create an opening for the application of the law of a Member State other than that that is subject to scrutiny. This is based on the fact that in contrast to a choice-of-law rule, the principle of equal treatment under Article 18 TFEU and the Treaty free movement provisions does not contain even an implicit reference to a particular national law that always becomes applicable whenever one has recourse to it. This, in turn, is a clear indicator of the difference between the functioning of the principle of equal treatment and that of a choice-of-law rule.

## Conclusion

This thesis aimed to provide a different perspective to the study of the principle of equal treatment under Article 18 TFEU and the Treaty free movement provisions by examining its scope and functioning from a choice-of-law perspective. It was aimed to be a follow up the studies conducted by Michaels on the functioning of the country of origin principle in light of the vested right theory,<sup>1</sup> and Fallon and Meeusen on the possible choice-of-law effect of the mutual recognition principle.<sup>2</sup>

The general conclusion of this thesis is that the principle of equal treatment does not explicitly or implicitly *designate* the applicable law in the sense understood from a choice-of-law perspective. The requirement that all rules should be non-discriminatory in nature and effect itself does not, even indirectly, address the general question of what national law is governing a cross-border relationship. Even from a choice-of-law perspective, the principle of equal treatment does not create an opening for the application of the law other than that that is subject to scrutiny. This is explained by the fact that in contrast, to a choice-of-law rule the principle of equal treatment does not contain even an implicit reference to a particular national law that always becomes applicable whenever one has recourse to it. Although, its effect in *Boukhalfa* was different, this can hardly make any difference, taking into consideration the specific factual background and the fact that it was a national choice-of-law rule that was subject to scrutiny in that case.

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<sup>1</sup> Ralf Michaels, 'EU Law as Private International Law? Reconceptualising the Country-of-Origin Principle as Vested-Rights Theory' (2006) 2 *Journal of Private International Law* 195.

<sup>2</sup> Marc Fallon and Johan Meeusen, 'Private International Law in the European Union and the Exception of Mutual Recognition' (2002) 4 *Yearbook of Private International Law* 37.

Therefore, in the context of the determination of the applicable law in the Union, the effect of the principle of equal treatment merely functions as an additional check on the operation of the *designated* or chosen national substantive law and choice-of-law rules themselves.

If the national substantive law *designated* by a choice-of-law rule is found to be discriminatory, it would not apply to a given cross-border relationship, unless there are objective justifications. Even though the principle of equal treatment substantially differs from mandatory rules or the public policy exception, a forum court has a right and even obligation to invoke it in light of the Union public policy exception. The applicability of the national substantive law pursuant to a choice-of-law rule cannot justify the application of the discriminatory rule. National or Union choice-of-law rules declare national substantive rules as applicable, but they do not ensure their automatic compliance with the principle of equal treatment.

The same argument could also be made as regards the national law chosen by private parties to a cross-border contractual relationship. Private parties are certainly bound by a choice-of-law clause. This however does not mean that the chosen law cannot be scrutinised in light of the principle of equal treatment. Similarly, it can hardly be accepted as a sufficient ground for objective justification. This concerns both mandatory and default rules that are part of the chosen law. In case of mandatory rules, the discretion available to private parties does not appear to affect their scrutiny under the principle of equal treatment, mainly because of the fact that these rules could be applicable to a given cross-

border relationship even without any choice-of-law clause. As regards default rules, it is true that private parties have more discretion, since they are free to exclude their contract from the scope of these rules. However, it does not seem reasonable to hold, for instance, that a private party discriminated by a default rule should accept any possible consequences arising as a result of not exercising such a discretion. This is due to the fact that, on the one hand, the absence of any specific contractual arrangement by private parties might not represent their actual intention and. On the other hand, it also appears to be inconsistent with the internal market rationale not to allow the otherwise discriminated party to raise before a forum court the compatibility of a given default rule with Treaty free movement provisions. Thus, since in case of default rules it is a national rule that is, in essence, subject to scrutiny, the discretion available to private parties over their scope does not appear itself to be an effective means to deal with any possible disadvantages that one might face in a contractual context.

In addition to the *designated* or chosen national substantive law, national and Union choice-of-law rules also come within the scope of the principle of equal treatment, regardless of their specific nature, i.e. the fact that they only determine the applicable law without dealing with matters of substance.

As far as national choice-of-law rules are concerned, a possible difference in treatment in terms of the applicable law arising in light of them would be compatible with the principle of equal treatment, as long as nationality and territoriality that these rules are usually based upon are only used as neutral connecting factor to determine the applicable law. This is less likely to be the

case, for instance, if the use of nationality as a connecting factor in fact results in a preference given to one nationality over the other; if nationality or a territorial connecting factor is given preference over another equivalent connecting factor. This could be incompatible with the principle of equal treatment and require objective justification.

As regards Union choice-of-law rules, because of the single neutral connecting factors they are based upon any possible difference in treatment in terms of the applicable law arising in light of these rules is only likely to trigger the principle of equal treatment on grounds of movement. In this respect, the application of the *Bosmann*-esque approach with regard to Union choice-of-law rules adopted under Article 81 TFEU seems problematic. The clear subordination of these rules to the principle of equal treatment on grounds of movement because of a possible disadvantage imposed on those who have exercised the Treaty free movement rights is questionable. These rules are intended to ensure certainty over the applicable law and predictability of litigation in the context of cross-border relationships between private parties. Therefore, setting aside these rules pursuant to the principle of equal treatment on grounds of movement because of the effect they produce in a specific case could impact upon the effectiveness in achieving their aim, which is crucial for private parties engaged in cross-border contractual, non-contractual or other civil law relationships. One certainly cannot deny that the mere application of the *designated* national substantive law in accordance with these rules might place one of the parties at a disadvantage. Despite that, it is doubtful whether such a disadvantage could trigger the principle of equal

treatment on grounds of movement and, even if it is the case, it is reasonable to expect that these rules are justified in light of their aim.

This thesis is limited to the study of the outcome of Union choice-of-law rules adopted under Article 81 TFEU being subject to scrutiny under the principle of equal treatment on grounds of movement. A similar study conducted outside the confines of a university setting on the outcome of these rules being subject to the restriction-based test under the Treaty free movement provisions could be further helpful in understanding the interaction between these rules and the Treaty free movement provisions. For instance, under the Rome II Regulation, the *lex loci damni* rule is the main choice-of-law rule, according to which the law applicable to liability arising out of cross-border torts is the law of the country where the damage occurs.<sup>3</sup> The *lex loci damni* rule could *designate* the law of a Member State as applicable in the context of cross-border tort litigation between private parties, the application of which, in turn, could be subject to the restriction-based test under the Treaty free movement provisions. In this respect, the focus would be on the broader understanding of the notion of restriction,<sup>4</sup> even though the market access test would also be considered.<sup>5</sup> This research would seek to

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<sup>3</sup> Article 4 of the Rome II Regulation.

<sup>4</sup> See eg Case C-19/92 *Dieter Kraus v Land Baden-Württemberg* [1993] ECR I-1663, para 32; Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, para 37; Joined Cases C-369/96 and C-376/96 *Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL (C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL (C-376/96)* [1999] ECR I-8453, para 33; Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279, para 39; Case C-442/02 *CaixaBank France v Ministère de l'Économie, des Finances et de l'Industrie (CaixaBank)* [2004] ECR I-8961, para 11-13; Case C-518/06 *Commission v Italy* [2009] ECR I-3491, para 66.

<sup>5</sup> See eg Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and Others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995] ECR I-4921, para 99-100; Case C-134/03 *Viacom Outdoor Srl v Giotto Immobiliare SARL* [2005] ECR I-1167, para 37-38; Joined Cases C-544/03 and C-545/03 *Mobistar SA v Commune de Fléron and Belgacom Mobile SA v Commune de Schaerbeek* [2005] ECR I-7723, para 29-31; Case C-110/05 *Commission v Italy (motorcycle trailers)* [2009] ECR I-519, para 58; Case C-142/05 *Åklagaren v Percy Mickelsson*

address, for instance, the question as to whether the aim of a Union choice-of-law rule adopted under Article 81 TFEU in ensuring certainty over the applicable law and predictability of litigation could be taken as a ground for objective justification, if the mere application of the national law *designated* pursuant to that rule is found to impose a restriction.

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*and Joakim Roos* [2009] ECR I-4273, para 28; Case C-265/06 *Commission v Portugal* (tinted film) [2008] ECR I-2245, para 31-36.

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