Equal treatment on grounds of movement and Union choice-of-law rules under Article 81 TFEU

Abstract

Union choice-of-law rules adopted pursuant to Article 81 TFEU are aimed to promote the exercise of the Treaty free movement rights by providing certainty over the applicable law and predictability of litigation in the context of cross-border contractual, non-contractual or other relationships. At the same time, due to the territorial connecting factors that these choice-of-law rules are based upon, any possible difference in treatment in terms of the applicable law imposed in light of them cannot be excluded. In this respect, it is not clear whether such a difference in treatment could also be contrary to Article 18 TFEU and the Treaty free movement provisions, which prohibit discrimination not only on grounds of nationality but also on grounds of movement.

Keywords: *choice-of-law rule, equal treatment on grounds of movement, legal certainty, applicable law*, *Article 81 TFEU*

1. Introduction

With the entry into force of the Amsterdam Treaty, the European Union acquired an express competence under Article 65 EC (now Article 81 TFEU) to adopt measures unifying national choice-of-law rules. Several Regulations enshrining unified choice-of-law rules have so far been adopted under this provision.[1] In addition, a number of unified choice-of-law rules are also embodied in the Union secondary legislation enacted under other Treaty provisions.[2] Choice-of-law rules determine what national substantive law is applicable to a given cross-border (or inter-State) relationship. If choice-of-law rules vary from Member State to Member State, it might lead to a situation where the same cross-border relationship is regulated according to different national substantive rules depending on the forum. Such an outcome would certainly affect cross-border activities in the internal market. With divergent national choice-of-law rules one could hardly predict the outcome of litigation or be certain over the applicable law. Unified choice-of-law rules adopted under Article 81 TFEU aim to solve this problem. These rules promote the exercise of the Treaty free movement rights in the internal market by providing certainty over the law applicable to cross-border contractual, non-contractual or other relationships and predictability of litigation.

Unified choice-of-law rules adopted under Article 81 TFEU determine the applicable law based on so-called connecting factors, which so far are mainly territorial in nature.[3] For instance, among others, one could mention 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. A possible difference in treatment in terms of the applicable law pursuant to territorial connecting factors cannot be excluded. In this respect, one might question how such an effect pursuant to Union choice-of-law rules adopted under Article 81 TFEU would be characterised in light of the principle of equal

[1] 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), [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), [2008] OJ L 177/6; Regulation 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separa.tion (Rome III), [2010] OJ L 343/10; 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. The latter refers to the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

[2] 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. 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; 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.

[3] 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.

treatment enshrined in Article 18 TFEU and in the Treaty free movement provisions. It is certainly less likely that these Union choice-of-law rules could be held to be discriminatory on grounds of nationality because of the neutral nature of the connecting factors they are premised upon. However, the principle of equal treatment under Article 18 TFEU and the Treaty free movement provisions is not confined to questions of nationality,[4] but is also encompasses the prohibition of discrimination on grounds of movement. That is to say, 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 also be caught under these Treaty provisions.[5]

Discriminatory treatment on grounds of movement imposed as a result of the application of a Union choice-of-law rule could be observed in *Bosmann*. [6] In this case, it appears that in light of the *lex loci laboris* rule under Regulation 1408/71 (now Regulation 883/2004), a German resident employed in another Member State was treated differently than a German resident employed in Germany in terms of the entitlement to a child benefit. In particular, in accordance with the *lex loci laboris* rule, the former was subject to the law of the State of employment, which did not provide a child benefit similar to German law. In essence, not the *designated* national substantive law itself but its mere application pursuant to a Union choice-of-law rule adopted under Article 48 TFEU led to a difference in treatment of those who have exercised the Treaty free movement rights and those who have not. [Next sentence seems important enough to me to 'highlight' by new alinea] From the reasoning of the Court in *Bosmann*, it could be assumed that the Union choice-of-law rule at issue is subordinated to the principle of equal treatment on grounds of movement and cannot be applied if it disadvantages those who have exercised the Treaty free movement right.

In this regard, it is not clear whether this [principle?] also applies to Union choice-of-law rules adopted under Article 81 TFEU. One may well argue that since secondary Union law is required to comply with primary, Union choice-of-law rules adopted pursuant to Article 81 TFEU in the form of Regulations would not

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[4] Opinion of AG Sharpston in Case C-353/06 *Proceedings brought by Stefan Grunkin and Dorothee Regina Paul* [2008] ECR I-7639, para. 21.

[5] 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-19/92 *Dieter Kraus v Land Baden-Württemberg* [1993] ECR. I-1663, para 32; 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-295/00 *Commission v Italy* [2002] ECR I-1737, para. 10; Case C-464/02 *Commission v Denmark* [2005] ECR I-7929, para. 34; 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-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-544/07 *Uwe Rüffler v Dyrektor 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 *Malgožata Runevič-Vardyn, Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others* (CJEU, 12 May 2011), para. 68.

[6] Case C-352/06 *Brigitte Bosmann v. Bundesagentur für Arbeit – Familienkasse Aachen* [2008] ECR I-3827.

be an exception in this regard. This also finds support in the 'binary' approach concerning the relationship between Union primary and secondary law adopted by the Court in the context of Union citizenship and health care cases and arguably extended in *Bosmann* to Union choice-of-law rules adopted under Article 48 TFEU.[7] However, the *Bosmann-esque* subordination of Union choice-of-law rules adopted under Article 81 TFEU to the principle of equal treatment on grounds of movement does not sit well with the essential policy behind these rules, which is to ensure certainty over the applicable law and predictability of litigation in the Union. This, in turn, is of crucial importance in the context of cross-border contractual, non-contractual or other relationships between private parties, which these rules regulate.

This article aims at exploring the relationship between Union choice-of-law rules adopted under Article 81 TFEU and the principle of equal treatment on grounds of movement.[8] I start by outlining the function of these rules in the context of cross-border relationships. Then I discuss the question of their subordination to the principle of equal treatment on movement and their role in ensuring certainty over the applicable law and predictability of litigation in this respect. In this part, *Bosmann* is taken as a starting point. I conclude that different approaches should be taken with regard to Union choice-of-law rules adopted under Article 81 TFEU that regulate cross-border relationships between private parties and Union choice-of-law rules adopted under other Treaty provisions, for instance Article 48 TFEU, that regulate cross-border relationships involving a State and a private party. In particular, I argue that the importance of certainty over the applicable law and predictability of litigation in the context of cross-border contractual, non-contractual and other relationships warrants the aim of Union choice-of-law rules adopted under Article 81 TFEU to be considered and even taken as a justifying

[7] More on the 'binary' approach see Dougan and Spaventa, 'Educating Rudy and the (non-) English patient: A double-bill on residency rights under Article 18 EC', 28 *European Law Review* (2003). See also 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 V.G. *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-413/99 *Baumbast and R v. Secretary of State for the Home Department* [2002] ECR I-7091; Case C-25/02 *Katharina Rinke v. Ärztekammer Hamburg* [2003] I-8349; Case C-208/07 *Petra von Chamier-Glisczinski v. Deutsche Angestellten-Krankenkasse* [2009] ECR I-6095.

[8] The present discussion will be confined to that. With regard to the relationship between national choice-of-law rules and the principle of equal treatment on grounds of nationality under Article 18 TFEU and the Treaty free movement provisions, see eg Ballarino and Ubertazzi, 'On *Avello* and Other Judgments: A Point of Departure in the Conflict of Laws?', 6 *Yearbook of Private International Law* (2004); Meeusen, 'Instrumentalisation of Private International Law in the European Union: Towards a European Conflicts Revolution?', 9 *European Journal of Migration and Law* (2007); M. Bogdan, *Concise Introduction to EU Private International Law* (Europa Law Publishing, Groningen 2006); Lehmann, 'What's in a Name? *Grunkin-Paul* and Beyond', 10 *Yearbook of Private International Law* (2008). For more general analysis on the relationship between the Treaty free movement provisions and national choice-of-law rules, see Gkoutzinis, 'Free Movement of Services in the EC Treaty and the Law of Contractual Obligations Relating to Banking and Financial Services', 41 *Common Market Law Review* (2004); Fallon and Meeusen, 'Private International Law in the European Union and the Exception of Mutual Recognition', 4 *Yearbook of Private International Law* (2002); Tison, 'Unravelling the General Good Exception: The Case of Financial Services', in M. Andenas and W-H. Roth, *Services and Free Movement in EU Law* (Oxford University Press, Oxford 2002); J. Israël, *European Cross-Border Insolvency Regulation* (Intersentia, Antwerpen 2005).

factor, if these rules are scrutinised in light of the principle of equal treatment on grounds of movement.

2. Union choice-of-law rules under Article 81 TFEU

Private parties exercising the Treaty free movement rights are involved in legal relationships, which could be linked to more than one national legal system. Such a cross-border relationship between private parties can theoretically be subject to each of the national legal systems it is linked to. However, due to their substantive differences, the simultaneous application of the law of each State to the same factual background could result in a *conflict*, in particular, they could contradict each other and yield conflicting results.[9] Choice-of-law rules aim to provide a solution in this respect. Based on connecting factors (which usually are territoriality and nationality),[10] these rules determine the national law that governs a given cross-border relationship. In this way, they aim to guarantee a foreseeable, efficient and just solution for a *conflict* of national laws in the context of cross-border relationships.[11] 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.[12] A choice-of-law rule, for instance, does not address any substantive issues related to a contract, for instance, its validity or the rights of contracting parties. This, in turn, is dealt by the *designated* national substantive law.

Prior to the Amsterdam Treaty, the areas of choice-of-law rules and internal market were quite separate.[13] Although, the original EEC Treaty introduced the free movement provisions in order to foster private relationships across the borders of Member States, it did not touch upon any choice-of-law matters.[14] 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.[15] However, a link between the two areas was established by the 1980 Rome Convention on the law applicable to contractual obligations.[16] The Convention established a set of uniform choice-of-law rules that determined the

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[9] Sauveplane, 'Renvoi', in U. Drobnig and K. Zweigert (eds.), *International Encyclopedia of Comparative Law*, Instalment 26 (Mohr Siebeck 1990) 12; M. Van Eechoud, *Choice of Law in copyright and related rights: Alternatives to the Lex Protectionis* (Kluwer Law International, The Haque 2003), p. 106.

[10] Michaels, 'The New European Choice-of-Law Revolution: Lessons for the United States?', 82 *Tulane Law Review* 2008, p. 1615.

[11] M. Van Eechoud, *Choice of Law in copyright and related rights,* p. 16.

[12] Vischer, 'General Course on Private International Law', 232 *Recueil des Cours* (1992), p. 23; De Boer, 'Facultative Choice of Law: the Procedural Status of Choice-of-Law Rules and Foreign Law', 257 *Recueil des Cours* (1996), p. 239.

[13] Boele-Woelki and Van Ooik, 'The Communitarization of Private International Law', 4 *Yearbook of Private International Law* (2002), p. 2; See also, Remien, 'European Private International Law, the European Community and its Emerging Area of Freedom, Security and Justice', 38 *Common Market Law Review* (2001), p. 53.

[14] Basedow, 'The Communitarization of the Conflict of Laws under the Treaty of Amsterdam', 37 *Common Market Law Review* (2000), p. 687; Drobnig, 'Conflict of Laws and the European Economic Community', 15 *American Journal of Comparative Law* (1966-1967), p. 204.

[15] Bayraktaroğlu, 'Harmonization of Private International Law at Different Levels: Communitarization *v.* International Harmonization', 5 *European Journal of Law Reform* (2003), p. 131.

[16] 1980 Rome Convention on the law applicable to the contractual obligations (consolidated version), [1998] OJ C 027.

relevant national substantive law applicable with regard to contractual obligations.[17] The Convention was an inter-State agreement and did not have the status of a Union legislative instrument.[18] 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.[19] In addition to 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.[20]

The changes brought about by the Amsterdam Treaty heralded a new era with regard to the place of choice-of-law rules in the Union 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.[21] At present, under Article 81 TFEU that replaced Article 65 EC, in order to 'develop judicial cooperation in civil matters having cross-border implications' and 'when necessary for the proper functioning of the internal market', the Union legislator can adopt measures '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 been adopted: the Rome I Regulation that replaced the 1980 Rome Convention on the law applicable to contractual obligations; the Rome II Regulation on the law applicable to non-contractual obligations; the Regulation on maintenance obligations; and the Rome III Regulation on the law applicable to divorce and legal separation.

The introduction of Article 65 EC (now Article 81 TFEU) has opened up the possibility to address at the Union level the problems arising as a result of the divergent choice-of-law rules applied in Member States. As mentioned earlier, prior to the Amsterdam Treaty, with the exception of the 1980 Rome Convention and several Regulations and Directives, each Member State applied its own set of choice-of-law rules. This might result in a situation where divergent national choice-of-law rules would be applied to the same cross-border relationship depending on the place of the court seised with it. In particular, the application of divergent national choice-of-law rules would lead to the substance of the cross-border relationship at issue to be regulated according to divergent national substantive laws. As an example, prior to the adoption of the Rome II Regulation, in 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 rule referring to the law of the place where the harmful act was committed.[22]

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[17] C. Quigley, *European Community Contract Law: the Effect of EC Legislation on Contractual Rights, Obligations and Remedies* (Volume 1, Kluwer Law International, London 1997), p. 5.
[18] Nott, 'For Better or Worse? The Europeanisation of the Conflict of Laws', 24 *Liverpool Law Review* (2002), p. 4.
[19] Beaumont, 'European Court of Justice and Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters', 48 *International & Comparative Law Quarterly* (1999), p. 228-229.
[20] See eg Directive 93/13/EEC, [1993] OJ L 095/29; Directive 94/47/EC, [1994] OJ L 280/83; Directive 1999/44/EC, [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 that has replaced and repealed Regulation 1408/71.
[21] Drobnig, 'European Private International Law after the Treaty of Amsterdam: Perspectives for the Next Decade', 11 *King's College Law Journal* (2000), p. 190.
[22] Posch, 'The 'Draft Regulation Rome II' in 2004: It Past and Future Perspectives', 6 *Yearbook of Private International Law* (2004), p. 140.

However, the interpretation of that rule varied from Member State to Member State. In some, the term 'place where an act was committed' referred to the place where the causal event took place, while in others, it meant the place where the damage arose.[23] In addition, in some cases, it was left for the court dealing with the case or the plaintiff to choose the relevant jurisdiction.[24] 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 laws.

Unified choice-of-law rules adopted under Article 81 TFEU ensure the clear designation of the law applicable to cross-border relationships.[25] Replacing divergent national choice-of-law rules, these rules guarantee that the same national substantive law is applied irrespective of the forum. This is intended to guarantee certainty over the applicable law and predictability of litigation in the context of cross-border relationships. For instance, the problem related to the different interpretations of the *lex loci delicti commissi* rule is addressed by the Union choice-of-law rule that designates the law of the country in which the damage occurs as the law applicable to a non-contractual obligation arising out of a tort/delict (*lex loci damni*).[26] Thus, unified choice-of-law rules adopted under Article 81 TFEU allow private parties to know with certainty which national substantive law will be applicable and to predict the outcome of litigation.[27]

3. Scrutiny under the principle of equal treatment on grounds of movement

Direct or indirect discrimination on grounds of nationality is less likely to occur in light of Union choice-of-law rules adopted under Article 81 TFEU taking into account the neutral connecting factors they are based upon.[28] However, the principle of equal treatment under Article 18 TFEU and the Treaty free movement provisions does not only prohibit discrimination on grounds of nationality but also on grounds of movement. In particular, a rule that disadvantages those who have exercised the Treaty free movement rights could also be caught. Considering the territorial nature of the connecting factors that Union choice-of-law rules adopted

[23] Koch, 'Comparative Report', in B. 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, Vienna/New York 2008), p. 637.
[24] Ibid. See eg footnotes 230-235 concerning each Member State.
[25] 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.
[26] See Article 4.1 of the Rome II Regulation.
[27] De Boer, 'The Purpose of the Uniform Choice-of-law rules: The Rome II Regulation', 56 *Netherlands International Law Review* (2009), p. 305.
[28] This does not concern situations where the applicable law is *per se* discriminatory on grounds of nationality. If that is the case, it could no longer applicable in light of the principle of equal treatment (prohibition of discrimination). In this respect, the fact that the law at issue is *designated* by the relevant Union choice-of-law rule would not make any difference, since national rules irrespective of their nature or origin are required to comply with it. See Case 82/71 *Publico Ministero Italiano v. Società Agricola Industria Latte (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.

under Article 81 TFEU are premised upon, the application of these rules could lead to a difference in treatment in terms of the applicable law. This, in turn, begs the question as to whether such a difference in treatment could also be caught by the principle of equal treatment on grounds of movement enshrined in Article 18 TFEU and the Treaty free movement provisions. In particular, it is not clear whether the objective of these rules 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 the approach taken by the Court in *Bosmann*. This case could be interpreted as involving discriminatory treatment on grounds 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. The Regulation was adopted under Article 48 TFEU and aimed to coordinate the application of national social security legislations. According 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 [Interesting 'cross-over', cf. as well ECJ Segers case: in 1986 not real seat theory was contested, but as well the impact on social sickness benefit scheme of a managing director of company due to the sole fact that he wasn't a director of a NL company but of a company duly established in another EC Member State], even if he/she resided in the territory of another Member State.[29] This rule also remains as a main choice-of-law rule in Regulation 883/2004 that has replaced Regulation 1408/71.

3.1. *Bosmann* and Union choice-of-law rule under Article 48 TFEU

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 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 the context of the situation involving Mrs. Bosmann 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 Regulation 1408/71.[30] The entitlement to a benefit, as AG Mazák continued, was a matter dealt in accordance with the applicable national legislation, which varied from Member State to Member State. This is because, in

[29] 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.
[30] Opinion of A.G. Mazák in Case C-352/06 *Brigitte Bosmann v Bundesagentur für Arbeit – Familienkasse Aachen* [2008] ECR I-3827, para. 64.

AG Mazák's words, under EU law national social security systems were only coordinated, not harmonised.[31]

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,[32] this did not necessarily mean that Mrs. Bosmann had no possibility to receive the benefit, since she was eligible for it under the German legislation because of her residence in Germany.[33] 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 those benefits reduced because they had exercised the right to free movement.[34] On these grounds, the Court came to the conclusion that Mrs. Bosmann could receive the benefit pursuant to German law, even though Dutch law was the applicable law pursuant to Regulation 1408/71.

3.1.1. The lex loci laboris rule

The conclusion reached by the Court contradicts the very wording of the relevant provisions enshrined not only in Regulation 1408/71, but also Regulation 833/2004. The *lex loci laboris* rule under Regulation 1408/71 had an exclusive effect, meaning that only the legislation of the Member State of employment could be applicable.[35] The exclusive effect of this rule was designed to prevent the simultaneous application of two or more different national legislations.[36] Otherwise, for instance, this might lead to a situation when a migrant worker would be subject to two national social security schemes and as a result have to pay double contributions.[37] At the same time, due to the combination of the requirements under different national social security systems, it is also possible that a migrant person would have no social security coverage at all.[38]

The place of employment as a connecting factor was chosen between other options, such as nationality or the place of residence of a migrant worker and the place of the employer's establishment.[39] It is considered as the most suitable for

[31] Ibid, para. 59. The position taken by A.G. 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 the disadvantage is linked to the differences in substance existing between possibly applicable national substantive laws.
[32] Case C-352/06 *Brigitte Bosmann v Bundesagentur für Arbeit – Familienkasse Aachen* [2008] ECR I-3827, para. 27.
[33] Ibid, para. 28.
[34] Ibid, para. 29.
[35] Article 13.1 of Regulation 1408/71.
[36] Jorens and Van Overmeiren, 'General Principles of Coordination in Regulation 883/2004', 11 *European Journal of Social Security* (2009), p. 72.
[37] Pennings, 'Co-ordination of Social Security on the Basis of the State-of-Employment Principle: Time for an Alternative', 42 *Common Market Law Review* (2005), p. 68.
[38] Jorens and Van Overmeiren, 11 *European Journal of Social Security* (2009), p.72.
[39] Y. Jorens and J. P. 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), http://www.tress-network.org/tressnew/public/europeanreport/thinktank_mobility.pdf, (last visited 19 September 2011), p. 21.

the objective of the Regulation.[40] First of all, the choice of the place of employment as a connecting factor is related to the historical development of national social security systems in which, as Pennings points out, the entitlement conditions and benefits rules have been based on employment relationships.[41] Second, the *lex loci laboris* rule ensures that the person is linked to the social security system of the Member State where he/she is mostly attached during his/her daily life.[42] This, on the other hand, also makes the use of the freedom to move and work in another Member State (specifically, where better social security coverage is provided) more attractive.[43] More importantly, the choice of the place of employment puts foreign and domestic employees on an equal footing in the labour market of the Member State of employment. This is because, if the place of residence of a migrant worker, for instance, is taken as a connecting factor instead, this might encourage employers to hire employees based on the level of contributions to be paid as this could certainly vary from Member State to Member State.[44]

3.1.2. Discrimination on grounds of movement and the 'binary' approach

As mentioned earlier, the principle of equal treatment under Article 18 TFEU and the Treaty free movement provisions also prohibits a difference in treatment imposed on grounds of movement.[45] Such a difference in treatment could be observed in *Bosmann*. The application of Dutch law pursuant to the *lex loci laboris* rule put Mrs Bosmann 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 those resident and employed in Germany on the one hand and those resident in Germany but employed in other Member States on the other hand. The fact that the exclusive application of Dutch law pursuant to the *lex loci laboris* rule was held to be contrary to Article 48 TFEU taken in conjunction with Article 45 TFEU seems to extend the prohibition of discrimination on grounds of movement with regard to Union choice-of-law rules. 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 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.

An important factor in this respect appears to be 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 right to social security benefits or the reduction of the

[40] Case C-249/04 *José Allard v. Institut national d'assurances sociales pour travailleurs indépendants (INASTI)* [2005] ECR I-4535. 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, contributed to facilitating the exercise of those freedoms.

[41] Pennings, 42 *Common Market Law Review* (2005), p.69.

[42] Jorens and Lhernould (eds.), Think Tank Report 2008, p. 21.

[43] Pennings, 42 *Common Market Law Review* (2005), p. 69.

[44] Jorens and Lhernould (eds.), Think Tank Report 2008, p.21.

[45] See eg the case-law mentioned in footnote 5. See also Bernard, 'Discrimination and Free Movement in EC Law', 45 *International Comparative Law Quarterly* (1996), p. 87. Obviously, not to mention non-discriminatory barriers that are caught by the Treaty free movement provisions.

amount of those benefits.[46] This could be argued endorses the idea that despite its exclude effect, the *lex loci laboris* rule does not take an absolute priority in every single situation, since any disadvantage imposed on a migrant worker as a result of its application cannot be disregarded.[47] In particular, from the reasoning of the Court it could be understood that the scope of the *lex loci laboris* rule is limited in light of the principle of equal treatment on grounds of movement. This is to the extent that the rule is not applied if its application works to the disadvantage of a person who has exercised the Treaty free movement rights. [another interesting parallel might be taken from right of 'moving' employee as a Works Council member, CJEU Koelzsch C-29/10] Considered this way, the reasoning of the Court in *Bosmann* seems to echo the 'binary' approach established in the context of Union citizenship and health care cases that the compliance with black-letter provisions under in Union secondary legislation does not actually guarantee the compliance with primary Treaty provisions.[48] Under this approach, the compatibility of a provision under Union secondary legislation with a hierarchically superior norm is not questioned.[49] In light of the relevant Treaty provision, because of its effect, a provision under Union secondary legislation is simply required to be set aside in so far as the specific case is concerned.[50] In essence, the requirements provided by secondary Union law are not regarded by the Court as conclusive or exhaustive and instead should be interpreted in light of the demands of primary Union law.[51]

Taken from this perspective, it is apparent that the fact that an action is deemed lawful pursuant to the *lex loci laboris* rule does not imply the same under the Treaty free movement provisions. In particular, it was lawful for the German authorities to refuse to grant a child benefit to Mrs. Bosmann in light of the Regulation, which was not the case under the Treaty provisions on free movement of workers. Thus, it could be argued that according to *Bosmann* the choice-of-law rules enshrined in Regulation 1408/71 and now Regulation 883/2004 are subject

[46] Case C-352/06 *Brigitte Bosmann v. Bundesagentur für Arbeit – Familienkasse Aachen* [2008] ECR I-3827, para. 29.
[47] Golynker, 'Co-ordination of Social Security Scheme in the European Union: The Rashomon effect in *Bosmann*', 16 *European Journal of Social Security* (2009), p. 99.
[48] E. Spaventa, *Free movement of persons in the European Union - Barriers to movement in their constitutional context* (Kluwer Law International, Alphen aan den Rijn 2007), p. 113-153; Dougan, 'The constitutional dimension to the case-law on Union citizenship', 31 *European Law Review* (2006), p. 632-640; Dougan and Spaventa, 28 *European Law Review* (2003), p. 702-707. See also the case-law mentioned in footnote 7. In *Baumbast*, for instance, the issue related to the refusal by the UK authorities to renew the residence permit of a German national living in the UK. The refusal was based on the fact that he did not have comprehensive health insurance as required by the conditions set out in Directive 90/364/EEC of 28 June 1990 on the right of residence, [1990] OJ L 180/26. Even though Mr Baumbast had health insurance in Germany, he did not have insurance for emergency treatment in the UK. In this respect, the Court found that the refusal based on that ground was a disproportionate interference with the right of residence provided by Article 21 TFEU. With regard to the relevance of *Baumbast* to *Bosmann*, see Van der Mei and Essers, 'Annotation to the Case C-352/06 *Brigitte Bosmann* v. *Bundesagentur für Arbeit – Familienkasse Aachen* [2008] ECR I-03827', 46 Common Market Law Review (2009), p. 965
[49] Dougan and Spaventa, 28 *European Law Review* (2003), p. 704.
[50] Spaventa, 'The impact of Arts. 12, 18, 39 and 43 of the EC Treaty on the coordination of social security system', in Y. 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), p. 120.
[51] Dougan and Spaventa, 28 *European Law Review* (2003), p. 705.

to the principle of equal treatment on grounds of movement and the result of their application should comply with it in so far as the specific case is concerned. Even though in *Bosmann* a non-contributory benefit was at issue, this seems to concern all social security branches, considering the general wording of the Court's finding that 'migrant workers must not lose the right to social security benefits or have the amount of those benefits reduced'.[52]

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

In light of *Bosmann* one could be of the opinion that, as a general rule, Union choice-of-law rules even those adopted under Article 81 TFEU that regulate cross-border relationships between private parties are subordinated to the principle of equal treatment on grounds of movement.[53] In particular, it could be 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.[54] This also in a certain way finds support, 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 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 Community instruments'.[55]

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[52] Jorens and Lhernould (eds), Think Tank Report 2008, p.26-27.

[53] The Treaty free movement provisions can be invoked in the context of the 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 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.

[54] Case 112/77 *August Töpfer & Co. GmbH v. Commission of the European Communities* [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 Wettbeweb eV v. Clinique Laboratoires SNC et Estée Lauder Cosmetic GmbH* [1994] ECR I-317, para. 12.

[55] Preamble 35 of the Rome II Regulation and Preamble 40 of the Rome I Regulation. Having said that, however, one might question whether the first part refers to the Treaty free movement provisions or the relevant Union secondary legislation. Furthermore, it is also questionable whether the last part concerns the substance of the provisions of the applicable law *designated* by this Regulation or their mere application in light of this Regulation.

3.2.1. Aim of Union choice-of-law rules adopted 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 ground of movement because of their effect in a specific case seems questionable. [?? Sentence structure??] To begin with, such an approach with regard to these rules seems 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 Community 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 or other relationship needs rules to guide it when entering into the relationship, when performing it, and when a dispute with another party threatens.[56] Having unified choice-of-law rules means that there is no need for parties to familiarise themselves with every national substantive law linked to the legal relationship at issue, but only the national substantive law that is declared applicable. Therefore, 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.[57] In other words, one might simply assume that the Court does not show enough respect to the choice made by the Union legislator.[58]

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[56] Hay, Lando and Rotunda, 'Conflicts of Laws as a Technique for Legal Integration', in Cappelletti et al (eds.), *Integration Through Law: Europe and American Federal Experience* (Walter de Gruyter, Berlin 1985), p.167.

[57] Dougan, 'Cross-educational mobility and the exportation of student financial assistance', 33 *European Law Review* (2009), p. 729.

[58] Van der Mei and Essers, 'Case C-352/06 *Brigitte Bosmann v Bundesagentur für Arbeit – Familienkasse Aachen* [2008] ECR I-3827', 46 *Common Market Law Review* (2009), p. 965. However, to what extent this should be the case seems to be 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, such a position taken by the Court is

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 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',[59] which, in turn, suggests that the fully-fledged harmonisation of national private (substantive) law rules can hardly be expected in the foreseeable future.[60] 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.[61] 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'[62] 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 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

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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.

[59] 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.

[60] Remien, 38 *Common Market Law Review* (2001), p. 64. See also, Watt, 'Experiences from Europe: Legal Diversity and the Internal Market', 39 *Texas International Law Journal* (2003-2004), p. 440-447. In the author's opinion, the full harmonisation of national substantive rules is not desirable.

[61] Hay, Lando and Rotunda, 'Conflicts of Laws as a Technique for Legal Integration', in Cappelletti et al (eds.), *Integration Through Law: Europe and American Federal Experience*, p.169.

[62] Article 288 TFEU.

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, taking into account not only the very aim of these rules, but also the so-called 'internal market requirement' stipulated in Article 81 TFEU.[63] 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 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.[64] This, in turn, suggests that these rules are indeed designed considering 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 provision of services is governed by the law of the country 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,[65] which is established since the *Cassis de Dijon* ruling.[66]

One might cast doubt on the relevance of this argument, arguing 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 mentioned earlier with regard to the relationship between secondary and primary Union law – i.e. the compliance with black-letter provisions of Union secondary legislation does not *per se* entail the compliance with the Treaty provisions. However, it is hard to believe that this approach could be applicable with regard to Union choice-of-law rules enshrined in Regulations adopted under Article 81 TFEU. To begin with, this approach has been established and so far mainly applied in the context of the cases concerning health care provisions and Union citizenship.[67] Therefore, it remains unclear whether it could be extended across a wider range of Union secondary measures.[68] Furthermore, in all those cases the issue related to a relationship between a private

[63] Dickinson, 'European Private International Law: Embracing New Horizons or Mourning the Past', 1 *Yearbook of Private International Law* (2005), p. 211.
[64] Ibid.
[65] See eg N. Bernard, *Multilevel Governance in the European Union*' (Kluwer Law International, The Hague 2002), p. 15-60.
[66] 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.
[67] 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 Yyonne Watts v. Bedford Primary Care Trust and Secretary of State for Health* [2006] ECR I-4325. With regard to Union citizenship, see eg 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.
[68] Dougan, 31 *European Law Review* (2006), p.640.

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 this approach as regards Union choice-of-law rules adopted under Article 81 TFEU would not only negate their objective, but also 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 the 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-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 based upon, 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.[69] Moreover, in the present context, the party is also unlikely to satisfy the

[69] In this respect, see the finding of 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 reiterated 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; Case 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 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 systems, 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 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, para. 51; Case C-444/05 *Aikaterini Stamatelaki v NPDD Organismos Asfaliseos Eleftheron Epangelmation* (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.

comparability test to trigger the equal treatment requirement.[70] Because of the system established by the Regulation enshrining unified choice-of-law rules in accordance with 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.[71] 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.[72] In addition, contrary to the reasoning given by AG Mazák, Mrs. Bosmann could claim a child benefit under German law similar to 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 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.[73]

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

In light of the arguments raised above, it is necessary to distinguish between Union choice-of-law rules adopted under Article 81 TFEU that regulate cross-border relationships between private parties and Union choice-of-law rules adopted under other Treaty provisions, for instance Article 48 TFEU, that deal with cross-border relationships involving a State and a private party. It is fair to argue that a different approach should be adopted with regard to the former.[74]

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[70] 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 justification process. See in this respect, Spaventa, *Free movement of persons in the European Union*, p.17.

[71] See eg Opinion of AG Mazák in Case C-352/06 *Brigitte Bosmann v Bundesagentur für Arbeit – Familienkasse Aachen* [2008] ECR I-3827, para. 80.

[72] In this respect, see eg the case-law mentioned in footnote 5.

[73] See eg Preamble 6 of the Rome I and Rome II Regulations.

[74] Bariatti, 'Restrictions resulting from the EC Treaty provisions for Brussels I and Rome I', in J Meeusen et al (eds.), *Enforcement of International Contracts in the European Union. Convergence and divergence between Brussels I and Rome I* (Intersentia, Antwerp 2004), p. 85. The author is of

Union choice-of-law rules adopted under Article 81 TFEU 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 the 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.[75] 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.[76] The acceptance of such a disadvantage in so far as a specific 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 State and a private party such as those enshrined in Regulation 883/2004. The situation with regard to these 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,

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the opinion that the notion of 'non-discrimination' would have to be construed in a different and more restrictive way when it sets limits to Union choice-of-law rules.

[75] 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 (superseded by 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) 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 Kretzchmar GmbH & Co. KG (WABAG) and Planungs- und Forschungsgesellschaft Dipl. Ing. W. Kretzschmar GmbH & KG (Plafog)* [2002] ECR I-1699, para. 24.

[76] 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 by objective circumstances such as the necessity of complying with the principle of legal certainty. With regard to the principle of legal certainty, see also, Joined Cases 205 to 215/82 *Deutsche Milchkontor GmbH and others v. Federal Republic of 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.

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 and conditions of employment'.[77] 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 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 and its exclusive effect were intended to provide certainty over the applicable national social security legislation, which served to the interests of migrant workers as well as Member States. 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 contributions.

4. Conclusion

This article sought to examine the relationship between Union choice-of-law rules adopted under Article 81 TFEU and the principle of equal treatment on grounds of movement enshrined in Article 18 TFEU and in the Treaty free movement provisions. In particular, it aimed to provide a solution for a possible conflict between them. The question discussed is whether the *Bosmann-esque* approach could be applicable with regard to Union choice-of-law rules adopted under Article 81 TFEU. In this respect, it is submitted that the latter and Union choice-of-law rules adopted under other Treaty provisions, for instance Article 48 TFEU, need to be distinguished. It is argued that the clear subordination of Union choice-of-law rules adopted under Article 81 TFEU to the principle of equal treatment on grounds of movement and, specifically, the applicability of the *Bosmann-esque* approach to these rules is questionable. 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 between private parties. Thus, 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 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 at a disadvantage. Despite this fact, it is doubtful whether such a disadvantage could trigger the equal treatment requirement and even if it is the case, it is reasonable to expect that these rules are justified in light of their aim.

[77] Case C-352/06 *Brigitte Bosmann v Bundesagentur für Arbeit – Familienkasse Aachen* [2008] ECR I-3827, para. 29-30. This is also enshrined in the Preamble to Regulation 883/2004.