THE G E O B L O C K I NG RE GULA TION A N D P AR TY AUTO NOMY IN THE CONFLICT O F L A W S A FORMALIST VIEW ON THE EUR OPEAN COURT OF JUSTI CE' S A P P R OACH TOWAR DS DIRECTING ACTIVITIES ON THE I N T E R N E T BY

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THE GEOBLOCKING REGULATION AND PARTY AUTONOMY IN THE CONFLICT OF LAWS

A FORMALIST VIEW ON THE EUROPEAN COURT OF JUSTICE'S APPROACH TOWARDS DIRECTING ACTIVITIES ON THE INTERNET

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1. INTRODUCTION*

The core of European Union law consists of rules supporting the creation of an internal market. Within the EU, people should have the freedom to roam freely across borders, and trade with each other with no more constraint than the 'invisible hand' of Adam Smith.[1] Many rules have been put into place, but not all rules take full account of the role internet plays in contemporary trading. More and more traders resort to the internet in order to promote their products or conclude contracts. As a consequence, a digital market emerges where consumers can shop from behind their computers. Having no territorial borders, the internet raises its own particular problems for free trade. These problems are the object of the EU's contemporary goal to establish a *digital* single market.[2]

One area of law in which the EU is active, is private international law, which considers the applicable law, the competent forum and the recognition and enforcement of foreign judgments in private law disputes. Consumer protection being an important goal of the EU,[3] special consumer rules are incorporated in the Brussels I Regulation (recast) (hereinafter BIR(r)), considering issues of jurisdiction, and the Rome I Regulation (hereinafter RIR), considering the applicable law to contractual obligations. More specifically, art. 17(1)(c) BIR(r) stipulates that contractual disputes between professionals and consumers should be heard in the forum of the consumer's domicile, if 'the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, *directs such activities* to that Member State or to several States including that Member State, and the contract falls within the scope of such activities'. Art. 6 RIR essentially gives the same conditions for the applicable law to consumer contracts.[4]

As a consequence of these rules, professional traders who frequently enter into cross-border business-to-consumer (B2C) relationships risk being subjugated to the law and jurisdiction of a plurality of Member States, resulting in legal uncertainty and high costs of legal expertise. Especially, professional traders are concerned about the element of 'directing activities'. Although they can control where they are situated and where they perform their contractual obligations – factors that are important in general private international law[5] –, they must beware of accidentally directing their activities to other Member States. The concept of 'directing activities' was interpreted by the European Court of Justice (hereinafter ECJ). More specifically, it had to clarify how the concept should be applied to websites. In *Pammer & Alpenhof* the ECJ established the need to establish whether the trader behind the website had the *intention* to direct its activities to another Member State.[6] If such intentions are not clear at first sight, the court must take a 'holistic' approach towards the trader's website. That is, a plurality of factors – a non-exhaustive list is given – should be taken into account when determining whether a website is directed to other Member States or not.[7]

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* This thesis was written for the Legal Research Master's at Utrecht University under the supervision of prof. mr. dr. X.E. Kramer. Mr. dr. E.A.G. van Schagen acted as second supervisor.

1 Barnard 2016, p. 4.

2 European Commission, 'A Digital Single Market Strategy for Europe', COM (2015) 192 final.

3 Artt. 12 and 169 TFEU, art. 38 CFR.

4 With the difference that art. 6 RIR refers to countries in general instead of Member States (due to the scope of the regulation), and to the country where the consumer has his *habitual residence* instead of the Member State of the consumer's *domicile*.

5 See para. 3.1.1.

6 ECJ 07-12-2010, Joined Cases C-585/08 and C-144/09, *Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v. Oliver Heller*, ECLI:EU:C:2010:740, paras. 69-75.

7 ECJ 07-12-2010, Joined Cases C-585/08 and C-144/09, *Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v. Oliver Heller*, ECLI:EU:C:2010:740, paras. 80-84, 92-94.

1.1. The Geoblocking Regulation

Given the difficulties mentioned above, professionals have a legitimate interest in avoiding the consumer protection rules in private international law. A choice of law (art. 3 RIR) and a choice of forum (art. 25 BIR(r)) in their contracts with consumers, however, does not help. Art. 6(2) RIR stipulates that the consumer cannot thus be deprived from the protection offered to him under the mandatory rules of the otherwise applicable law. Moreover, a choice of law in consumer contracts – and presumably a choice of forum as well – may constitute, according to the ECJ, an unfair term in the sense of art. 3(1) Directive 93/13.[8] The only way left is therefore to avoid the accusation of directing activities to foreign consumers' Member States. A popular means of doing so on the internet, is *geoblocking*, which allows professionals to close their websites from certain geographical areas. The impossibility for consumers from certain Member States to reach the professional's website clearly indicates that the professional did not intend to direct his business activities to their Member States.[9]

The possibility to use geoblocking, however, now comes to an end. Its use comes down to an obstacle to free trade, and consequently hinders the EU's objective of a digital single market. Geoblocking may help professionals in the private international law process, but clearly hinders consumers from making use of the benefits of the internal market.[10] For this reason, the EU legislator adopted the so-called *Geoblocking Regulation*, which addresses unjustified geoblocking and other forms of discrimination (hereinafter: geoblocking) based on customers' nationality, place of residence or place of establishment within the internal market.[11] In the regulation, companies acting in cross-border situations are forbidden to use discriminatory measures that may hinder potential customers from another EU Member State in concluding a contract with them.

1.2. The problem

Although the regulation may have positive effects on customers' access to the single market, legal commentators have criticised it for constituting a disproportionate breach of the principle of party autonomy[12] and for clashing with art. 6(1)(b) RIR and art. 17(1)(c) BIR(r).[13] Furthermore, the regulation would be difficult to enforce, as consumer authorities would not have enough resources to do so.[14] This research focuses on the first two of these issues, which are very much interrelated. Taken together they mainly concern the possibilities for traders to circumvent the factors leading to directedness mentioned in *Pammer and Alpenhof*.[15] Without the use of geoblocking, it becomes very difficult for traders to narrow down the scope of their activities on the internet and to determine beforehand with whom to do business and with whom not to do business. Their ability to evaluate the private-international-law risks involved in doing business then threatens to be undermined and their freedom of contract, which falls under the principle of party autonomy,[16] might become an empty shell.

The EU legislator recognised the problems that arise in private international law, and therefore included recital 13 and art. 1(6) in the Geoblocking Regulation. Accordingly, the regulation stresses that traders' compliance with its requirements 'shall not be construed as

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[8] ECJ 28-08-2016, C-191/15, *Verein für Konsumenteninformation v. Amazon EU*, ECLI:EU:C:2016:612, paras. 61-71; Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

[9] Sein 2017, p. 151; Hill 2008, pp. 145, 357-358; Asser/Kramer & Verhagen 10-III 2015/858.

[10] European Commission, 'A Digital Single Market Strategy for Europe', COM (2015) 192 final.

[11] Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC.

[12] Basedow 2016, pp. 641-642.

[13] Peschel 2016, pp. 194-199; Sein 2017, pp. 148-152.

[14] Sein 2017, pp. 153-157.

[15] Peschel 2016, p. 198; Sein 2017, p. 151.

[16] See para. 2.1.

implying that a trader directs activities to the Member State of the consumer's habitual residence or domicile within the meaning of [art. 6(1)(b) RIR and art. 17(1)(c) BIR(r)]'. However, commentators note that this reassurance misses the point of what is at stake. In stating that compliance with the Geoblocking Regulation may not be interpreted as directing activities to consumers' Member States, the article does no more than repeating the established rule that mere access to a website does not make that website directed to the Member State from which it is consulted.[17] As can be perceived from the following two situations, the problem for traders is more difficult than the EU legislator seems to think.

Firstly, consider the situation in which the trader focuses all of his business on only one state and therefore blocks foreign customers from entering his website. Here, the Geoblocking Regulation would force the trader to end his geoblocking practice, as a consequence of which he is submitted to a *de facto* obligation to accept the conclusion of contracts with foreign customers. The result is a restriction of his freedom to contract with whoever he wants,[18] and therefore – presumably[19] – a restriction of his party autonomy. As to the application of art. 17(1)(c) BIR(r) and art. 6(1)(b) RIR, however, there is enough reason to suppose that the European Court of Justice would not consider the trader's website to be directed to other Member States. In order to come to this conclusion, the activities of the trader should show the trader's intention to trade cross-border. As he clearly does not wish to do so at all, it is unlikely that the international factors mentioned in *Pammer and Alpenhof* are present on the trader's website. There is therefore enough reason to suppose that it can be interpreted as solely being directed to one Member State.[20] In this situation therefore the Geoblocking Regulation *does* obstruct the trader's freedom to concentrate his business within his own Member State, but there is *no problem* regarding the interpretation of the 'directed activity' criterion. For this reason, the trader can clearly foresee which law will be applicable and which courts are competent in an eventual dispute.

Secondly, consider the situation in which the trader wants to conduct business in only a specific selection of Member States. Just like in the situation mentioned above, the Geoblocking Regulation would force the trader to widen the scope of his business to permit customers from states outside the trader's selection to enter into contracts with him. With regard to the application of consumer private international law, however, the ECJ's interpretation techniques are presumably not sophisticated enough to unravel the specific intentions of the trader. His website does show the willingness to act cross-border, but it is difficult to interpret his website in a way that narrows down this willingness to certain Member States. Sein uses the example of an Estonian hotel focusing its business activities on the Baltic States, Finland and Sweden, but not having enough resources to finance translations of its website into all of these countries' languages.[21] Using the English language, international phone numbers and directions for arrival from abroad in order to reach this specific selection of states, and thereby advertising with reviews written by customers from several of these states, the hotel is – on the basis of *Pammer and Alpenhof* – taken to direct its business activity to all Member States. Potential means to avoid this conclusion are for the hotel to put a disclaimer on its website stating that it does not intend to direct its business activities to Member States other than the ones specifically selected, or to put in place drop-down menus in which customers should confirm their country of residence / domicile. Both however have their shortcomings – drop-down menus are no solution for websites that focus on advertising and therefore do not interact with visitors, and disclaimers do not protect the trader if not supported by an actual practice of hindering consumers from entering into contractual relationships with the trader – and therefore cannot fully replace

[17] This follows already from recital 24 RIR and ECJ 07-12-2010, Joined Cases C-585/08 and C-144/09, *Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v. Oliver Heller*, ECLI:EU:C:2010:740, para. 69.
[18] Basedow 2016, p. 642; Peschel 2016, p. 199.
[19] The distinction between freedom of contract and party autonomy is dealt with in para. 2.1.
[20] See ECJ 07-12-2010, Joined Cases C-585/08 and C-144/09, *Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v. Oliver Heller*, ECLI:EU:C:2010:740, paras. 75, 80-84.
[21] Sein 2017, p. 151.

geoblocking for the purpose of avoiding consumer private international law.[22] Furthermore, using drop-down menus or disclaimers to avoid contracting with consumers based on their domicile or place of residence would, just like geoblocking itself, amount to a breach of the principle of non-discrimination laid down in the Geoblocking Regulation. In this situation, therefore, the trader's party autonomy is arguably further restricted than in the one described above. Not only is the trader forced to enter into contracts with whoever may contact him; his contracts are also submitted to the laws and jurisdiction of all Member States.

In the second situation, moreover, the rationale underlying art. 17(1)(c) BIR(r) and art. 6(1)(b) RIR lies under threat. As the ECJ stated in *Pammer and Alpenhof*, the consumer protection offered by these provisions is not absolute.[23] The condition of a directed activity makes sure that the interests of the consumer are weighed against those of the trader who would otherwise be confronted with an unforeseeable amount of different contract laws. Nevertheless, the combination of a *de facto* obligation to contract and the resulting applicability of consumer private international law could change the 'directed activity' criterion into a rule that *does* breach party autonomy. Notwithstanding recital 13 and art. 1(6) therefore, the Geoblocking Regulation may result in a disbalance between the interests of the consumer and those of the trader. The 'directed activity' criterion may consequently be loosened from its underlying balancing rationale, as a consequence of which its application breaches the principle of party autonomy.

1.3. Research questions

The following research question is asked:

What are the consequences of the Geoblocking Regulation for the ECJ's approach towards the principle of party autonomy as laid down in the 'directed activity' criterion of art. 6(1)(b) RIR and art. 17(1)(c) BIR(r)?

As can be seen, the principle of party autonomy constitutes the question's main point of reference. This is justified on the basis of the problems identified above, which essentially revolve around exactly this principle. Given recital 13 and art. 1(6) of the Geoblocking Regulation, the goal is to find out how the Geoblocking Regulation should be reconciled with the private international legal framework in which it is to be incorporated, if party autonomy is to be upheld by the ECJ.[24] On the one hand, the Geoblocking Regulation must fit within this framework; on the other hand, it could steer the general framework into a new direction, as a consequence of which the current interpretation of the 'directed activity' criterion should be reconsidered in order to be in harmony with the ban on geoblocking. The following sub questions should be asked:

1. Which conception of party autonomy is laid down in the Charter of Fundamental Rights (CFR), more specifically in art. 16 CFR in its relation to art. 21 CFR, art. 38 CFR and the fundamental freedoms in the Treaty on the Functioning of the European Union (TFEU)?

2. Which conception of party autonomy is laid down in the Brussels I (recast) and Rome I Regulations?

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[22] Peschel 2016, pp. 196-197.

[23] ECJ 07-12-2010, Joined Cases C-585/08 and C-144/09, *Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v. Oliver Heller*, ECLI:EU:C:2010:740, paras. 70-71; Opinion AG Trstenjak 18-05-2010, Joined Cases C-585/08 and C-144/09, *Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v. Oliver Heller*, ECLI:EU:C:2010:740, para. 64.

[24] This goal leads to a partly prescriptive analysis. This is, however, not in contravention of the descriptive character of the research questions. See para. 1.4.

3. What is the role of party autonomy in the 'directed activity' criterion of art. 6 Rome I Regulation and art. 17 Brussels I Regulation recast, and its interpretation by the European Court of Justice (ECJ) in case law starting with Pammer & Alpenhof?[25]

4. What is the role of party autonomy in the Geoblocking Regulation?

Having discussed all sub questions, the main question can be answered whether and to what extent the Geoblocking Regulation fits the general legal framework of the EU, and how potential distortions in the balance between party autonomy and consumer protection should be restored.

In the following, chapters 2 to 5 focus on sub questions 1 to 4, after which chapter 6 tries to reconcile the Geoblocking Regulation with the 'directed activity' criterion in art. 17(1)(c) BIR(r) and art. 6(1)(b) RIR. A conclusion follows in which the main research question is answered.

1.4. Methodology

The main question of this research is descriptive. In order to answer it, however, regard should be had of the law's normative underpinnings. The research is done, therefore, from an 'internal perspective', that is, from the perspective of a participant of the legal system. This excludes the point of view taken by the so-called 'bad man', who takes an 'external perspective'. The 'bad man', that is, only studies legal arguments in order to predict how the judge will decide on his behaviour. He does not, therefore, *participate* in legal discussions.[26] From the theoretical point of view, an external perspective can lead to the conclusion that so-called 'hard cases', cases in which there is no clear cut solution to a legal question, can be solved by resorting to political decision-making.[27] Analyses from the internal perspective, on the other hand, are based on the belief that a final right answer to every legal question exists.[28] In the end, so-called 'hard cases' should be resolved by uncovering the law's underlying principles of justice, which then should be extrapolated to the issue at stake. Consequently, the issue at stake in this paper, which comes down to finding a new balance between legal rules, can only be solved by an internal perspective. More specifically, the relationship between the Geoblocking Regulation and the 'directed activity' criterion is analysed from the perspective of the principle of party autonomy. This is done by using *two theoretical frameworks*, which both pertain to at least one of the opposing laws that form the topic of this research.

The first theoretical framework concerns the position of party autonomy in EU law generally, that is in primary EU law. The focus lies on the Charter of Fundamental Rights, and more specifically art. 16 CFR, which lies down the freedom to conduct a business and is considered incorporating the principle of freedom of contract.[29] By focusing on legislation and case law, and analyses thereof in secondary literature, this first theoretical framework gives a positive-law view on the conception of party autonomy that should be applied to the relationship between the Geoblocking Regulation and artt. 17(1)(c) BIR(r) and 6(1)(b) RIR.

The second theoretical framework concerns the position of party autonomy in private international law. Although the BIR(r) and RIR are part of EU law, their origins are much older. The goal is therefore to reveal private international law's underlying rationale, which should in the end govern the application of the 'directed activity' criterion. Via a short excursion to the 'founding father' of contemporary European-continental private international law, Friedrich Carl von Savigny, the discussion arrives at the domain of legal theory, within which the theory of *legal*

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[25] ECJ 07-12-2010, Joined Cases C-585/08 and C-144/09, *Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v. Oliver Heller*, ECLI:EU:C:2010:740.
[26] See Shapiro 2006; Taekema 2011, pp. 39-49.
[27] See, e.g., Hart 2012, pp. 128-136.
[28] See Dworkin 2012.
[29] ECJ 22-01-2013, C-283/11, *Sky Österreich v. Österreichischer Rundfunk*, ECLI:EU:C:2013:28; ECJ 18-07-2013, C-426/11, *Alemo-Herron*, ECLI:EU:C:2013:521.

formalism is followed. It is this school in legal philosophy that has focused most on the importance and intricacies of an inner coherence in law, and therefore it is considered the theory that is most helpful in finding the right balance between the ban on geoblocking and consumer protection in private international law. Furthermore, legal formalism constitutes an apt theory by which to understand Savigny's writings, and therefore further clarifies the legal concepts that form the core of the BIR(r) and RIR.[30] In contemporary literature, the most influential work on formalism in the area of private law is that written by Ernest Weinrib.[31] Discussing the logical inner structures of private legal relationships, Weinrib shows how private law has its own distinct rationality, which can be summarised with Aristotle's concept of *corrective justice*.[32] Weinrib's elaboration of formalism is focused on private law generally, and more specifically on tort law. In order to use it as a standard by which to evaluate the position of party autonomy in private international law, therefore, the theory has to be worked out. This is done by a close analysis of the central concepts of private international law in light of formalism, and by analysis of further literature in the field.

After both theoretical frameworks have been worked out and the Geoblocking Regulation and 'directed activity' criterion have been discussed separately, chapter 6 focuses on the goal of reconciliation. Given the fact that use is made of two theoretical frameworks, there is need of a third one, which combines the former two and overcomes any clashes between them that may exist. This third theoretical framework is, again, formalism. It is not the formalism as worked out by Weinrib, but the one articulated by Lon Fuller.[33] In his work he addressed the importance of the rule of law, separated by him into eight desiderata, for the existence of law as such.[34] Thanks to Fuller's theory, the principle of party autonomy that follows from the Charter of Fundamental Rights is liberated from mere *political* principles,[35] and brought in line with the formalist principles of private law. The foundational principles underlying EU law generally and private international law specifically may then be reconciled, after which it should be possible to reconcile the specific rules laid down in the Geoblocking Regulation and artt. 6(1)(b) RIR and 17(1)(c) BIR(r). An answer to the main research question can then be given.

[30] See para. 3.3.
[31] See especially Weinrib 2012.
[32] See para. 3.3.1.
[33] For classifying Fuller under legal formalism, cf. Stone 2011, pp. 316, 335-337.
[34] Fuller 1969.
[35] See para. 2.5.

2. PARTY AUTONOMY AND THE CHARTER OF FUNDAMENTAL RIGHTS

2.1. Introduction

The implications of the Geoblocking Regulation on private international law centre around the principle of party autonomy. Effectually being forced to enter into contracts with consumers from abroad, traders cannot be said to be in control of their own business anymore. In other words: their freedom of contract is impaired. Basedow distinguishes five freedoms under this heading: the freedom to enter into a contract, the freedom to select a contractual partner, the freedom to determine the content of the contract – including type of performance, quantity, price and conditions –, the freedom of form and the freedom to amend existing contracts.[36] Under the Geoblocking Regulation, the first two are impaired. Simultaneously, the Regulation aims to support the right of consumers not to be discriminated and their freedom to roam throughout the entire EU. For this reason, the tension that was marked in the introduction comes down to a balance of several values. Party autonomy, it is argued here, constitutes the higher principle on the basis of which the values mentioned must be weighed.

Legal literature sometimes regards 'party autonomy' as a synonym for 'freedom of contract', but at other times distinguishes the two, putting party autonomy at a higher ranking in the hierarchy of norms than freedom of contract.[37] This research takes party autonomy to constitute the philosophical rationale underlying freedom of contract. Although Colombi Ciacchi favours 'a substantive understanding' of freedom of contract, by which she effectively equates freedom of contract with party autonomy,[38] this research follows the premise that party autonomy and freedom of contract should be distinguished for reasons of clarity. As regards the relationship with freedom of contract, it rejects the view, held by Nieuwenhuis, that freedom of contract is more fundamental than party autonomy. According to him, freedom of contract constitutes the principle that everyone is free to make his own choices in contract law, whereas party autonomy is the idea that explains the binding force of a contract. Without freedom of contract, he argues, party autonomy would be an empty shell, as it would not have a place in the legal order. For this reason freedom of contract is more fundamental than party autonomy.[39] Vranken and Keirse hold the opposite view that party autonomy is the most fundamental principle.[40] It constitutes the philosophical idea that every person is free to follow his own conception of 'the good'. Party autonomy therefore not only underlies contract law, but all of private law. Freedom of contract merely serves the higher-ranking principle of party autonomy by allowing parties to enter into contracts, determine their content, and so on. The discussion between Nieuwenhuis on the one hand and Keirse and Vranken on the other hand seems trivial: both essentially say the same, but reach different conclusions as to the nomenclature to be used. Nevertheless, the importance of the discussion can be perceived if one thinks of the position of notions such as weaker-party protection in general contract law. According to Nieuwenhuis' view, judicial intervention in contracts on the basis of weaker-party protection must be regarded as *exceptional* in the general system of contract law. At its basis, namely, lies the principle of freedom of contract, which gives, in the words of the French *Code Civil*,[41] 'force of law' to agreements between private parties. Following Keirse and Vranken, however, judicial intervention on the basis of weaker-party protection must be regarded as serving the principle of party autonomy that reigns over private law. It is therefore not an exception to, but the *consequence* of the structure of contract / private law. If, namely, private law is ultimately based on the principle that every

[36] Basedow 2008, pp. 905-907.
[37] Patti 2015, p. 124.
[38] See Colombi Ciacchi 2010, pp. 303-305.
[39] Nieuwenhuis 1979, p. 6.
[40] Vranken 2000, pp. 145-155; Keirse 2009, p. 108.
[41] Art. 1103 *Code Civil.*

individual should have an equal opportunity to lead life as he or she wishes, weaker party protection is a logical outcome.

Party autonomy, in short, constitutes the principle that everyone should be able to follow his own conception of 'the good'. It stipulates that everyone should be able to lead his or her own life according to the values he or she considers most relevant. It therefore abstracts from substantive notions of 'the good', and replaces them with a formal one. In other words, party autonomy can be regarded as a principle derived from the so-called 'thin theory of the good' that is liberalism.[42] Rules of weaker-party protection must then be viewed as instances of party autonomy that aim to uphold the equality in contractual relationships, so that each party can make a deliberate choice of what to agree upon. Freedom of contract remains, however, of central concern for party autonomy. In order to determine the specific conception of party autonomy that a legal system embraces, freedom of contract must be taken as a starting point. This position is supported by the fact that all Member States recognise the principle of freedom of contract, but differ in respect to the limits they set to it.[43] Uncovering the instances in which freedom of contract is restricted therefore leads to a specific conception of party autonomy. Paragraphs 2.2 to 2.4 employ this method to general EU law, and more specifically, to the Charter of Fundamental Rights. Paragraph 2.5 then analyses the results by seeing whether a clear conception of party autonomy can be discerned. In the following chapters, then, this conception can help to end the tension between the Geoblocking Regulation and the consumer rules in private international law.

2.2. Freedom of contract as a principle in EU law

The position of party autonomy in EU law can be investigated at the levels of primary and of secondary EU law. This chapter focuses on primary law, and more specifically on art. 16 CFR. As freedom of contract and its limits are of central concern, this paragraph and the following one are structured accordingly. This paragraph discusses how freedom of contract is recognised as a principle in EU law. Paragraph 2.3 then focuses on potential restrictions of freedom of contract.

2.2.1. Free movement and freedom of contract

As touched upon in the introduction, the focus of the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) is the development of the internal market. Most notably, this is done by protection of the 'four freedoms', upholding the free movement of persons, goods, services and capital. In *Dassonville*, the ECJ ruled on what is now art. 34 TFEU – the provision prohibiting domestic law to restrict the free movement of goods, whether quantitatively or in a manner equivalent to it –, and held that 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an equivalent effect to quantitative restrictions'.[44] For this reason, Member States have to observe the principle of mutual trust / mutual recognition, according to which they should trust other Member States to have taken control of regulating the entering on the market of goods, services, persons and capital.[45] Extra measures are, in principle, forbidden.

Drawing on these rules, which essentially promote the establishment of a European area of free trade, scholars have argued that freedom of contract forms the core of European law. Although the principle is not mentioned in EU legislation, it underlies it as a silent presupposition.[46] Without freedom of contract, private actors would not have a free choice as to whether, when and how to enter the market. Moreover, a lack of freedom of contract could take

[42] See Rawls 2005.
[43] Mak 2015, p. 9.
[44] ECJ 11-07-1974, 8/74, *Dassonville*, ECLI:EU:C:1974:82, para. 5.
[45] ECJ 20-02-1979, 120/78, *Cassis de Dijon*, ECLI:EU:C:1979:42.
[46] Basedow 2008, p. 907; Reich 2014, pp. 21-24; Leible 2011, pp. 29-30; Davies 2013, pp. 53-69.

away the freedom of choice as to which products private actors want to buy. If free trade is to be established, therefore, the legal system must be based on the liberal principle of freedom of contract.[47] Similarly one could argue that free movement law 'releases' contractual autonomy by enabling cross-border contracting.[48]

In case freedom of contract is perceived as entirely embraced by the TFEU's free movement provisions, its limits can be found in measures protecting the public interest. Art. 3(3) TEU stipulates that the EU must strive for a *social* market economy and the TFEU contains several openings for Member States to impose their domestic laws on private actors acting cross-border. If a Member State invokes an interest that is able to justifiably restrict free movement, the ECJ must strike a balance between the two, which it does on the basis of the so-called *Gebhard* test:[49]

> *It follows, however, from the Court's case law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.*

Gebhard shows that free-movement law applies the principles of non-discrimination and of proportionality in order to determine whether 'imperative requirements in the general interest' may trump free movement. Essentially, the ECJ strikes a balance between economic values on the one hand, i.e. the functioning of the internal market, and social values on the other hand. If freedom of contract is perceived as part of free movement, then, it can be restricted by Member States if the *Gebhard* criteria are met.

2.2.2. Recognition of freedom of contract

Still, it took until 1979 that the ECJ explicitly mentioned freedom of contract in its case law. In *Sukkerfabriken Nykobing*, it recognised the principle's existence in the EU.[50] It did however not elaborate on the principle's normative content. This was only done much later, in *Jean Neu*, in which the ECJ elaborated on the right to pursue a trade or profession as general principle of EU law, and concluded that this right includes the right to freely choose a business partner. For this reason the regulation under consideration had to be interpreted in light of this principle.[51] Subsequently, in *Automec*, it was stated that 'freedom of contract must remain the rule' and that the Commission therefore does not have 'the power to order a [private] party to enter into contractual relations'.[52] In *Spain v. Commission* the ECJ specifically affirmed the freedom to amendment:

> *It must be observed, first of all, that the right of parties to amend contracts concluded by them is based on the principle of contractual freedom and cannot, therefore, be limited in the absence of Community rules imposing specific restrictions in that regard.*
>
> *It follows that, provided that the purpose of the contractual amendment is not contrary to the objective pursued by the applicable Community rules and does not involve any risk of fraud, such an amendment cannot be regarded as unlawful.*[53]

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[47] Reich 2014, pp. 18-19.
[48] Weatherill 2016, p. 27.
[49] ECJ 30-11-1995, C-55/94, *Gebhard*, ECLI:EU:C:1995:411.
[50] ECJ 16-01-1979, C-151/78, *Sukkerfabriken Nykoebing Limiteret v. Ministry of Agriculture*, ECLI:EU:C:1979:4, paras. 19-20.
[51] ECJ 10-07-1991, Joined Cases C-90/90 and C-91/90, *Jean Neu*, ECLI:EU:C:1991:303, para. 13.
[52] ECJ 18-09-1992, T-24/90, *Automec*, ECLI:EU:T:1992:97, para. 51.
[53] ECJ 05-10-1999, C-240/97, *Spain v. Commission*, ECLI:EU:C:1999:479, paras. 99-100.

In *Werhof*, finally, the ECJ had recourse to the principle of freedom of association as laid down in art. 11 ECHR – and more specifically, the freedom *not* to associate – in order to interpret art. 3 Business Transfers Directive.[54] According to this article, business transferees were bound by collective agreements that existed at the moment of transfer. Considering the freedom of association as an instance of freedom of contract, but simultaneously acknowledging the Directive's goal to protect workers' interests, the ECJ ruled that later amendments to collective agreements did not necessarily bind the transferee.[55]

The case law discussed shows that, at least before the entry into force of the Charter of Fundamental Rights, the ECJ only referred to freedom of contract in order to interpret EU secondary legislation. The principle seems to have been recognised, but only very indirectly and subject to specific restrictions on the basis of EU law. With Basedow it can be argued that though the ECJ did not expressly recognise freedom of contract as a general principle of EU law, it may nevertheless have felt the need to fall back on general principles of private law in order to meet the demands that accompany the Europeanisation of private law.[56]

2.2.3. Freedom of contract in the Charter of Fundamental Rights

With the entry into force of the Treaty of Lisbon, legal force was given to the Charter of Fundamental Rights. Following art. 6(1) TEU it now has 'the same legal value as the Treaties'. Several of the rights enshrined in the Charter have been interpreted in legal doctrine to include aspects of the principle of party autonomy, and more specifically, the principle of freedom of contract. These are the general right to liberty and security of person (art. 6 CFR), the right to marry (art. 9 CFR), the freedom of assembly (art. 12 CFR), the freedom to choose an occupation and engage in work (art. 15 CFR), the freedom to conduct a business (art. 16 CFR) and the right to property (art. 17 CFR).[57] Nowadays, it is generally recognised that freedom of contract falls under art. 16 CFR. The Explanations to the Charter, which should – according to art. 6(2) TEU and art. 52(7) CFR – be taken into account when interpreting the Charter's specific provisions, already said so. According to the Explanations, art. 16 CFR contains three discrete rights: the freedom to exercise an economic or commercial activity, the freedom of contract and the freedom of competition.[58]

In *Sky Österreich* the ECJ clarified the principle of freedom of contract that falls under art. 16 CFR.[59] This case concerned Directive 2010/13/EU,[60] which gives broadcasters the right to broadcast short extracts of material exclusively owned by other broadcasters, if these extracts concern events of high interest to the public and are used for the purpose of short news reports. More specifically, the ECJ had to consider art. 15(6) of the Directive, which limits remuneration to broadcasters whose material is used to the additional costs directly incurred in providing access. Arguably, this rule contravenes art. 16 CFR, the right to conduct a business, and art. 17 CFR, the right to property.[61]

In its judgment, the ECJ held that freedom of contract under art. 16 CFR includes 'the freedom to choose with whom to do business' and 'the freedom to determine the price of a

[54] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.
[55] ECJ 09-03-2006, C-499/04, *Hans Werhof v. Freeway Traffic Systems*, ECLI:EU:C:2006:168, paras. 23, 32-37.
[56] Basedow 2008, p. 913.
[57] See Basedow 2008, pp. 908-909.
[58] Explanations relating to the Charter of Fundamental Rights, 2007/C303/02.
[59] ECJ 22-01-2013, C-283/11, *Sky Österreich v. Österreichischer Rundfunk*, ECLI:EU:C:2013:28.
[60] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).
[61] ECJ 22-01-2013, C-283/11, *Sky Österreich v. Österreichischer Rundfunk*, ECLI:EU:C:2013:28, paras. 20-24, 30.

service'.[62] Here we can recognise two of Basedow's elements of freedom of contract: the freedom to select a contractual partner and the freedom of content.[63] Although both of these are restricted by art. 15(6) of the Directive, the ECJ argues that freedom of contract is 'not absolute, but must be viewed in relation to its social function'.[64] Given art. 52(1) CFR, 'any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms and, in compliance with the principle of proportionality, must be necessary and actually meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others'.[65] In what follows, the ECJ holds that the Directive does 'not affect the core content of the freedom to conduct a business', as it does not 'prevent a business activity from being carried out as such by the holder of exclusive broadcasting rights'.[66] Furthermore, the principle of proportionality has been duly regarded, as the European legislator took into account the suitability and necessity of the Directive. More specifically the ECJ considers the balance that must be struck between artt. 16 and 11 CFR: the freedom to conduct a business on the one hand, the freedom to receive information and the freedom and pluralism of the media on the other hand. Accepting that the public interest pursued is enshrined in art. 11 CFR, the ECJ concludes that the Directive serves a legitimate aim. Again referring to the attention paid to the proportionality principle, the ECJ then holds that the Directive constitutes a justified restriction of the freedom to conduct a business.[67]

In *Alemo-Herron* the ECJ had to apply art. 16 CFR again. The case concerned the admissibility under art. 3(1) of the Acquired Rights Directive (2001/23/EC) of dynamic clauses referring to collective agreements.[68] The Directive concerns minimum harmonisation, meaning that the standard of protection under the Directive is only a minimum, which the Member States may extend to a higher level. *Werhof* had previously established that EU law did not give rise to an *obligation* to apply such dynamic clauses; in *Alemo-Herron* the question was whether EU law also *prohibited* the application of such clauses where they were enforceable under domestic law. More specifically, the employer that attacked the binding force of a dynamic clause had not negotiated the employment contract himself. He was the transferee of the business concerned. Essentially, therefore, the issue at stake was similar to the one in *Werhof*, in which the ECJ had recourse to freedom of contract in order to protect the interests of the employer.[69] In *Alemo-Herron*, the ECJ had to apply the Charter, which was not yet in force under *Werhof*, and had to consider the case in light of art. 16 CFR. Ruling on the issue, the ECJ stressed the importance of striking a balance between employers' and workers' rights under the Directive. Balancing the interests involved, the ECJ reasoned that the employer/transferee in the case did not have the opportunity to participate in the collective bargaining body that ruled on the contents of the collective agreement. 'In those circumstances, the transferee can neither assert its interests effectively in a contractual process nor negotiate the aspects determining changes in working conditions for its employees with a view to its future economic activity'.[70] Concluding, the binding force of the re-negotiated collective agreement on the employer/transferee would amount to a breach of the principle of freedom of contract, to the extent that he is deprived of the *very essence* of his freedom to conduct a business. The dynamic clause at stake was therefore not binding under EU law.[71]

According to Prassl, *Alemo-Herron* should be criticised for not striking a fair balance between employers' and workers' rights. Strikingly, he argues, the ECJ alleges that the Directive at

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[62] ECJ 22-01-2013, C-283/11, *Sky Österreich v. Österreichischer Rundfunk*, ECLI:EU:C:2013:28, para. 43.
[63] See para. 2.1.
[64] ECJ 22-01-2013, C-283/11, *Sky Österreich v. Österreichischer Rundfunk*, ECLI:EU:C:2013:28, para. 45.
[65] ECJ 22-01-2013, C-283/11, *Sky Österreich v. Österreichischer Rundfunk*, ECLI:EU:C:2013:28, para. 48.
[66] ECJ 22-01-2013, C-283/11, *Sky Österreich v. Österreichischer Rundfunk*, ECLI:EU:C:2013:28, para. 49.
[67] ECJ 22-01-2013, C-283/11, *Sky Österreich v. Österreichischer Rundfunk*, ECLI:EU:C:2013:28, paras. 49-68.
[68] ECJ 18-07-2013, C-426/11, *Alemo-Herron*, ECLI:EU:C:2013:521.
[69] ECJ 09-03-2006, C-499/04, *Hans Werhof v. Freeway Traffic Systems*, ECLI:EU:C:2006:168; see para. 2.2.2.
[70] ECJ 18-07-2013, C-426/11, *Alemo-Herron*, ECLI:EU:C:2013:521, para. 34.
[71] ECJ 18-07-2013, C-426/11, *Alemo-Herron*, ECLI:EU:C:2013:521, paras. 31-37.

issue is based on a balance in which the interests of both sides have equal value. When reading the preamble and considering the minimum-harmonisation nature of the Directive, however, it is obvious that the Directive one-sidedly aims to protect workers' rights. Case law may have evolved into a more balanced interpretation of the Directive over time, but *Alemo-Herron* constitutes, according to Prassl, 'a radical break with the existing regime'. The judgment is – in spite of the ECJ's emphasis on the Directive's internal balance – 'surprisingly one-sided', favouring the interests of the employer.[72] Also on a more abstract level, Prassl argues, the weight that is given to the principle of freedom of contract constitutes a break with previous case law. The ECJ's interpretation of art. 16 CFR is 'aggressive', and justifies 'the abrogation of employees' rights that breaks with well-established case law'.[73] Where *Viking* and *Laval* were already criticised for broadening the scope of the fundamental freedoms in a way that encroaches on fundamental social values,[74] *Alemo-Herron* goes a step further by applying the Charter in the same way.[75] According to Weatherill, *Alemo-Herron* threatens to 'grotesquely destabilise the long-established balance in EU secondary legislation between integration of markets and their regulation'. The case should therefore 'be treated as an aberration', which 'should not be relied on in future'.[76]

Comparing *Alemo-Herron* with *Sky Österreich*, it is remarkable how both cases mention the 'very essence' or 'core content' of the freedom to conduct a business.[77] What does this entail? In *Sky Österreich* it is referred to as the possibility to carry out a business activity as such. The obligation for a broadcaster to share some of its materials with broadcasters that need it in order to provide short news reports, does not amount to a restriction of this 'core content'. In *Alemo-Herron* however, the modification in a collective agreement to which the employer was bound, *did* constitute an encroachment on the 'very essence' of the freedom to conduct a business. Nevertheless, it cannot be said that the employer was entirely bypassed as a consequence of this modification: he could still have entered into negotiations with the employees in order to change the dynamic clause in the employment contract.[78] Furthermore, by becoming owner of the business he supposedly has accepted the applicability of the old employment contract, and therewith the dynamic clause referring to collective agreements. Strong arguments, in short, oppose the ECJ's judgment in *Alemo-Herron*, and it can be argued that the ECJ, though giving freedom of contract a strong status vis-à-vis primary free movement law,[79] unduly favoured a neo-liberal understanding of the internal market over the traditional ordo-liberal understanding.[80] If the approach in *Alemo-Herron* is followed, however, it results in a broadening of the scope of the 'essence' or 'core' of art. 16 CFR, as a consequence of which freedom of contract gets more weight in relation to weaker-party protection principles.

2.3. Restrictions of freedom of contract

2.3.1. Freedom of movement

Nevertheless, freedom of contract can sometimes contravene freedom of movement: private actors may conclude contracts by which they effectively restrict market access for other actors. The question is, therefore, whether the free-movement provisions in the TFEU have horizontal effect, that is, whether they can be applied in disputes between private parties. Following the

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[72] Prassl 2013, pp. 439-440.

[73] Prassl 2013, p. 441.

[74] ECJ 11-12-2007, C-438/05, *International Transport Workers' Federation v. Viking Line ABP (Viking)*, ECLI:EU:C:2007:772; ECJ 18-12-2007, C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet (Laval)*, ECLI:EU:C:2007:809. See para. 2.4.

[75] Prassl 2013, p. 441.

[76] Weatherill 2016, pp. 180-181, 233.

[77] ECJ 18-07-2013, C-426/11, *Alemo-Herron*, ECLI:EU:C:2013:521, para. 35; ECJ 22-01-2013, C-283/11, *Sky Österreich v. Österreichischer Rundfunk*, ECLI:EU:C:2013:28, para. 49.

[78] Prassl 2013, p. 443.

[79] See para. 2.4.1.

[80] Cf. Everson & Gonçalves 2014, pp. 456, 458-462.

ECJ's case law, the free-movement provisions of the TFEU do at least sometimes apply to horizontal relationships, and in so doing constitute restrictions on freedom of contract. In *Viking*, the ECJ held:[81]

> *that it is clear from its case-law that the abolition, as between Member States, of obstacles to freedom of movement for persons and freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise, by associations or organisations not governed by public law, of their legal autonomy.*

Free-movement law, or at least the free movement of persons and services, therefore seems entirely applicable to the conduct of private actors. *Angonese* is an example in which the principle of non-discrimination was applied.[82] In this case, an Italian bank could not require from its future employees to hand over a certificate of bilingualism, as the certificate could only be acquired in Bolzano, the city in which the bank was established.[83] Arguing on the basis of the principle of effectiveness, the ECJ held that the free movement of workers would be impaired were it not applicable to private parties. The ECJ concluded that a requirement as used by the bank indirectly discriminates between potential employees from different Member States, and therefore constitutes a derogation from art. 45 TFEU.[84] Although more cases, such as *Walrave & Koch* and *Bosman*,[85] underline the horizontal applicability of free-movement law, it is notable that the ECJ did not extend it to the area of free movement of goods. Both *Schmidberger* and *Sapod Audic* limited the application of art. 34 TFEU to vertical relationships.[86] *Fra.bo* suggests otherwise, as the ECJ here stipulated that a private organisation falls under art. 34 TFEU if it de facto regulates the market by state-authorised certification of products.[87] This judgment did extend the application of art. 34 TFEU to horizontal relationships, but has been interpreted not to give rise to a 'real' horizontal direct effect. Rather, it establishes that art. 34 TFEU applies to quasi public-law bodies.[88] *Fra.bo* therefore leads to 'extended vertical direct effect',[89] or at most 'limited horizontal direct effect'.[90] For this reason, the free movement of goods is regarded as an exception to the ECJ's tendency to apply free-movement rules horizontally: the free-movement provisions on workers, services and establishment all do have horizontal direct effect, and with regard to capital, legal doctrine assumes that the ECJ will accept such horizontal effect in future.[91] Bringing attention to this discrepancy between the application of the fundamental freedoms, Weatherill notes that 'the current system, whereby some freedoms have a broader personal scope than others, is very hard to justify'.[92] According to Mak, furthermore, the ECJ's arguments are not based on a clear 'meta-principle', by which it could resolve conflicts among the EU and domestic legal systems. It is therefore not clear why it puts emphasis on effectiveness when dealing with

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[81] ECJ 11-12-2007, C-438/05, *International Transport Workers' Federation v. Viking Line ABP (Viking)*, ECLI:EU:C:2007:772, para. 57; see also ECJ 18-12-2007, C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet (Laval)*, ECLI:EU:C:2007:809, para. 98.

[82] ECJ 06-06-2000, C-281/98, *Angonese*, ECLI:EU:C:2000:296; see also ECJ 17-07-2008, C-94/07, *Raccanelli*, ECLI:EU:C:2008:425.

[83] ECJ 06-06-2000, C-281/98, *Angonese*, ECLI:EU:C:2000:296, paras. 5-9.

[84] ECJ 06-06-2000, C-281/98, *Angonese*, ECLI:EU:C:2000:296, paras. 30-36, 45-46.

[85] ECJ 12-12-1974, 36/74, *Walrave & Koch*, ECLI:EU:C:1974:140; ECJ 15-12-1995, C-415/93, *Bosman*, ECLI:EU:C:1995:463.

[86] ECJ 12-06-2003, C-112/00, *Schmidberger*, ECLI:EU:C:2003:333; ECJ 06-06-2002, *Sapod Audic*, ECLI:EU:C:2002:343, para. 74.

[87] ECJ 12-07-2012, C-171/11, *Fra.bo*, ECLI:EU:C:2012:453, paras. 31-32.

[88] Cf. ECJ 12-12-1974, 36/74, *Walrave & Koch*, ECLI:EU:C:1974:140; ECJ 15-12-1995, C-415/93, *Bosman*, ECLI:EU:C:1995:463, considering the freedom of services (art. 56 TFEU) and workers (art. 45 TFEU).

[89] Barnard 2016, p. 233.

[90] Prechal & De Vries 2009, pp. 13, 22.

[91] Mak 2015, pp. 2-4.

[92] Weatherill 2013, p. 12; see also Weatherill 2016, p. 17.

the free movement of persons, services and capital, but is reluctant to do so in the case of free movement of goods.[93]

Davies tries to rationalise the case law, and contends that all cases concerned with horizontal application of general free-movement law can be analysed on the basis of a single distinction. On the one hand, there are cases in which private actors restrict free movement by way of contracting themselves. Applying free-movement law to such a case would amount to supervision of the content of a contract, or the 'contractual preferences' of private parties. On the other hand, private actors can restrict free movement by hindering *others* from freely contracting with each other. The actors subjugated to free-movement law then constitute third parties to an actual contract. Analysing the case law of the ECJ, Davies notes how the ECJ only interferes in horizontal relationships in case of the latter situation. As a consequence, the ECJ's application of primary free-movement law could be brought back to the principle of party autonomy, which sometimes interferes in horizontal relationships in order to ensure that everyone's freedom of contract is preserved.[94] The only exceptions Davies recognises, are the applications of free-movement law to contractual preferences in cases concerning public procurement and cases concerning labour law. The first of these exceptions is not surprising: de facto it is the state that is held accountable for free-movement restrictions. Application of primary free-movement law to labour disputes is more interesting. The *Angonese* case mentioned above is an example of this application. Davies refers to the specific needs of weaker-party protection in order to vindicate his claim that the case is an exception to the general rule that freedom of contract is preserved.[95] This argument is weak if one considers the amount of cases in which weaker-party protection may play a role: extensive restrictions of freedom of contract could all be argued away on this basis.[96] For this reason, freedom of contract and free movement cannot be said to overlap. Rather, they clash if private parties obstruct free movement.

2.3.1.1. Non-discrimination

Special attention should be devoted to the principle of non-discrimination. Above it was discussed that free-movement law in principle prohibits Member States to take measures that are liable to hinder the free movement of goods, services, persons and capital. In legal doctrine it is noted that this prohibition de facto amounts to a prohibition to discriminate between private actors on the basis of nationality, place of residence, domicile or place of establishment. If Member States require private actors to abide by local rules of production, namely, they effectively treat foreign actors differently from their own subjects. Having produced their product in their home states, importing actors already followed the rules of their home jurisdiction. The imposition of standards from other countries would then create a 'double burden', under which they must abide by the rules of two jurisdictions at the same time. In terms of the principle of non-discrimination, this is indirect discrimination.[97] In legal literature, therefore, non-discrimination is said to constitute the 'cornerstone of the four freedoms'.[98] Furthermore, the ECJ's mention of non-discrimination under the *Gebhard* test shows that it is an inherent part of free-movement law.[99]

Apart from free-movement law, non-discrimination also constitutes a value in itself. Although it serves the functioning of the internal market in the manner discussed above, the ECJ in *Defrenne II* held that the EU 'is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living

[93] Mak 2015, pp. 6, 10-11.
[94] Davies 2013, pp. 53-69.
[95] Davies 2013, pp. 65-66.
[96] Schepel 2013, p. 1220.
[97] Barnard 2016, pp. 18-19.
[98] Barnard 2016, pp. 18-19.
[99] See para. 2.2.1.

and working conditions of [its] peoples, as is emphasised by the Preamble to the Treaty'.[100] Conferring horizontal effect to the principle of non-discrimination as enshrined in the current art. 157 TFEU, the ECJ gave a social dimension to non-discrimination.[101] Freedom of contract, more specifically the freedom to select a contractual partner, can be heavily restricted by this principle.[102]

Especially *Mangold* and *Kücükdeveci* need mention here.[103] In these cases, the ECJ interpreted the principle of non-discrimination to constitute a general principle of EU law that could be applied horizontally, even if a case does not immediately fall under EU law. In *Mangold*, the ECJ had to interpret Directive 2000/78/EC on equal treatment in employment and occupation.[104] Although the implementation period of the Directive had not yet expired, the ECJ argued that it was based on the principle of non-discrimination that constitutes a general principle of EU law. In order to ensure the effectiveness of EU law therefore, this principle must be applied directly in horizontal relationships. The judgment was heavily criticised for disregarding the limits to the EU's competences. The Directive at issue, namely, was based on art. 19 TFEU, which does not have horizontal effect. The ECJ however used art. 19 TFEU to establish the existence of a general principle of non-discrimination and held that this principle should be applied horizontally. Mangold, the party that was discriminated against, did not have to rely on the Directive, but could immediately invoke its underlying principle. Constitutional concerns about direct horizontal effect of directives – which are directed at the Member States and therefore cannot be applied directly in horizontal disputes[105] – were therefore sidestepped.[106] Furthermore, the ECJ's reasoning made it redundant to implement secondary legislation considering non-discrimination into domestic law.[107] As is elaborated upon below,[108] however, the ECJ confirmed its ruling in *Kücükdeveci*, in which it relied on the then existing Charter of Fundamental Rights in order to ground the general principle of non-discrimination.[109]

2.3.1.2. Weaker-party protection

Another part of the establishment of an internal market and of free-movement law constitutes weaker-party protection. Harmonisation of social legislation supports free movement in the internal market, as it takes away domestic differences in this area of law that would otherwise constitute justified restrictions of free movement under the TFEU. Next to that it supports consumers' trust in the internal market and therewith encourages them to act cross-border. Simultaneously, weaker-party protection must be viewed from the viewpoint of the EU's goal to promote social values in the social market economy (art. 3(3) TEU). By emphasising the importance of this part of European integration, the EU hopes to avoid a social race to the bottom, which could ensue as a consequence of competition between Member States to attract businesses.[110]

In private law, the social side of EU law manifests itself in legislation concerning weaker-party protection. Secondary EU law, that is, regulations and directives, is therefore mostly mandatory in nature: private parties in principle cannot deviate from the rules laid down

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[100] ECJ 08-04-1976, 43/75, *Defrenne II*, ECLI:EU:C:1976:56, para. 10.
[101] Cf. Reich 2013, p. 253.
[102] See Storme 2007, pp. 247-250.
[103] ECJ 22-11-2005, C-144/04, *Mangold v. Helm*, ECLI:EU:C:2005:709; ECJ 19-01-2010, C-555/07, *Kücükdeveci*, ECLI:EU:C:2010:21.
[104] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.
[105] See, for instance, ECJ 14-07-1994, C-91/92, *Paola Faccini Dori v. Recreb Srl.*, ECLI:EU:C:1994:292.
[106] Weatherill 2013, pp. 22-24.
[107] Leible 2011, pp. 38-41.
[108] Para. 2.4.1.2.
[109] ECJ 19-01-2010, C-555/07, *Kücükdeveci*, ECLI:EU:C:2010:21.
[110] See Barnard 2016, pp. 27-28.

therein.[111] As regards the present research, it is important to note that weaker-party protection in secondary EU law *supports* general EU free-movement law, but simultaneously *constrains* the principle of freedom of contract. *Mangold* and *Kücükdeveci* already showed how directives constrain freedom of contract by giving rise to the application of general principles of EU law to horizontal relationships. Another reason for secondary legislation's restrictive nature can be found in its instrumental character. That is, the EU legislator adopts very specific legislation that aims to regulate specific issues in order to reach a certain goal. The resulting rules differ significantly from those under domestic private law, which find their origin in the old *ius commune* and hang together on the basis of an inherent structure in the legal system.[112] Instrumental legislation does not take regard of these old structures and regards private law as a means to reach certain pre-established goals. The result of this background of EU legislation is that it must be applied very strictly, without reference to the domestic system in which it is implemented.[113] Due to the principle of effectiveness, it is the *goal* of EU consumer protection law that is at the forefront of its interpretation, while its systematic interconnections with domestic private law are less important. Following such a teleological interpretation, the ECJ tends to a consumer-friendly interpretation of European consumer protection law. This means that consumers are regarded as people who lack insight into their own interests and therefore need a high level of protection. As is explained further down below,[114] this line of reasoning is not followed in case of *domestic* consumer protection due to its potential disruptions of the internal market.

An example of the strictness in EU consumer protection law that ensues from the principle of effectiveness, forms art. 25 of the Consumer Rights Directive.[115] Via this provision, the EU legislator prohibits consumers to waive their rights under the Directive. Normally, under domestic law, contractual relationships are scrutinised under notions such as 'good faith', leaving the judge a considerable amount of discretion to take into account the circumstances of the case and the grander system under which it must be judged. If, however, EU legislation categorically sets the standards to be applied, as is done in art. 25 Consumer Rights Directive, the judge loses this discretion. Even if the party who is protected by EU legislation expressly agrees to a waiver of his protection, the EU rules on unfair terms still stipulate that his consent is invalid.[116] EU legislation in this way tends to force judges to disregard principles of domestic private law, replacing a systematic interpretation with a teleological one. In so doing, it intervenes in the principle of freedom of contract in order that this principle fits the EU's 'economic constitution'.[117] By means of secondary legislation, the EU legislator favours the adoption of very specific rules above the use of general principles such as good faith. Only then can traders be sure of what to expect from the principle of party autonomy if crossing borders within the EU and are barriers to free movement truly taken away. The consequence, however, is that judges cannot take into account the specific circumstances of the case. Private actors are then forced categorically to abide by certain pre-established mandatory rules, even if this contravenes their express will. Freedom of contract, in short, is restricted.

2.4. Balancing free movement and freedom of contract

The above paragraph made clear that freedom of contract and free movement do not necessarily cohere. Rather, they may well clash with each other. If freedom of contract amounts to a

111 Basedow 2008, p. 909.
112 Michaels 2011, pp. 139-158.
113 See Smits 2012a, pp. 157-160; Smits 2012b, pp. 14-16; cf. Smits 2006, pp. 95-104; Basedow 2008, pp. 914-916.
114 See para. 6.2.
115 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.
116 Patti 2015, pp. 128-129.
117 Patti 2015, p. 126.

restriction of free movement, it is to be balanced under the *Gebhard* test. It is however difficult to conceive of a situation in which private actors can justify the barriers they impose on free trade by reference to 'imperative requirements in the public interest'. At this point, it is useful to recall the ECJ's recognition of freedom of contract as a principle in the EU legal order. In the case law discussed above,[118] the ECJ applied freedom of contract to interpret EU secondary legislation, but if it amounts to a general principle of EU law, it can well constitute an imperative requirement in the sense of *Gebhard*. When we look at the domestic laws of the Member States, freedom of contract is seen to have reached constitutional status.[119] What is more, the ECJ has recognised fundamental rights previously as justified restrictions of intra-Union trade. The cases *Schmidberger* and *Omega* provide valuable examples of this. *Schmidberger* concerned a 30 hours-lasting demonstration on the Brenner Motorway, causing a block of interstate traffic. According to the ECJ, Austria could rely on the fundamental rights of freedom of expression and freedom of assembly in order to justify its inaction regarding the block.[120] In *Omega*, the ECJ similarly accepted Germany's recourse to the right to human dignity on the basis of which it banned a company from offering the game of laser tag which involved the shooting at human targets.[121]

It is interesting to note that the Charter of Fundamental Rights had not yet taken force of law at the time of these cases. Austria and Germany could rely on the European Convention of Human Rights and their own national constitutions to invoke fundamental rights. The ECJ, in turn, accepted these rights to constitute general principles of EU law capable of independently justifying a restriction on free-movement law.[122] Being part of EU law, fundamental rights were *not* considered *domestic* derogations on free-movement law that must be scrutinised under the derogation provisions in the TFEU, and consequently they were interpreted more broadly than would have been the case under these Treaty provisions.[123] Given fundamental rights' classically high constitutional status, it would seem logical that the ECJ treats them as hierarchically superior to the EU's fundamental freedoms. Nevertheless, the ECJ did not go that far. It did, namely, apply the principle of proportionality in order to see whether the fundamental rights at stake could restrict free-movement law. In so doing, it emphasised the margin of discretion in which Member States may decide whether their measures are proportionate, thereby broadening the possibilities of restricting free-movement law.[124] Simultaneously it held that fundamental rights are not absolute, as they may be restricted in the public interest.[125] In short, the ECJ was on the one hand willing to allow Member States to invoke fundamental rights – constituting general principles of EU law – in order to restrict free movement, while on the other hand it also emphasised that fundamental rights can be restricted themselves. For this reason, the ECJ arguably applied the so-called *double proportionality test*, under which two standards with equal value can be weighed.[126] Following this test, the fundamental rights invoked by Austria and Germany had to meet the conditions established in *Gebhard* in order to be able to restrict freedom of movement. More specifically they had to meet the conditions of suitability and necessity, i.e. the principle of proportionality. On the other hand, the fundamental rights at issue were also protected by the principle of proportionality, which had to be applied in order to determine whether free-movement law could restrict the impact of these fundamental rights. Fundamental

118 Para. 2.2.2.
119 See Colombi Ciacchi 2010, pp. 303-318.
120 ECJ 12-06-2003, C-112/00, *Schmidberger*, ECLI:EU:C:2003:333; see Barnard 2016, pp. 154-155.
121 ECJ 14-10-2004, C-36/02, *Omega*, ECLI:EU:C:2004:614.
122 Barnard 2016, p. 155; see ECJ 17-12-1970, 11/70, *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114.
123 Schepel 2013, p. 1222.
124 ECJ 09-12-1997, C-265/95, *Commission v. France (Spanish Strawberries)*, ECLI:EU:C:1997:595, paras. 33-34; ECJ 14-10-2004, C-36/02, *Omega*, ECLI:EU:C:2004:614, para. 31.
125 Barnard 2016, p. 155.
126 Schepel 2013, pp. 1222-1223; Opinion AG Trstenjak 14-04-2010, C-271/08, *Commission v. Germany*, ECLI:EU:C:2010:183, paras. 190-195.

rights and fundamental freedoms thus reached an equal footing within the EU legal system and had to be balanced accordingly.

The situation changed under *Viking* and *Laval*.[127] In *Viking*, the ECJ ruled on the compatibility of the right to strike with free-movement law. In the case, a labour union rallied its partners to hinder Viking Line from reflagging a ship by way of which it could circumvent the obligation to pay its Estonian and Finnish employees equally. Rather than recognising the domestic recognition of the fundamental right to strike as a general principle of EU law, the ECJ applied the derogation provisions of the TFEU in order to see whether there was a legitimate restriction on the freedom of establishment (art. 49 TFEU). *Laval* constituted a similar case. Again, a labour union protested against the dealings of a company (Laval) acting cross-border that amounted to unequal pay. Laval argued that the protests amounted to a restriction of its freedom of services (art. 56 TFEU), which argument was approved of by the ECJ. In both judgments, therefore, the ECJ left the double proportionality test and returned to the old one-sided view on the matter from the side of free-movement law. Rather than giving the fundamental rights at stake the status of EU law, the ECJ regarded them as domestic restrictions on the free-movement provisions in the TFEU, and thereby as national public policy. Therefore, it did not ask whether free-movement law meets the proportionality threshold of the fundamental rights, but instead only focused on the question of whether the domestic fundamental rights meet the *Gebhard* test mentioned above.[128] In other words, one could say, the ECJ set aside *social principles* having an independent standing as fundamental rights in the domestic legal system in favour of the *economic principles* underlying the EU's legal system.

2.4.1. The balance of interests in the Charter

In *Viking* and *Laval* the ECJ returned to an approach in which the fundamental freedoms of the internal market were treated more favourably, as higher standards in the legal hierarchy, than fundamental rights recognised in the Member States. In the meantime, however, the Charter of Fundamental Rights has gained force of law. Although the ECJ has held that artt. 15 to 17 CFR did not change anything to the test of the fundamental freedoms,[129] it seems legitimate to argue that the fundamental rights recognised therein should have equal status with the fundamental freedoms, which would suggest a return to the double proportionality test. Furthermore, the Charter may well influence the status of the principle of non-discrimination and of weaker-party protection legislation, both being restrictions on freedom of contract. In artt. 21 and 38 CFR, namely, it stipulates the principle of non-discrimination and the objective of a high level of consumer protection. In order to determine the exact status of freedom of contract and the EU conception of party autonomy, this subparagraph focuses on the relationship between freedom of contract (art. 16 CFR), non-discrimination (art. 21 CFR) and consumer protection (art. 38 CFR) in the Charter of Fundamental Rights.

Further clarification of this relationship can be provided by closer analysis of the structure of the Charter. According to art. 52 CFR the provisions of the Charter should be separated into principles and rights. '[P]rinciples may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality' (art. 52(5) CFR). Principles therefore are dependent on further legislation by which they are implemented, and only serve as guidelines in the interpretation of this legislation. Rights, on the other hand, are

[127] ECJ 11-12-2007, C-438/05, *International Transport Workers' Federation v. Viking Line ABP (Viking)*, ECLI:EU:C:2007:772; ECJ 18-12-2007, C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet (Laval)*, ECLI:EU:C:2007:809.

[128] Schepel 2013, pp. 1221, 1223.

[129] Weatherill 2016, p. 13; ECJ 30-04-2014, Case C-390/12, *Pfleger*, ECLI:EU:C:2014:281, paras. 57-60.

enforceable directly if there is a connection with EU law (art. 51(1) CFR).[130] Some argue on the basis of the Charter's legislative history that the division between principles and rights follows the same lines as the classical human-rights division into positively-oriented social and economic rights on the one hand, and negatively-oriented civil and political rights on the other hand. Such a conclusion seems to follow from the fact that originally the Charter spoke of 'social principles' instead of 'principles'.[131] As regards freedom of contract, this would mean that it constitutes a right, as it is traditionally aimed at restricting the powers of government so as not to encroach on the dealings of private actors. Moreover, art. 16 CFR does not fall under the Charter's social-rights title.[132] On the other hand, art. 16's reference to 'Union law and national laws and practices' can be interpreted as bringing the provision under the heading of 'principle'.[133] Furthermore, the official Explanations make clear that the provision is based on the ECJ's prior case law,[134] which, as discussed above,[135] only referred to freedom of contract in the interpretation of secondary legislation. Up to *Sky Österreich*, moreover, the ECJ only referred to art. 16 CFR in combination with other provisions of the Charter, which suggests that art. 16 CFR did not have an independent standing.[136] Another possibility would be that art. 16 CFR includes both rights and principles: following the Explanations, a provision 'may contain both elements of a right and of a principle'.[137] The three elements of art. 16 CFR – i.e. freedom of contract, freedom to exercise an economic or commercial activity and the right to free competition[138] – must therefore be classified individually.

As to freedom of contract, the ECJ's ruling in *Sky Österreich* seems to have ended the discussion in favour of those who see it as a right.[139] The ECJ applied freedom of contract in a way as to give private actors an individual right that can be applied directly in order to set aside contravening EU law. Moreover, it was analysed as to contain two more specific freedoms: the freedom to choose whom to do business with and the freedom to determine the price of a service.[140] Such specificity of content would not be possible were freedom of contract a principle.[141] At least freedom of contract, therefore, should be interpreted as a right in the sense of art. 52 CFR. However, as the provision states that the freedom to conduct a business is only recognised 'in accordance with Community law and national laws and practices', it could still be called a 'weak right', subjugated to both European and domestic law. *Alemo-Herron* seems to have changed art. 16 CFR, or at least freedom of contract, into a 'strong right' on the basis of which domestic legislation can be evaluated. By contending that the legislation at issue touched the 'essence' of art. 16 CFR, the ECJ escaped the balancing test of art. 52(1) CFR which requires that '[a]ny limitation on the rights and freedoms recognised by this Charter must [...] respect the essence of those rights and freedoms. [...]'.[142] As a consequence, art. 16 CFR changed freedom of contract into a hard right that can be used to set aside legislation. The question of whether it

130 Everson & Gonçalves 2014, p. 444.
131 De Vries 2013, pp. 72, 86-87; Opinion AG Cruz Villalón 18-07-2013, C-176/12, *Association de médiation sociale*, ECLI:EU:C:2013:491, para. 49.
132 Cf. Opinion AG Cruz Villalón 18-07-2013, C-176/12, *Association de médiation sociale*, ECLI:EU:C:2013:491, para. 55.
133 Oliver 2013, p. 295; Everson & Gonçalves 2014, p. 444.
134 Explanations relating to the Charter of Fundamental Rights, 2007/C 303/02, p. 7.
135 Para. 2.2.2.
136 Oliver 2013, pp. 298-299; Groussot, Pétursson & Pierce 2014, pp. 15-16.
137 Explanations relating to the Charter of Fundamental Rights, 2007/C 303/02, p. 19.
138 See para. 2.2.3.
139 Oliver 2013, p. 295; cf. Everson & Gonçalves 2014, pp. 450-455, who argue that art. 16 CFR was already evolving into a 'quasi subjective right' before the ECJ's ruling in *Sky Österreich*.
140 ECJ 22-01-2013, C-283/11, *Sky Österreich v. Österreichischer Rundfunk*, ECLI:EU:C:2013:28, para. 43; cf. Basedow 2008, pp. 905-907.
141 Cf. Opinion AG Cruz Villalón 18-07-2013, C-176/12, *Association de médiation sociale*, ECLI:EU:C:2013:491, para. 54.
142 Bartl & Leone 2017, pp. 121-123.

affects the application of primary free-movement law in the sense that private actors imposing barriers on free trade can invoke their right to freedom of contract, still remains open.[143] As *Sky Österreich* showed, however, directives at least can be scrutinised as to their compatibility with art. 16 CFR. At this point, the value of weaker-party protection as laid down in art. 38 CFR comes into play.

2.4.1.1. Weaker-party protection

Art. 38 CFR stipulates that 'Union policies shall ensure a high level of consumer protection', and thereby elevates the EU's commitment to consumer protection to the level of fundamental rights. Nevertheless, the position of consumer protection in the Charter is considerably weaker than that of freedom of contract. Since art. 38 CFR lays down a mere objective to be achieved by further legislation, it cannot be a directly enforceable right. That is, it cannot – in contradistinction to art. 16 CFR – individually be relied upon by litigants.[144] It must therefore be a principle in the sense of art. 52 CFR, to be taken into account when interpreting EU law. As a consequence, art. 38 CFR cannot be used to set aside secondary legislation the way that is possible with art. 16 CFR. It *can* however be used to put more weight on the social dimension of secondary law if the latter is contested on the basis of art. 16 CFR. *McDonagh* was such a situation: the ECJ relied on art. 38 CFR in order to reject the claim, based on art. 16 CFR, that consumer protection in the Air Passengers Rights Regulation[145] should be interpreted narrowly.[146]

The role art. 38 CFR can play must not be overrated. Before the Charter was adopted, its role was fulfilled by art. 153 EC, whose contents are reaffirmed in the TFEU. More specifically, art. 169 TFEU stipulates the EU legislator's commitment to make legislation in the field of consumer protection, while art. 12 TFEU lays down that '[c]onsumer protection requirements shall be taken into account in defining and implementing other Union policies and activities'.[147] In practice, it was the principle of effectiveness that could play a role similar to that of art. 38 CFR. By emphasising the need to ensure 'full effectiveness' of secondary legislation, the ECJ tended to give a wide interpretation to the rules contained therein. As secondary legislation is mostly mandatory in nature and aims to protect social values,[148] this approach led to a strong position of weaker-party protection vis-à-vis free-movement law and freedom of contract. Considering this background, the adoption of art. 38 CFR does not add so much weight to the protection of weaker parties as art. 16 CFR does to freedom of contract. Because of art. 16 CFR, the ECJ cannot follow its old approach anymore, but must take into account the freedom to conduct a business.[149] *Alemo-Herron* shows that art. 16 CFR can play a central role in downplaying the importance of weaker-party protection under EU law.[150] Although the Directive at issue concerned minimum harmonisation, the domestic legislation that went further than necessary was tested as to its compliance with art. 16 CFR. The approach in *Alemo-Herron* is therefore questionable under art. 51(1) CFR, which stipulates that the Charter provisions are only addressed to the Member States 'when they are implementing Union law'. Arguably, the ECJ applied art. 16 CFR on the basis of the applicability of free-movement law, which scrutinises domestic law as to its compatibility with the internal market.[151] Another explanation could be that domestic 'gold plating' is expressly allowed by the Directive and therefore falls within the scope

[143] Leczykiewicz 2013, p. 182; see para. 2.4.1.2.
[144] Weatherill 2014, p. 1008.
[145] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91.
[146] ECJ 31-01-2013, C-12/11, *Denise McDonagh v. Ryanair Ltd*, ECLI:EU:C:2013:43.
[147] Weatherill 2014, pp. 1008-1010.
[148] See para. 2.3.1.2.
[149] Leczykiewicz 2013, pp. 178-182.
[150] See para. 2.2.3.
[151] See Bartl & Leone 2017, pp. 117-120.

of EU law.[152] In terms of weaker-party protection, freedom of contract seems to evolve into a principle that hampers the development of social legislation at the domestic level. Although the ECJ may have gone somewhat too far in this regard,[153] its understanding of art. 16 CFR as a 'hard right' to be protected against overly protective weaker-party legislation can be explained on the basis of the right-principle distinction of art. 52 CFR.

2.4.1.2. Non-discrimination

The principle of non-discrimination, which was discussed above as not only 'the cornerstone of the four freedoms', but also an independent principle of its own,[154] is now laid down in art. 21 CFR. Following *Kücükdeveci*, it has the ability to have horizontal effect.[155] In the case, the ECJ confirmed its ruling in *Mangold*, discussed above,[156] in which it recognised a general principle of non-discrimination that is directly applicable to horizontal relationships. In its affirmation, the ECJ referred to art. 21 CFR, which consequently obtained horizontal effect and could be used to extend the applicability of secondary legislation.[157] This approach is questionable, again, in light of art. 51(1) CFR. In both *Mangold* and *Kücükdeveci*, the implementation period of the non-discrimination directives at issue had not yet expired, and the directives could by their very nature only create obligations for the Member States. By disregarding the constitutional limits of the applicability of directives, the ECJ arguably abuses the mere existence of a non-discrimination directive in order to apply art. 21 CFR.[158]

Notwithstanding these constitutional concerns, the ECJ's approach suggests that art. 21 CFR constitutes a right in the sense of art. 52 CFR.[159] It can therefore be individually relied upon, that is, not only via the interpretation of secondary legislation. Given its equal status to art. 16 CFR, then, any appeal to freedom of contract in the interpretation of primary free-movement law between private parties can be countered by an appeal to the principle of non-discrimination. Its encroachment on freedom of contract therefore appears far-reaching. Nevertheless, the changes brought forward by art. 21 CFR must, just like those brought about by art. 38 CFR, not be overrated. Given the ECJ's approach in *Mangold*, non-discrimination already constituted a powerful principle before adoption of the Charter. In *Kücükdeveci* the ECJ merely mentioned art. 21 CFR in order to give an extra reason for the approach it had taken earlier. Freedom of contract, however, did not have such a firm basis before the Charter.[160] In their mutual relationship, therefore, freedom of contract has won in weight since the adoption of the Charter.

The question now is whether *Kücükdeveci* and *Alemo-Herron* lead to the conclusion that freedom of contract and non-discrimination rank equally in the hierarchy of norms. Within the Charter this seems the case. If one considers, however, that non-discrimination not only constitutes an independent right in the Charter, but also an inherent element of free-movement law, its relationship to freedom of contract depends on the way *Alemo-Herron* is explained. As said above,[161] it is still unclear whether freedom of contract can now be used to set aside free-movement considerations. If so, it would be superior to primary free-movement law and the principle of non-discrimination contained therein. At this moment, however, subjugation of primary free-movement rules to freedom of contract is improbable: given the ECJ's case law,

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[152] Cf. ECJ 29-01-2008, C-275/06, *Promusicae*, ECLI:EU:C:2008:54, para. 68, where the ECJ stated that Member States are bound by general principles of EU law in the implementation of directives, notwithstanding their discretion in defining implementation measures.

[153] See para. 2.2.3.

[154] See para. 2.3.1.1.

[155] ECJ 19-01-2010, C-555/07, *Kücükdeveci*, ECLI:EU:C:2010:21.

[156] Para. 2.3.1.1.

[157] Leible 2011, p. 41.

[158] Basedow 2008, p. 920; Weatherill 2013, pp. 22-24.

[159] However, according to Reich 2013, p. 254, art. 21 CFR is broadly formulated and needs 'to be transformed into legal "rights" by EU-legislation and court practice'.

[160] Para. 2.2.2.

[161] Para. 2.4.1.

primary free-movement law has – with the possible exception of the free movement of goods – horizontal direct effect. The ECJ is not likely to suddenly leave this approach, and the status of non-discrimination as a right under the Charter arguably strengthens free-movement law against potential invasions of the principle of freedom of contract. Freedom of contract and primary free-movement law should therefore be regarded as standing on an equal footing. In short, the ECJ's statement in *Sky Österreich* that freedom of contract is not absolute, is still valid after *Alemo-Herron*: with regard to primary free-movement law and the principle of non-discrimination contained therein, the ECJ should use the double proportionality test.

2.5. Party autonomy as a policy instrument

Above it was discussed that the conception of party autonomy at the EU level can only be investigated by focusing on the degree to which freedom of contract is restricted. It was held that party autonomy consists of a balance between the interests of private actors dealing with each other. Consequently, freedom of contract is only one part of party autonomy. Weaker-party protection and non-discrimination constitute another part. Only by clarifying the balance struck in the EU can we find the European principle of party autonomy.

Before adoption of the Charter, the principle of freedom of contract seems to have been recognised only indirectly: it could be deduced from general free-movement law and was used in the interpretation of secondary EU law. Ascribing an independent status to the principle would have to be done on the basis of *Schmidberger* and *Omega*. These cases showed that freedom of contract may have constitutional status in EU law in so far as it is recognised as a fundamental right in the constitutional traditions of the Member States. Having constitutional status in many Member States[162] and being presupposed by free movement law,[163] its recognition as a general principle with constitutional status seems logical. When restricting free movement, then, it escapes the narrow interpretation of the Treaty derogation provisions and must instead be balanced with the EU's fundamental freedoms under the double proportionality test.

The conclusion reached on the basis of *Schmidberger* and *Omega* appeared, however, incorrect in view of *Viking* and *Laval*. These cases have shown that freedom of contract may entirely lose its constitutional status if restricting free movement. It then rather constitutes domestic policy that must be tested according to the *Gebhard* criteria, including the principle of non-discrimination.[164] This approach towards freedom of contract matches the ECJ's case law in which it gave horizontal effect to primary free-movement law – at least in the areas of persons, services and capital. As a consequence, not only public, but also *private* restrictions of free movement are subjugated to the *Gebhard* test. Furthermore, non-discrimination, which also forms part of the *Gebhard* test, may nowadays even be conceived as restricting freedom of contract independently from the general free-movement provisions: it evolved into a *social* principle, which together with secondary legislation further limits the exercise of freedom of contract. In short: before the Charter was adopted, freedom of contract was only recognised on the condition that it did not obstruct the EU in reaching its goal of a 'social market economy' (art. 3(3) TEU).[165]

At first sight, the adoption of the Charter did not change the situation.[166] According to the ECJ, freedom of contract is not absolute, and art. 16 CFR expressly states that it may be restricted by EU or domestic law.[167] *Alemo-Herron* however showed that freedom of contract has been strengthened by the Charter. Stipulating the existence of an 'essence' of freedom of contract, the ECJ took away this part of art. 16 CFR from the balancing test of art. 52(1) CFR.

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[162] See Colombi Ciacchi 2010, pp. 303-318.

[163] Basedow 2008, p. 907.

[164] Schepel 2013, p. 1223; cf. Reich 2014, p. 26.

[165] Prassl argues that freedom of contract did not constitute a general principle of EU law at all. Rather, the image that arises from the ECJ's case law is that freedom of contract could readily be restricted by EU law. See Prassl 2013, p. 442.

[166] See Groussot, Pétursson & Pierce 2014, p. 4.

[167] ECJ 22-01-2013, C-283/11, *Sky Österreich v. Österreichischer Rundfunk*, ECLI:EU:C:2013:28, para. 45.

Weaker-party protection rules can now be scrutinised as to their compatibility with the 'essence' of freedom of contract, as a consequence of which the relationship between freedom of contract and weaker-party protection has been reversed by the Charter. As to free-movement law, the Charter established that freedom of contract is a principle that must be weighed according to the double proportionality test, and therefore does not fall under the approach of *Viking* and *Laval*.

In short, freedom of contract is not entirely incorporated by the fundamental freedoms of the EU. Rather, it constitutes an independent principle that may contravene free-movement law. On the one hand, freedom of contract is protected by EU law, whether as a general principle or as a right in the Charter of Fundamental Rights, but on the other hand it must follow the principle of proportionality with regard to the goals on which the EU is built. Freedom of contract and the goal of a fully functioning internal market are therefore to be balanced as equal-ranking principles.

2.5.1. Autonomy as a balance of principles

The ECJ's balancing exercise between principles is regarded by some as subjugating party autonomy to the EU's objective of a fully integrated social market economy. Party autonomy is moulded to fit, and consequently dependent on, the EU's policy agenda. Comparato and Micklitz speak of the 'marketisation of autonomy', which serves the EU's 'economic constitution'.[168] Reich similarly argues that 'autonomy and its corollary, freedom of contract, are "framed" by EU civil law by being both guaranteed and limited'. Competition law, weaker-party protection and the principle of non-discrimination constitute the limitations that make party autonomy subservient to EU goals.[169] These goals however do not give clear principles by which the ECJ can decide cases. Weatherill, equalising freedom of contract with party autonomy, argues that the case law of the ECJ 'contains anxieties about the possible damaging effect that it may exert on private autonomy, but that they are unsystematically expressed'. Party autonomy therefore has, in his eyes, an elusive character.[170]

The uncertainties about the exact content of party autonomy can be explained on the basis of the ECJ's goal-oriented reasoning. When the focus lies on policy goals, the balance between freedom of contract and its limits cannot be struck in an abstract manner. In each individual case, the balance must be struck again on the basis of the circumstances of the case. In this regard, Schepel draws attention to two developments in European private law, which removes the debate from private-law discourse to public-law or fundamental-rights discourse.[171] On the one hand, he notices the 'privatisation of constitutional law': private-law concepts such as freedom of contract get a constitutional status as fundamental principles of EU law. On the other hand, he mentions the 'constitutionalisation of private law': traditional fundamental rights, such as the right to non-discrimination, are applied horizontally and become standards to be applied in private-law disputes.[172] These opposite directions of European private law illustrate how the focus lies more and more on the balancing of abstract principles that rank equally in the hierarchy of norms. The nature of these principles can be clarified by Dworkin's distinction between rules and principles.[173] According to him, '[r]ules are applicable in an all-or-nothing fashion. If the facts

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[168] Comparato & Micklitz 2013, pp. 122-123, 127-128; see also Comparato 2016, pp. 623-624; Everson & Gonçalves 2014, pp. 441-442, 446-448.

[169] Reich 2014, pp. 20-21.

[170] See Weatherill 2013, pp. 9-27.

[171] Schepel 2013, pp. 1211-1229; cf. Cherednychenko 2004, p. 61; Cherednychenko 2007, pp. 553-557. Here it must be noted that the historical origins of the European principle of party autonomy lie in the area of vertical relationships: both in the earlier case law under primary free-movement law and under the Charter it is applied to the validity and interpretation of EU legislation. For this reason, it may well have derived its character from public-law reasoning.

[172] Cf. Leible 2011, pp. 36-37, who argues that public-law principles such as non-discrimination should, when practice so requires, be incorporated in private-law thinking in order to accommodate them to their new, horizontal, environment.

[173] Adar & Sirena 2015, p. 20; Groussot, Pétursson & Pierce 2014, pp. 16-17.

a rule stipulates are given, either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision'.[174] Principles, on the other hand, cannot be applied in this fashion, but rather 'state reason[s] that argue in one direction' with regard to the application of rules, 'but do[..] not necessitate a particular decision'.[175] If various principles must be weighed against each other, according to Dworkin, the judge should look for a higher principle that unifies the lower-ranking clashing principles. The act of interpretation of clashing principles comes down to an exercise in which the interpreter tries to show the legal system in its best light, that is, as a unity.[176]

Dworkinian principles are coloured by political preferences, and the ECJ may have used *Alemo-Herron* to give more importance to freedom of contract vis-à-vis free-movement law.[177] On the one hand, then, art. 16's strengthening of freedom of contract can be seen as a move away from 'marketisation'. On the other hand, it can also be seen as forming part of a 'liberating strand' of the ECJ's case law favouring economic principles over social ones.[178] *Alemo-Herron* therefore has a dual meaning in terms of its underlying political rationale. Still, therefore, the ECJ does not – and possibly cannot – articulate an abstract principle on the basis of which freedom of contract and free movement are to be weighed. Although general principles of EU law exist,[179] Weatherill's concerns remain true as a consequence of the absence of a 'clearly recognisable and widely accepted coordinating meta-principle'.[180] Removing the debate from private-law to public-law discourse, in short, is likely to undermine legal certainty.[181]

2.6. Conclusion

Eventually this research aims to show which consequences the Geoblocking Regulation has for the ECJ's approach towards the principle of party autonomy that is laid down in art. 17(1)(c) BIR(r) and art. 6(1)(b) RIR. Given the importance of understanding the EU principle of party autonomy, then, this chapter focused on its status in the CFR and more generally in free-movement law. In so doing, it started from the premise that party autonomy can best be understood in terms of balancing. Discussing its development made clear that this balance is uncertain, since the underlying principles are very much dependent on the EU's policy goals, or at least are interpreted in that way by the ECJ. At least one conclusion about hierarchy may however be drawn: with the introduction of the Charter, the hierarchy between weaker-party protection and freedom of contract has been reversed. Whilst weaker-party protection is only included as a principle in the sense of art. 52 CFR, freedom of contract is a right. Following *Alemo-Herron*, freedom of contract cannot be balanced with weaker-party protection if its 'essence' is at stake. Non-discrimination constitutes a different matter: as a right in the sense of art. 52 CFR, it ranks equally to freedom of contract.

In the following, the discussion continues with a focus on private international law. Revealing its formalist underpinnings in the end helps to determine how the Charter should be applied to private international law. Only when that is made clear can the right balance of interests be found between the Geoblocking Regulation and the 'directed activity' criterion of art. 17(1)(c) BIR(r) and art. 6(1)(b) RIR, and consequently the main research question be answered.

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[174] Dworkin 2013, pp. 40-41.
[175] Dworkin 2013, p. 42.
[176] Dworkin 2012, p. 52.
[177] Groussot, Pétursson & Pierce 2014, p. 10; cf. Everson & Gonçalves 2014, p. 449.
[178] Cf. Everson & Gonçalves 2014, p. 461.
[179] See Mak 2012, pp. 323-346.
[180] Mak 2015, p. 11; see para. 2.3.1.
[181] Schepel 2013, pp. 1228-1229.

3. PARTY AUTONOMY IN EUROPEAN PRIVATE INTERNATIONAL LAW

The previous chapter dealt with general EU law and made clear what status the principle of party autonomy has in it. Discussing the principle as a balance between freedom of contract and other, countervailing interests, it became clear that party autonomy is subjugated to the goal of establishing an internal market. Its core idea, freedom of contract, has an ambiguous relationship with the internal market. On the one hand, traders should be free to pursue their goals in the internal market, but on the other hand their actions may not result in obstructions to the four freedoms of the internal market. Party autonomy is 'framed' by public goals: private law relationships are not only judged on the basis of private parties' mutual relationships, but on the basis of the interests of society in general.

Leaving the realm of general EU law, this chapter focuses on party autonomy in European private international law. Firstly it examines the general system that is codified in the RIR and BIR(r). During the discussion, the focus gradually changes into a more theoretical one in which the theoretical underpinnings of contemporary private international law are discussed. Paragraph 3.3 then delves into the theory of legal formalism, by which the 'Savignian' underpinnings of the regulations can be analysed more thoroughly. In so doing, it becomes clear which conception of party autonomy underlies the field, and consequently according to which rules contemporary developments in weaker-party protection should be judged in order to uphold that conception. As will be revealed later, the 'marketisation' of party autonomy under art. 16 CFR should be rejected in private international law, and any application of art. 16 CFR to the field should be balanced with the principles derived from formalism. Paragraph 6.3 will eventually come to a discussion of how this reconciliation should take place. For now, the focus is on party autonomy in European private international law.

3.1. Party autonomy in EU private international law

Party autonomy in this research is regarded as freedom of contract plus its limitations. In European private international law this distinction between freedom of contract and its limitations is clearly visible. On the one hand, contracting parties are free to agree on the forum and the law applicable to their relationship, based on the principle of freedom of contract, while on the other hand the scope of this freedom is limited by law. Both the RIR and BIR(r) give primacy to the will of the parties: private parties can stipulate by agreement that their contract is governed by a certain law (art. 3 RIR) and that eventual disputes should be subjugated to the jurisdiction of a certain forum (art. 25 BIR(r)). Such an agreement can be made explicitly or implicitly; that is, sometimes it has to be inferred from the circumstances of the case.[182] Historically, the opportunity of a choice of law or forum is not self-evident. Its recognition only took place during the 20th century, and countries in Latin America, for instance, still do not recognise private parties' power to establish the applicable law or competent forum.[183] In the EU, the possibility of a choice of law is recognised in two different forms: on the one hand, parties can make a so-called primary choice of law. Such a choice sets aside the law that would otherwise be applicable and replaces it with the law chosen by the parties. On the other hand, there is the so-called secondary choice of law, by which parties only set aside the default rules of the applicable law.[184] This possibility is the one that parties have in, for instance, consumer contracts (art. 6(2) RIR).

As parties may designate the forum that should be competent and the law that is applicable, party autonomy is regarded as the leading principle governing European private international law.[185] In general, the principle of party autonomy is referred to as the idea that the

[182] Rogerson 2014, pp. 302-305.
[183] Kramer & Themeli 2017, pp. 33-34; Basedow 2011, pp. 34-36.
[184] Asser/Vonken 10-I 2013/225.
[185] Kroll-Ludwigs 2013, p. 155; recital 11 RIR.

subjective connecting factor of an express choice of law / forum is the starting point, while recourse to so-called *objective* connecting factors comes second. Although party autonomy thus conceived has been called a *Verlegenheitslösung*, or 'stopgap', it has developed into private international law's governing principle, and scholars debate over its proper theoretical foundation.[186] In order to explain the primacy of the will of the parties, contemporary literature refers to four justifying factors.[187] Firstly, it seems logical to extrapolate the domestic principle of freedom of contract to the international sphere. It ensures that private parties are free to regulate their mutual dealings in the way they want. Nevertheless, this argument cannot explain on itself how parties could choose the law by which they are governed: rather, one could argue, their freedom of contract only exists under a legal regime by which it is enforced, and is therefore limited by law. Here, the second factor comes into play: on the international level, states are limited in their possibilities to regulate the conduct of their subjects. This follows from the fact that states do not have jurisdiction over the territory of another country. As a consequence, private parties *de facto* already have the opportunity to circumvent the law of a particular country: they can just travel cross-border and subject their dealings to the jurisdiction and law of another state. The third factor concerns the balance that states should find between their respective acts of sovereignty. That is, in international dealings, states must recognise that their sovereignty may clash with the sovereignty of other states. A certain degree of recognition of foreign law and of the competence of foreign courts is therefore necessary. With regard to party autonomy in private international law, this means that the will of the parties arguably plays a larger role on the international plane than on the national one. The fourth factor concerns legal certainty and efficiency. The uncertainties that may arise as a consequence of the complexity of objective connecting factors are mitigated when parties can freely deviate from them, while simultaneously law and economics literature suggests that a free choice of law promotes the efficiency of the market.[188]

3.1.1. Objective connecting factors

If no choice is made, the RIR and BIR(r) take recourse to so-called objective connecting factors, which stipulate which forum has jurisdiction and which law is applicable to specific types of disputes. The idea underlying these objective connecting factors is that private international law is neutral vis-à-vis the outcome in the substantive case. Rather than directing a case to a certain forum or applicable law in order to attain a certain type of outcome, objective connecting factors are based on, indeed, an 'objective' analysis of the dispute.[189]

In general, contractual relationships within the EU are governed by the law of the country of the 'characteristic performer',[190] and fall under the jurisdiction of the defendant's Member State.[191] Both rules are justified by a balance of interests. As regards choice of law, reference to the law of the country of the characteristic performer can be explained by the fact that the characteristic performer usually enters into a wide array of contracts. The customer, on the other hand, only enters into one: the specific contract concluded with the performer. Balancing the interests, the European legislator considers it important to avoid the situation in which companies – the usual characteristic performers – are subjugated to a great amount of domestic laws, as a consequence of which they are deterred from doing business at all. Moreover, the EU legislator wants to give the party that is considered performing the most complex part of a contract the benefit of that party's own law.[192] From the perspective of legal certainty it is also important to consider that generally the customer goes to a provider of services or products

[186] Asser/Vonken 10-I 2013/226; Maultzsch 2016, pp. 476-477; Bens 2018.
[187] Kuipers 2012, pp. 48-51.
[188] See also Kramer & Themeli 2017, p. 32; Asser/Vonken 10-I 2013/226.
[189] See para. 3.2.
[190] Artt. 4(1) and (2) RIR.
[191] Artt. 4 BIR(r).
[192] Rogerson 2014, p. 307.

instead of the other way around. The customer can therefore foresee the kind of contractual relationship he is about to enter into, whereas the characteristic performer cannot. For these reasons, it is justified to apply the law of the country of the characteristic performer. As regards jurisdiction, similar considerations play a role: the claimant chooses to sue a particular defendant, but the defendant does not choose to be sued by this particular claimant. Again, on the basis of legal certainty it is justified to make the defendant's Member State competent to hear the case.

These rules are no more than starting positions. That is, there are situations in which it is justified to deviate from the main rules. One of these is, under art. 7(1) BIR(r), the situation in which the contract is performed in another Member State than the one in which the performer/defendant is situated. In such a case, the judge of the place of performance is competent to hear the case as well. Again, the principle of legal certainty can be invoked to justify this. Just like the above rules, the contracting parties are treated as equals whose interests are given equal weight. The place of performance is, just like the place where the characteristic performer/defendant is situated, an *objective* connecting factor that abstracts from the substantive issues of the case.

3.1.2. Protective connecting factors

Objective connecting factors can, again, be derogated from by so-called *protective* connecting factors. Such connecting factors form a subgroup of objective connecting factors, but are no longer truly 'objective'. Instead of abstracting from the facts of the case, they take into account substantive issues and on the basis of this guide a case towards a certain substantive outcome.[193] Consumer law constitutes an example. In business-to-consumer (hereinafter B2C) relationships, the main rules formulated above would generally benefit the professional trader who enters into contracts with consumers. He is the characteristic performer, and being so he is most often the defendant in case of a dispute. According to the general rules, therefore, the trader has the benefits of home jurisdiction and his acts being governed by the law of his own Member State. In order to protect the consumer, who is the weaker party vis-à-vis the professional trader, and given the EU's goals of achieving a high standard of consumer protection (art. 38 CFR), special rules of private international law apply in this case. If in B2C relationships certain criteria are met, it is the consumer's Member State that has jurisdiction or whose law must be applied. This consumer privilege is regulated by artt. 6 RIR and 17 et seq. BIR(r).

3.2. Party autonomy and connecting factors

Above it was said that scholars regard party autonomy as the governing principle of private international law. How, then, do objective and protective connecting factors fit within this image? The idea of objective connecting factors can be traced back to the nineteenth century, when older theories focusing on the scope of statutes were increasingly called into question. More specifically, the work of Friedrich Carl von Savigny (1779-1861) has had a great influence on the development of private international law and on the introduction of objective connecting factors. In book eight of his *System des heutigen Römischen Rechts* he contested the then common conviction that private international law is based on the principle of sovereignty.[194] Older authors had argued that the problems of private international law essentially concerned the relationship between states. Consequently, it was the principle of comity on the basis of which they explained private international law: as states should have a certain degree of respect for the sovereignty of other states, they cannot automatically assume jurisdiction and apply the *lex fori*.[195] Rather, they should recognise the right of other states to regulate the conduct of their subordinates in certain

[193] See Van Bochove & Kramer 2010.
[194] Von Savigny 1849.
[195] Asser/Vonken 10-I 2013/283-284; Peari 2014, pp. 113-114.

situations. The task of lawyers, then, was to classify laws into categories that clarify their territorial scope.[196]

Rejecting this notion, Savigny argued that the applicable law to a certain case – the *lex causae* – should be found on the basis of the 'objective' *Sitz* of the legal relationship at issue. The goal is to establish

> *daß bei jedem Rechtsverhältniß dasjenige Rechtsgebiet aufgesucht werde, welchem dieses Rechtsverhältniß seiner eigenthümlicher Natur nach angehört oder unterworfen ist (worin dasselbe seinen Sitz hat).*[197]

On the basis of the nature of the legal relationship at issue, for instance, property law is governed by the *lex situs* and contract law by the law of the place of performance.[198] In literature Savigny's theory has been regarded as a 'copernican revolution'. Though contested, it could be argued that Savigny turns the old focus on the territorial scope of a legal rule upside down by focusing on the legal relationship between the litigating parties.[199] His goal was to establish a *universal* theory of private international law that ensured an international harmony of solutions.[200] The outcomes should therefore be established objectively, that is, in a way that everyone can agree to.

Savigny's notion of objectivity seems to leave only a minor role for party autonomy: the applicable law is found on the basis of an academic analysis of the dispute under consideration instead of the will of the parties. Also in contemporary private international law, if the parties to a dispute have not selected the law applicable to the dispute or the forum that has jurisdiction, a selection must be made on 'objective' grounds. The conclusion that seems to follow, is that party autonomy is only the starting point, but must be set aside if parties do not make use of it. This view on objective connecting factors is not correct if one may believe Savigny's own contentions on the matter. In fact, he argued that the will of the parties is central to his theory: it is the *Herzstück*, core idea, of it.[201] Considering the applicable law in property law cases, Savigny argues that the applicability of the *lex situs* is based, just like the applicability of the *lex domicilii* in other cases, on the principle of 'voluntary submission':

> *Wer an einer Sache ein Recht erwerben, haben, ausüben will, begiebt sich zu diesem Zweck an ihren Ort und unterwirft sich freiwillig für dieses einzelne Rechtsverhältniß dem in diesem Gebiet herrschenden örtlichen Recht.*[202]

Savigny's focus on the will of the parties suggests a first explanation of why objective connecting factors are neutral vis-à-vis the substantive norms of the *lex causae*. Focusing on the autonomy of individuals, private law is regarded as an area of law that allows private parties to lead their lives according to their own choices. It regulates private parties' behaviour only in so far as is necessary to uphold the freedom of each individual. In private international law this means that the selection of an applicable substantive law is only necessary to establish a framework in which parties can act freely. The applicable law is not regarded as an instrument for public policy goals, and the state does not have an interest to apply one law rather than the other. Furthermore, based on the idea of 'voluntary submission' underlying private international law, it can be argued that the idea of objective connecting factors is based on the principle of foreseeability: if private parties can reasonably foresee which law will govern their dispute, they can rationally adapt their conduct accordingly. Their behaviour may even be regarded as a voluntary act by which the

196 Asser/Vonken 10-I 2013/276.
197 Von Savigny 1849, p. 108.
198 Kroll-Ludwigs 2013, p. 165.
199 Asser/Vonken 10-I 2013/289.
200 Von Savigny 1849, p. 27; Asser/Vonken 10-I 2013/287; Peari 2014, pp. 116-117; Püls 1995, pp. 62-63.
201 Kroll-Ludwigs 2013, pp. 165-166.
202 Von Savigny 1849, p. 169.

parties accept the outcome of objective connecting factors.[203] Given this idea, it is no big step to accept the possibility for private parties to expressly choose an applicable law or competent court in a contract. Although Savigny himself did not mention this possibility yet, it is argued in literature that his theory formed the basis for its recognition in later times.[204]

3.2.1. The theoretical difficulty of protective connecting factors

Notwithstanding the above, there are downsides to the reign of freedom of contract. Strong parties can force their will upon weaker ones, as a consequence of which their relationship is disturbed. It is therefore deemed justified by the EU legislator to protect weaker parties against their strong opponents.[205] In literature, such weaker-party protection is considered to be an interference with the general principle of party autonomy, and scholarly discussion consequently focuses on this principle's proper boundaries.[206] In European private international law, weaker-party protection is introduced by means of the protective connecting factors mentioned above.[207] Rather than abstracting from substantive outcomes, these connecting factors incorporate a set of values which they try to support in society. Generally, these values are aimed at protecting the weaker party in contractual relationships,[208] which means that these parties, who presumably do not have much experience in litigation, have the benefit of home jurisdiction and of the law of the state of their habitual residence. This is also the case with art. 6 RIR and art. 17 BIR (r).

As a consequence of this orientation on substantive outcomes, protective connecting factors constitute an interference of the EU legislator in the connecting factors that classically govern private international law. Private parties are not let alone anymore. Rather, their dealings are tested as to their conformity to certain public goals. What does this mean for party autonomy? Is there an abstract theory or principle that unifies all rules that are given in the RIR and BIR(r)? In literature on the theoretical underpinnings of private international law there are some who emphasise the central role that keeps to be played by the will of the parties, while others turn back to the 'pre-Savignian' notion of private international law being based on international relations between sovereign states. These latter argue that everything, including the recognition of choice of law and / or forum, should in the end be reduced to an authorisation of the 'sovereign'.[209] Otherwise, they argue, the sovereignty of legislators is subjugated to the will of private parties to be bound by them, which would constitute an unacceptable breach of the sovereignty principle. Within private international law, moreover, the subjugation of freedom of contract to the sovereignty of states would be evidenced by concepts such as *ordre public* and protection of the weaker party, which both narrow down the ability of private parties to choose an applicable law.[210] As a logical argument, moreover, it is brought forward that contracts cannot even be enforced without their recognition by positive law: even a choice of forum and / or law relies ultimately on its recognition by the law.[211]

The sovereignty argument fits well with the generally accepted idea that the European legislator adopts a functionalist approach to private law: rather than codifying it as a coherent system that aims for justice in private relationships, the EU legislator uses private law as a means to reach its goals in society.[212] A focus on the will of the parties would then have to be explained on the basis of purely practical considerations. 'Fragmentation' of private law is the

[203] Püls 1995, pp. 90-93. See para. 3.3.4.
[204] Kroll-Ludwigs 2013, p. 166; Wicki 1965, pp. 32-33.
[205] Hill 2008, p. 100.
[206] Kuipers 2012, p. 52; Basedow 2011, pp. 33, 48-50.
[207] See Van Bochove & Kramer 2010.
[208] See recital 23 RIR and recital 18 BIR(r).
[209] Kroll-Ludwigs 2013, pp. 170-171.
[210] Basedow 2011, pp. 41-46, 48-50.
[211] Basedow 2011, pp. 46-47.
[212] Michaels 2011, pp. 139-158; Micklitz 2014, pp. 81-113.

consequence,[213] and a teleological manner of interpretation, focusing on the goal aimed for, becomes central to its application.[214] As a consequence, private international law loses its foreseeability, and legal uncertainty is the result. Here there are similarities with the way in which party autonomy is perceived in the Charter of Fundamental Rights: a balance of principles is central to the application, but there is no clear theory on the basis of which the outcome of such a balance can be predicted. For this reason, the sovereignty argument is not helpful when confronted with issues such as the one at stake in this research: the clash between the Geoblocking Regulation and the 'directed activity' criterion. The main research question concerns an issue of private international law, and in order to re-establish the field's inner coherence after its disturbance by the Geoblocking Regulation, it is therefore necessary to delve deeper into private international law's theoretical foundations. If these foundations are truly understood, it is possible to find a general principle according to which the rules of private international law should be applied. As will be seen,[215] such a principle not only helps to solve the issue of uncertainty in the area of European private international law. Also the application of art. 16 CFR must, if applied to private international law, conform to this area of law's foundations.

3.3. Theoretical foundations: formalism and party autonomy

Savigny's writings constitute the source from which the main principles underlying contemporary European-continental private international law stem. For this reason, his work provides valuable insights into the philosophical core of contemporary EU private international law.[216] This paragraph delves into this philosophical core, as a better understanding of it is needed if one wants to apply contemporary private international law's principles to new situations. The aim is not to give a historically accurate view of Savigny's ideas. Rather, his theory is taken as a starting point for a better understanding of contemporary private international law thinking. The goal is to work out the core principles of the idea of objective connecting factors against the background of legal formalism.[217] Although the BIR(r) and RIR are ultimately instruments that should foster the internal market, their internal structure cannot be understood without an understanding of the theoretical background against which this structure was once – before the EU even existed – developed.[218] The BIR(r) and RIR are deeply rooted in the past. A formalist understanding of them therefore remains of great value. This paragraph focuses on this understanding, while private international law's position within and dependence on general EU law is the topic of chapter 6.

Savigny's writings can very well be explained on the basis of legal formalism, and more specifically on the basis of the philosophy of Immanuel Kant.[219] Legal formalism shows how private law must be seen as an internally coherent system. This not only pertains to domestic private law, but to private law generally. Although it can be disputed in how far EU law conforms to the notion of 'system',[220] therefore, it is submitted here that EU law in the field of private law should, at least partially, be understood from the formalist point of view. In contemporary literature, legal formalism and its connections to Kant's legal philosophy are most eminently vindicated by Ernest Weinrib. In working out his general theory of private law for private international law, this paragraph clarifies the inherent rationality of this field of law. It is this explanation that eventually helps us in determining what consequences the Geoblocking Regulation has for the principle of party autonomy as laid down in the 'directed activity' criterion.

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[213] Hesselink 2002, pp. 34-46; Roth 2002, pp. 761-776; Basedow 2008, pp. 914-916; Smits 2012a, pp. 157-160; Smits 2012b, pp. 14-16; cf. Smits 2006, pp. 95-104.
[214] Cherednychenko 2013, pp. 163-167.
[215] See para. 6.3.
[216] Bisping 2014, pp. 515-516.
[217] See para. 1.4.
[218] Cf. Zimmermann 1996.
[219] See Peari 2014; Püls 1995, pp. 31-32.
[220] See para. 6.3.

3.3.1. A formalist account of private law

Weinrib's thesis is directed against the tendency of legal scholars to regard private law as a means to an end. In order to explain legal rules, Weinrib notes, many scholars take recourse to external disciplines, such as economics and sociology. Under the influence of legal realism, the American legal academia developed so-called 'law and' disciplines. Law is regarded as an instrument used for political goals, or if not an instrument, as a social phenomenon that can only be understood on the basis of its functions. In contradistinction, Weinrib points at what he shows is the paradigm case of 'knowledge': knowing something in terms of itself.[221] Full understanding of something can only be reached if there is a certain point at which the researcher does not have to look any further. Contemporary scholars generally try to understand law in terms of something else, be it economics or sociology. The formalist approach is, however, to understand the law in terms of itself. Coherence is therefore of the utmost importance in legal systems: only if the rules cohere can they be truly understood in terms of themselves, without recourse to external disciplines.

As an example of a discussion in which the need for coherence is fortgotten, Weinrib mentions the idea that tort law should be understood in terms of its goals. Whereas some argue that tort law primarily has a compensatory function, others think that the emphasis should be put on its deterring function. Combining these functions would then lead to an explanation of the substantive rules of tort law. In contradistinction, Weinrib notes how this argumentation incorporates an internal incoherence. An emphasis on compensation explains why a victim of a tort should be compensated for his loss, but cannot explain why *this particular tortfeasor* should make this compensation. One could also argue that victims should be compensated out of a societal fund. Simultaneously, tort law's deterring effect explains why the tortfeasor should pay a certain amount of money, but does not explain why he should pay to *this particular* victim. Again, it could be argued that the sum should be paid to a fund especially designed for this goal. As a consequence, both arguments provide only a partial explanation of tort law. Moreover, their 'justificatory force' is not limited to conclusions that are actually part of tort law. When combined, therefore, both arguments – or justifications – partially conflict with each other. In Weinrib's words:

> *In countenancing justifications that pertain separately to one or the other of the litigants, it makes a legal relationship the locus of mutually frustrating considerations, each of which is limited not by the boundaries to which its justificatory force entitles it, but by the competing presence of an independent consideration. In this mixing of unrelated justifications, no single one of them occupies the entire area to which it applies. Thus, none of them actually functions as a justification.*[222]

In order to give a *real* justification for rules of private law, all elements of the justification must mutually reinforce each other. That is, they must cohere 'into a single integrated justification'.[223] Considering the central *nexus* in private law, which is the relationship between claimant and defendant, all justifications should be able to explain why *this specific* claimant should compensate *this specific* defendant. In the end, private law's overarching 'form' of justice – that is, its essence by which we can recognise a certain set of rules as being part of private, rather than public, law – is *corrective justice*.[224]

Corrective justice focuses on the *nexus* between claimant and defendant, and thereby on doing justice to relationships between private parties.[225] As a consequence, private law rules

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[221] Weinrib 1988, pp. 963-965.
[222] Weinrib 1992, p. 347.
[223] Weinrib 2012, pp. 33, 39-42.
[224] This origins of this form of justice are found in Aristotle 2008, pp. 166-175 (V. 2-5).
[225] Cf. Cherednychenko 2013, pp. 148-171.

cannot be justified by arguments that come from other considerations, for instance *distributive justice*.[226] This latter kind of justice aims to distribute wealth equally. The idea of equality that underlies distributive justice is, however, very different from the one underlying corrective justice. Whereas the latter aims to uphold the status quo – private parties may not by their actions disturb the balance of rights that exists –, the former is aimed at a fair distribution of wealth in general. Distributive justice therefore necessarily contains a political element, the formula according to which wealth is distributed, whereas corrective justice is apolitical:

> *As an autonomous form of justice, corrective justice operates on entitlements without addressing the justice of the underlying distribution.*[227]

Mixing corrective justice with distributive justice results, just like in the example of the discussion on tort law, in incoherence. Private law rules can therefore only be truly explained with reference to corrective justice.

3.3.2. From natural law to positive law

The above argumentation may, due to its belief in an essence of private law, be classified under natural law thinking. In the end, Weinrib shows, its normative underpinnings can only be truly understood by reference to the philosophy of law that was formulated by Immanuel Kant. In his legal philosophy, that is, Kant essentially worked out corrective justice in two directions. On the one hand, he made clear what logical concepts form the foundation of corrective justice, while on the other hand he showed how these concepts logically result in a system of positive law.[228] The result was a full-fledged theory about the transition from individual will and ethics to natural law and, ultimately, positive law.

Starting with an examination of the claimant-defendant nexus, the core of corrective justice, Kant sought an explanation for its underlying rationale in the meeting between individual wills. For this reason, his analysis starts with the nature of free will. Essentially, he argued, we cannot think about ethics and law, i.e. morality, without regarding ourselves as free. In modern terminology, one could say, the existence of free will is presupposed when reasoning about morality from an 'internal perspective'.[229] Although it could be argued from an 'external perspective' that we are but animals that are subjugated to the same laws of nature as everything else, Kant argues that we see this 'causal' world only by mediation of interpretation. The *real* world, or the world *an sich*, can never be observed. Notions such as 'causality', 'time' and 'space' are, in Kant's eyes, concepts that are necessary for our mind in order to see the world as an intelligible whole. This does not negate, however, the theoretical conclusion that there exists a world *an sich*, in which we ourselves exist as well. As *homo noumenon*, that is, as a human being in the world *an sich*, we cannot be said to be subjugated to the laws of nature. Only as *homo phaenomenon* we are.[230] As a consequence, Kant argues, *practical* reasoning should be based on the starting point of us being free. Morality, which includes corrective justice, only has a point if we are free to decide on our actions. In the world of nature – e.g. between animals – morality does not exist. Freedom is therefore the core idea underlying Kant's moral philosophy. In order to act morally good, he continues, we must not base our judgements on the world as we see it. If we would do that, our judgement would follow the laws of nature and our actions would not be free. Rather than following such a *hypothetical imperative*, we need to adjust our actions to the *categorical imperative*, which orders us to 'act only according to that maxim whereby you can, at the same

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[226] Schmid 2011, p. 19.
[227] Weinrib 2012, p. 80.
[228] Weinrib 2012, pp. 84-87.
[229] See para. 1.4.
[230] Byrd & Hruschka 2010, pp. 280-285, 288-289.

time, will that it should become a universal law'.[231] Only by following our duty, therefore, we are truly free.[232]

Taking the categorical imperative as his starting point for further research, Kant arrives at his philosophy of *law*. In short, Kant argues that reasoning from the categorical imperative we necessarily arrive at a point at which we must recognise the freedom of *others* and the need to uphold their right to be free. By stipulating that we should act virtuously, the categorical imperative already incorporates the existence of an external world. Its implication is that we, as *homo noumenon*, deserve to be treated the same way by others. Following that, we are obligated to not only act virtuously in a purely individual manner: if we encounter other people, we must respect their right of being free. At this stage, we have arrived at natural law: the categorical imperative, which was the logical result of ethics, is turned into a principle that mediates the behaviour between a *plurality* of people. The core idea is that law should preserve everyone's freedom:

> *Eine jede Handlung ist recht, die oder nach deren Maxime die Freiheit der Willkür eines jeden mit jedermanns Freiheit nach einem allgemeinen Gesetze zusammen bestehen kann.*[233]

An important distinction should be made between law and ethics: where ethics concerns itself with virtue as it naturally follows from a rational being's *internal* ratio, law regulates people's behaviour in the *external* world.[234] Law, that is, does not base its judgments on people's internal mindset: rather, it looks at people's external relations with each other. Only in this way are people truly free. Suppose, for instance, that someone justifies a wrong on the basis of his own stupidity: if this argument would be honoured in a legal proceeding, this would factually subjugate the wronged person to the internal mindset of his opponent, as a consequence of which he can no longer trust the world as he sees it and make rational decisions.[235] In short, law judges people only on the basis of their *external* actions.

There remains a difficulty, however: in order to uphold the system of rights that follows from natural law, we need a third actor, the judge, who can independently and impartially decide on what follows from natural law. Without such a third actor, the peaceful coexistence of people cannot be secured. Moreover, such a third actor is necessary in order to overcome the inherent indeterminacy of *acquired rights* in the state of nature.[236] When we act, that is, we can use *external* objects for our purposes. A builder may, for instance, gather objects of his choice in order to build a house. Using his *innate right* to freedom, the builder uses external objects to act the way he wants. The problem here is, however, that the builder's innate right to freedom must coexist with the right to freedom of others, and that his use of external objects clashes at some point with someone else's use of them. If someone takes away the instruments used to build the house, for instance, the builder cannot finish his work. He is, consequently, hampered in using his innate right to freedom.[237] For this reason, the law should contain a system of 'acquired rights', an external *Mein und Dein*, i.e. a system of rights on external objects.[238] Only if the use of external objects is legally constrained can freedom truly be secured. In the state of nature, however, the problem is that such a system of acquired rights cannot be established in the abstract. That is, it cannot be deduced from natural law where exactly the specific boundaries between, e.g., property rights should lie. In the natural condition, this indeterminacy of acquired rights necessarily leads

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231 Kant (1785) 2013, p. 96
232 Kant (1785) 2013, pp. 133-137; Weinrib 2012, pp. 88-92.
233 Kant (1797) 1986, p. 39 (AA VI, 230).
234 Weinrib 2012, pp. 94-97, 99-100.
235 Weinrib 2012, pp. 179-183.
236 Peari 2013, pp. 495-496; Ripstein 2009, pp. 57-85, 168-176.
237 Unberath 2005, pp. 722-726.
238 Kant (1797) 1986, pp. 63-65 (AA VI, 255-257). Kant distinguishes three kinds of acquired rights: property, contract and status. See Ripstein 2009, pp. 65-81.

to disputes, in which the only way out is *unilateral* choice: the imposing of someone's individual will over the will of another.[239] The result is, in terms of Hobbes, a war of all against all,[240] which does not match the general principle of law stated above. For this reason, Kant argues that we must leave the natural condition in order to replace it with civil society. The task of *positive law*, then, is not only to put into place a third party, the judge, who can solve disputes on the basis of *omnilateral* choice, i.e. the law, but also to provide an intelligible system of acquired rights.[241] Only if the indeterminate system of acquired rights is made determinate by positive law can people truly enjoy their innate right to freedom.

Summarising, Kant notes how the stages that lead from the categorical imperative to positive law can be recognised in the three principles that were formulated by Ulpian: *honeste vive, neminem laede, suum cuique tribue*.[242]

3.3.3. Protection of weaker parties

An important objection to legal formalism comes from those who emphasise the existence of private law rules that interfere with corrective justice's strict application. Think for instance of the concept of 'good faith acquisition' in property law.[243] This concept interferes with the general rule in private law that the status quo should be upheld, and that stolen goods must be returned to their rightful owners. Moreover, private law often takes into account the personal characteristics of private parties.[244] The private law of many countries, including, at least, the Netherlands, shows a history in which lawyers became ever more aware of the need to protect weaker parties against the power of big companies in order to enable them to pursue their own goals when dealing with stronger parties.[245] If we take corrective justice as the essence of private law, however, we should abstract from these characteristics. The only thing that matters, is the relationship between the parties: justifications that pertain to only one of the parties cannot bind the other party. As private law rules in practice do not match such a corrective justice view on the matter, opponents to legal formalism argue that private law is actually part of distributive justice.[246]

Nevertheless, these arguments, in Kant's view, and also in Weinrib's view, do not erode private law's essence. Deviations from corrective justice are only justified in so far as they are necessary to uphold natural law as a system in society. Positive law is the law as it is upheld in civil society. As it must take into account practical difficulties of upholding people's natural rights, Kant argues, differences exist between positive law and natural law. According to Kant it is

> *ein gewöhnlicher Fehler der Erschleichung der Rechtslehrer, dasjenige rechtliche Prinzip, was ein Gerichtshof, zu seinem eigenen Behuf (also in subjektiver Absicht), anzunehmen befugt, ja sogar verbunden ist, um über jedes Einem zustehende Recht zu sprechen und zu richten, auch objektiv, für das, was an sich selbst recht ist, zu halten: da das erstere doch von dem letzteren sehr unterschieden ist.*[247]

In short, positive law must not be equated to natural law, although its core *is* determined by it. Positive law must take into account the difficulties that arise if one wants to protect everyone's innate right to freedom in the external world.[248] In order to achieve a well-functioning society,

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[239] Ripstein 2009, pp. 170-172.
[240] Byrd & Hruschka 2010, pp. 73-74; see Hobbes (1651) 1967, p. 96.
[241] Ripstein 2009, pp. 172-176.
[242] D. 1.1.10.1. (Ulp.).
[243] See, e.g., art. 3:86 and art. 3:88 of the Dutch Civil Code.
[244] Van den Berg 2000, pp. 336-337.
[245] Keirse, Renting & Loos 2017, pp. 4-6.
[246] Van den Berg 2000, pp. 328-332, 336-337.
[247] Kant (1797) 1986, pp. 109-110 (AA VI, 297).
[248] Basedow 2011, pp. 50-52.

positive law takes into account the principles of publicity and systematicity: citizens must know beforehand by which rules they are governed – so that they can rationally choose how to act – and courts need to uphold the *general* system of law in order to be truly independent and impartial.[249] In some instances, these principles obligate the judge to deviate from principles of natural law. The abovementioned concept of 'good faith acquisition' is expressly mentioned by Kant as an example of such an instance. Its justification must be found in the principle of publicity: in order to be free, citizens must be able to rely on their good faith judgements of what seems right. Otherwise, the well-functioning of society would be undermined by a lack of trust, as a consequence of which people cannot act freely. Apart from the principles of publicity and systematicity, Kant emphasises the need for practical workability in his idea of *ius necessitatis*, the law of necessity. Consider his example of a shipwrecked sailor who pushes another one off a plank that can only save one of them. Killing the other, the sailor clearly acts in contravention of natural law. In positive law, however, nothing can be done: even if the death penalty were to be given, this would not deter the sailor from pushing his fellow sailor into the water. The threat of an uncertain death, that is, cannot outweigh the fear of certain death. It cannot be said that the sailor is not culpable. Rather, he is not punishable. Practical reasons of enforceability, in short, lead to the maxim of necessity: *Not hat kein Gebot*.[250]

Concluding from the above, positive law necessarily deviates from natural law in order to uphold the system of private law in civil society. Distributive considerations do play a role in positive law, therefore, but corrective justice remains at its core.[251] A Kantian justification for weaker party protection, then, forming the rationale of artt. 6 RIR and 17 BIR(r), must be found in the nature of positive law. While natural law abstracts from the characteristics of the parties and from the empirical world in general, positive law puts natural-law theory into practice. It seems fitting, therefore, if positive law incorporates some regard for substantive equality in order to uphold the natural-law concept of formal equality. Weaker-party protection may then be justified so long as it serves the general aim of private law to uphold everyone's freedom vis-à-vis each other in civil society.

Kant himself argued against paternalism in law.[252] He seems, however, to have had in mind a kind of paternalism which imposes upon people the goals they should pursue. Rather than this, there is a case in contemporary literature for the existence of 'Kantian paternalism'.[253] While law may not force people to act in a certain way, Kantian paternalism would take away those factors in society that make it impossible for people to act rationally. In the end the law must protect people's freedom to make choices, and this is only possible under certain circumstances. Cholbi describes it as follows:

> *K[antian] P[aternalism] thus disallows interference to prevent mistakes of instrumental rationality, but allows interference to prevent errors of instrumental reasoning due to distortions of rationality.*[254]

While people should be let alone when it comes to their choice of how to act and what goals to pursue, even if it seems probable that their choice ultimately leads to their own disadvantage, Kantian paternalism does allow interference to take away factors that hinder the process of choosing. It is therefore admissible if positive law forces stronger parties to *inform* weaker parties about the risks involved in concluding a certain contract, whilst it is inadmissible to force them to *refuse* the conclusion of that same contract.

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[249] Weinrib 2011, pp. 197-198. Cf. para. 6.3 for the principle of systematicity.
[250] Kant (1797) 1986, pp. 44-45 (AA VI, 235-236); Ripstein 2009, pp. 321-322.
[251] See also Beever 2013, pp. 150-170, who argues that Kant's theory is part of the old, 'forgotten', tradition in legal philosophy that regards corrective justice as being prior to distributive justice.
[252] Kant (1797) 1986, pp. 132-133 (AA VI, 316-317).
[253] Cholbi 2013, pp. 115-133.
[254] Cholbi 2013, p. 121.

As a public interference in the natural law of individual freedom, weaker-party protection lays bare the tension between public and private law.[255] Perceived through the glasses of legal formalism, however, such public interference is allowed in private law as long as it respects the principle of proportionality. A neat balance between the individual rights to freedom must be struck. Against this background the so-called 'instrumentalisation' of private international law should be regarded. Only then can it be interpreted so as to form a coherent unity that centres around the principle of party autonomy.

3.3.4. Formalism and private international law

Following legal formalism and its Kantian conception, the principle of party autonomy is *prior* to *any* positive law.[256] In this regard, private international law is no different than substantive private law. In fact, it is argued, the questions of private international law not only play a role in cross-border litigation: purely domestic cases also raise the question of which law is applicable and which court has jurisdiction.[257] The law serves private parties' *innate* right to freedom, and this is the explanation for the possibility of a contractual choice of law and jurisdiction.

In the absence of an explicit agreement on these matters, the judge takes recourse to objective connecting factors. Essentially, the question addressed by the idea of objective connecting factors is how jurisdiction and the applicable law are to be selected if the private parties involved have not explicitly agreed on these matters. In such a case, coherence in law can only be retained if some other way is found in which party autonomy is served. Reasoning in terms of corrective justice, objective connecting factors constitute *indicators* that show which law and which jurisdiction should be regarded as chosen on the basis of private parties' *external* behaviour. This explanation follows the Kantian idea that law only concerns itself with private parties' *external* behaviour, and Kant's positive-law principle of publicity: parties must be able to rely in good faith on the impressions they get from the world around them. If they would be punished for that, they would not be truly free: every act may in the end turn out to constitute an interference with someone's natural-law rights. In order to keep up the system of law in general, therefore, private international law looks only at external factors that indicate the applicability of a certain law or the competence of a certain forum. The idea that objective connecting factors are based on the principle of foreseeability must therefore be subscribed from a formalist perspective.

Next to the demand of externality, objective connecting factors must uphold a judgment's *coherence*. Following the demands of corrective justice, this means that the applicable law or the competent forum must be based on the parties' *united* will. Savigny's idea of objective connecting factors being based on the parties' will can therefore be explained by reference to the influence of Kantian legal philosophy on Savigny's thinking.[258] From a formalist perspective, this means that the factors that steer the application of private international law are only relevant to the extent that they 'affect *both the plaintiff and the defendant*'.[259] This condition reflects the central relationship in private law disputes, the nexus between claimant and defendant, and is therefore necessary in order to reach a coherent judgment. Lacking an explicit or implicit choice of law or forum, the judge *imposes* on the parties 'a united choice',[260] which is – similar to the implicit choice of law mentioned above[261] – inferred from the parties' behaviour. On this basis, it is argued, objective connecting factors are in the end organised according to the 'principle of voluntary

[255] Kramer & Themeli 2017, p. 34.
[256] Cf. Siehr 2001, pp. 773-774.
[257] Peari 2013, p. 481.
[258] Kant's influence on Savigny can be seen in other areas of law as well. Think, for instance, of Savigny's 'discovery' of the principle of abstraction in transfers of property. See Byrd 1997, pp. 131-153.
[259] Peari 2013, p. 488.
[260] Peari 2013, pp. 486-494.
[261] See para. 3.1.

submission'.[262] The parties' rights to *individual* or *private* autonomy, so to say, are brought together by an objective connecting factor, after which the united will of the parties – which is imposed on them by the judge – reflects the principle of *party* autonomy.[263]

The demands for externality and coherence narrow down the factors that can be used as connecting in private international law. What does this mean more concretely? In tort law it means, for instance, that the parties' domicile is only relevant in so far as it is their domicile at the time of the tort.[264] Their domicile *after* or *before* the tort is not intelligible for the other party and is for that reason ruled out as a connecting factor by the demand of externality, or publicity. Furthermore, a focus on domicile before or after the tort can in no way be reasonably connected to the legal relationship between the parties: this focus would pertain to only one of the parties and therefore breach the principle of coherence. An objective connecting factor, that is, can only bind if it pertains to *both* parties, and if it is traceable on the basis of their legal relationship, the core of which is the nexus between claimant and defendant.

Following this rationale, the objective connecting factors that are expressly mentioned in legal documents are no hard rules. Rather, according to Peari, they are 'juridical presuppositions', which refer to the law or forum that is generally *presumed* to concur with private parties' reasonable expectations. There may however be instances in which the judge must deviate from these starting points. This is the case when other connecting factors, or juridical indicators, steer the judge away from the juridical presuppositions.[265] In this vein it is possible to explain provisions such as art. 4(3) RIR, according to which the objective connecting factors mentioned earlier in art. 4 can be set aside if the contract under consideration is 'manifestly more closely connected' with another country. Moreover, this insight shows how behind all the fuss of an ever-greater specificity of rules there is a common theme on the basis of which all of private international law can be explained.

There is one exception, however, on the basis of which the applicable law or the jurisdiction of a specific forum should be sidestepped. This is the situation in which a party's *innate* right to freedom, that is, his freedom to act according to the categorical imperative, is under threat.[266] In such a situation, positive law does not fulfil its function anymore and the principle of party autonomy overrules the outcome of objective connecting factors. As regards European private international law, this idea can be recognised in the concepts of *ordre public* and internationally mandatory provisions (artt. 45 and 46 BIR(r) and artt. 9 and 21 RIR).[267] It opens up private international law for human rights considerations, such as those established in the Charter of Fundamental Rights. In Peari's words, it is the 'innate test of legality'.[268]

3.3.4.1. Protective connecting factors

Protective connecting factors that aim for weaker party protection constitute a specific scenario. Here one cannot really speak of objectivity or neutrality in private international law anymore, as the arguments brought forward in favour of a particular outcome are entirely aimed at supporting one side of the claimant-defendant nexus. The coherence of justifications underlying the private international law process seems lost, and the only way to explain such protective considerations is therefore to refer to Kant's idea of positive law. Consumer protection should then be regarded as serving the same leading principle as objective connecting factors: party autonomy.[269] Above it was noted that weaker-party protection can be justified on the basis of 'Kantian paternalism'.

[262] Peari 2014.
[263] Cf. Kramer & Themeli 2017, pp. 29-30.
[264] Peari 2013, p. 490.
[265] Peari 2013, pp. 488-494.
[266] Peari 2013, pp. 495-498.
[267] Cf. Siehr 2001, p. 773.
[268] Peari 2013, pp. 495-498.
[269] At this point, Bens 2018, pp. 28-29, makes the mistake that was noted by Kant, by stating that the 'deontological' justification for party autonomy does not provide for an explanation of party autonomy's limitations. See para. 3.3.3.

This notion, however, seems difficult to apply in private international law: interference in contractual relationships is a topic of substantive law, and therefore comes into play *after* the private international law process. How, then, can protective connecting factors be justified?

Here it must be reminded that from a Kantian perspective there is no unbridgeable difference between private international law and substantive law: both are based on the principle of party autonomy. This means that the judge must, when dealing with private international law, consider differences in actual bargaining power when imposing a united will on the parties. Indeed, not only in substantive law literature, but also in literature on choice of law and / or forum it is noted that an emphasis on complete freedom in contract law presupposes that private parties have the same bargaining power. In reality, however, there are big differences, as a result of which weaker parties are subjugated to the will of stronger parties. Weaker parties' individual autonomy is then distorted, if not neutralised.[270] The imposition of a united will may therefore be informed by considerations of weaker-party protection: weaker parties may not have the same amount of control over their external behaviour as have strong parties. Just like strong parties may impose a contractual choice of law on weaker parties, they may also force weaker parties to conclude a contract at the stronger party's premises. Against this background, protective connecting factors can be explained from the formalist perspective.

3.4. Conclusion

In this chapter the general paradigm of contemporary private international law was discussed. Literature is generally divided into two extremes: some argue that all rules are subject to the will of the parties, whilst others argue that the will of the parties is only honoured by way of benevolence of the state. Tracing back the idea of objective connecting factors to the writings of Savigny, and working out these writings by means of modern writings on legal formalism, the first of these views seems to hold ground. Nevertheless, public interference plays a role as well when law makes the transgression from natural law to positive law. A middle ground is the result:[271] although the will of the parties forms the core of private international law, weaker party protection is necessary to uphold law in civil society. Party autonomy is, in the end, the leading principle.

The following chapters return to the specific topic of this research, the Geoblocking Regulation and its relationship with the directed-activity criterion in artt. 6(1)(b) RIR and 17(1)(c) BIR(r). Discussing the tension between the two in light of the formalism that was worked out above, recital 13 and art. 1(6) of the Geoblocking Regulation may be reconciled with the case law of the ECJ.

[270] Kramer & Themeli 2017, p. 31.
[271] Cf. Basedow 2011, p. 57.

4. PARTY AUTONOMY IN THE DIRECTED ACTIVITY CRITERION

Having discussed the role of party autonomy in the RIR and BIR(r) in general, it is time to zoom in on art. 17(1)(c) BIR(r) and art. 6(1)(b) RIR and more specifically on the 'directed activity' criterion. As the main research question asks what the consequences of the Geoblocking Regulation are for the ECJ's approach towards the principle of party autonomy laid down in the 'directed activity' criterion, it is of the utmost importance to establish how the ECJ has interpreted this criterion in the past. Furthermore, the EU legislator's use of the concept of 'directing activities' needs clarification before its relationship with the principle of party autonomy can be truly understood. For these reasons, this chapter continues with the description of the 'directed activity' criterion that was started in chapter 1 and seeks to delve deeper into the justifications that underlie it. Having shortly discussed the general role of 'directing activities' in the area of private international law on the internet (paras. 4.1-4.2), the discussion focuses on art. 17(1)(c) BIR(r) and art. 6(1)(b) RIR (para. 4.3). Having placed the case law of the ECJ in a formalist framework (para. 4.4), it should be possible to juxtapose the 'directed activity' criterion to the Geoblocking Regulation, which is necessary to formulate an answer to the main research question.

4.1. The need for a concept of 'directing activities' on the internet

The internet poses special difficulties for private international law. Due to its worldwide reach, the internet does not stop at national borders. Classical connecting factors, which focus on geographical indicators, become problematic in view of the delocalised nature of transactions via the internet, leading to a potentially high number of connections to various jurisdictions. In principle, a website can be accessed from every Member State, as a consequence of which they all have a connection to potential disputes regarding that website.[272] On the other hand, mere accessibility is not enough for a court to entertain jurisdiction or apply a certain law. Something more has to be shown, whether it is damage within a certain jurisdiction or the website being directed to it. An important area of law in which the ECJ had to deal with the specificities of the internet, is the matter of jurisdiction in cases involving defamation via the internet.

If something is published online, the effects are potentially worldwide. According to art. 4 BIR(r) the forum of the defendant's domicile has jurisdiction, but art. 7(2) BIR(r) notes that a court also has jurisdiction for tort cases if the harmful event occurred within its forum. As to the latter, the ECJ established in *Bier* that the expression 'place where the harmful event occurred' must be interpreted as meaning both the place where the harm occurred and the place of the event giving rise to it.[273] The problems that are specific to the internet arise when dealing with the place where the harm occurred.[274] The question that arises is whether in the case of defamation via the internet all courts of the world have jurisdiction. Of course, some real harm must have occurred – mere accessibility of a website is not enough –,[275] but in principle the place where the harm occurred can be anywhere on the world. In *Shevill*,[276] the ECJ introduced the so-called 'mosaic principle',[277] according to which a court can rule on the entire amount of damages if its forum constitutes the place of the event giving rise to the harm. If this is not the case, a court can still claim jurisdiction for that part of the damages that occurred in the forum of the court seized. These bases for jurisdiction are, of course, additions to the general rule of art. 4 BIR(r), according to which a court can claim general jurisdiction if its forum constitutes the place of the defendant's domicile.

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[272] See Lutzi 2017, pp. 687-721; Asser/Kramer & Verhagen 10-III 2015/854; Gillies 2008, pp. 128-131.
[273] ECJ 30-11-1976, Case 21/76, *Bier v. Mines de potasse d'Alsace*, ECLI:EU:C:1976:166.
[274] Lutzi 2017, p. 690.
[275] Bogdan 2011, p. 4.
[276] ECJ 07-03-1995, Case C-68/93, *Shevill v. Presse Alliance*, ECLI:EU:C:1995:61.
[277] Rogerson 2014, pp. 92-93.

Notwithstanding the inventiveness of the ECJ's approach in *Shevill* towards cases concerning defamation via the publication of a newspaper, it does not solve the difficulties for plaintiffs in *internet* defamation cases. Starting actions in courts that only have jurisdiction over a specific part of the damages, that is, would be too burdensome for the plaintiff given the worldwide reach of internet publications. Generally, therefore, the plaintiff would be forced to seek damages in the court of the place where the event giving rise to the harm, the publication, occurred, while the place of the defendant's domicile generally does not provide an extra option as it often corresponds to the place where the publication occurred. For these reasons and considering the sound administration of justice whose needs are to be served under art. 7(2) BIR(r),[278] the ECJ adjusted the mosaic principle when dealing with internet defamation cases. In *eDate Advertising v. X* and *Martinez v. MGN* it ruled that a court may also rule on the entirety of the damages if its forum constitutes the *plaintiff's centre of interests*, which generally corresponds to his habitual residence.[279] Since this case, plaintiffs in internet defamation cases can choose between three jurisdictions to bring an action for the entire amount of their damages: the court of the alleged tortfeasor's domicile, the court of the place where the defamatory content was published online, and the court of the plaintiff's centre of interests.

The discussed cases on defamation show that the establishment of jurisdiction under art. 7(2) BIR(r) is *not* dependent on a concept of 'directing activities'. This is also the case in privacy and intellectual property cases.[280] However, the directedness of tortious actions *does* seem to be important in establishing the reach of a court's judgment, that is, under the law on recognition and enforcement of foreign judgments. If a court has only jurisdiction over the damage done within its territory, it arguably can only issue injunctions against the tortfeasor in so far as the latter directs his tortious acts to that territory.[281] This problem was recognised in *Bolagsupplysningen*, in which the ECJ ruled that a court with only specific jurisdiction under the mosaic principle cannot order a defendant to rectify and remove certain information of the internet, as this judgment would have a universal effect that is not in line with the court's limited amount of jurisdiction.[282] Narrowing down an injunction to only activities that are directed to the court's Member State was considered impossible: the effects of such an injunction can only be viewed in terms of accessibility, which is, in principle, a worldwide phenomenon. Following *Google Spain*, a similar discussion took place in legal doctrine regarding the *scope* of the 'right to be forgotten'.[283] A geographical scope of the 'right to be forgotten' was not defined, and whereas some commentators argue that it applies worldwide, others argue that Google should only abide by the judgment on its websites with an EU top-level domain.[284] In other words: the question is whether the obligations arising from *Google Spain* apply to *all* websites, i.e. worldwide, or only to those websites that are *directed to* EU Member States.

In short, this small excursion outside contract law shows that the concept of 'directing activities' plays a role when determining the scope of a judgment's force of law. Its role in establishing which forum is competent and what law is applicable in cases involving the internet, however, is quite uncertain. This is understandable if one considers the fact that 'directing activities' incorporates a sense of volition on the part of the 'directing' individual, while the cases treated here concern defamation, privacy and intellectual property. These areas of law are quite different in nature from contract law, in that the legal relationship under dispute is involuntary rather than voluntary. The intentional or unintentional nature of communication between a

[278] ECJ 25-10-2011, Joined Cases C-509/09 and C-161/10, *eDate Advertising v. X and Martinez v. MGN*, ECLI:EU:C:2011:685, paras. 40, 45-47.
[279] ECJ 25-10-2011, Joined Cases C-509/09 and C-161/10, *eDate Advertising v. X and Martinez v. MGN*, ECLI:EU:C:2011:685, paras. 48-49.
[280] See, with further references, Stone 2015, pp. 12-16.
[281] Lutzi 2017, p. 692.
[282] ECJ 17-10-2017, Case C-194/16, *Bolagsupplysningen*, ECLI:EU:C:2017:766, paras. 45-49.
[283] ECJ 13-05-2014, Case C-131/12, *Google Spain*, ECLI:EU:C:2014:317.
[284] See, with further references, Svantesson 2016, pp. 474-475.

defendant's website and the claimant is therefore not relevant in order to determine the *Sitz* of the legal relationship in tort law.[285] The facts in the cases discussed amounted to a one-sided action of the defendant, and therefore his *intention* does not play a central role in the private international law process. In contradistinction, contract law is all about the relationship between the intentions of litigating parties. It is therefore logical that the concept of 'directing activities', qua concept that incorporates the idea of an intention, plays a larger role in contract law than in tort law.

4.2. Consumer contracts on the internet: who directs activities to whom?

In consumer law, the EU legislator aims to protect the consumer against stronger parties. In private international law, this means that the EU legislator lays down special rules that deviate from the general rules on applicable law and jurisdiction. As to the applicable law to contractual disputes, therefore, consumers are not necessarily confronted with the law of the country of the characteristic performer. Similarly, in the matter of jurisdiction, consumers may bring proceedings in another court than those of the defendant's domicile or the place of performance. The alternative that is chosen, is the 'directed activities' criterion, according to which the judge should determine whether the trader has directed his activities to the Member State of the consumer's domicile. This, however, begs the question why the law does not look at the directedness of the consumer's activities. In short, who directs activities to whom on the internet? This question has been the centre of a more general discussion about private international law in the field of contracts on the internet.

More specifically, this discussion revolves around two general approaches towards e-contracts.[286] On the one hand, there is the *country-of-origin approach*, which stipulates that traders on the internet should only be bound by the law and jurisdiction of their home state. Online shopping is, in this view, equated to offline shopping: the customer who enters a foreign website is well aware of his crossing borders, and should therefore be seen as a customer that physically travels to another country in order to buy goods. In their mutual relationship, the trader cannot predict from where his customers arrive on his website, whereas customers *can* predict where they enter into contractual relationships. It is therefore justified, according to this view, that the contractual relationship is governed by the law and jurisdiction of the trader's home state. On the other hand, there is the *country-of-destination approach*. This approach regards the online *trader* instead of the customer as crossing borders, and therefore argues that the trader should be subjugated to the law and jurisdiction of the customer's state.

Which of these approaches is followed in practice? As regards the laws by which a trader's internet activities are governed, the EU legislator favours the country-of-origin approach. This follows from art. 3 E-Commerce Directive, which essentially follows the principle of mutual recognition.[287] Nevertheless, the ECJ argues that art. 3 E-Commerce Directive should not be regarded as a rule of private international law. Rather, it stipulates that the private international law rules of a Member State remain applicable in full, but may not result in the imposition of a 'double burden' on the trader.[288] As regards specific cases, therefore, the discussion on jurisdiction and the applicable law on the internet continues.

In the context of consumer protection in private international law, the two approaches mentioned can be recognised in the distinction between so-called 'active' and 'passive' consumers. Active consumers actively travel to another state where they enter into contractual relationships, whereas passive consumers are those who remain in their home state but

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[285] Cf. Hill 2008, pp. 137-138.

[286] Hill 2008, pp. 133-134.

[287] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'); Hill 2008, p. 135.

[288] ECJ 25-10-2011, Joined Cases C-509/09 and C-161/10, *eDate Advertising v. X and Martinez v. MGN*, ECLI:EU:C:2011:685, paras. 53-68.

nonetheless enter into cross-border contracts due to an activity on the part of the professional. Art. 13 of the Brussels Convention and art. 5 of the Rome Convention were based on this distinction, and protected passive consumers against 'active' traders that addressed a specific invitation to the consumer or had advertised in the state where the consumer was domiciled.[289] Nevertheless, this formulation became problematic with the rise of the internet. The mere use of website cannot, namely, be regarded as either addressing a specific invitation to consumers or advertising in all Member States from which the website can be accessed.[290] Under the RIR and BIR, therefore, the provision was adapted in order to take into account the existence of so-called 'e-contracts', contracts that are concluded via the internet.[291] By using the 'directed activity' criterion, the EU legislator took into account the 'dematerialisation' of contracts concluded via the internet, and shifted the attention from the location where the contract is concluded to the intention of the trader to reach the consumer in his Member State.[292] Because of the new formulation, it is debatable to what extent the distinction between active and passive consumers was upheld under art. 6(1)(b) RIR, art. 15 BIR and nowadays under art. 17 BIR(r).[293] It is somewhat artificial to call consumers active when they surf on the internet, and simultaneously the internet makes it irrelevant whether the consumer concludes an e-contract while being in his home state or in another state.[294] Nowadays, therefore, the concept of 'directing activities' is explained in terms of active and passive websites, or perhaps better, in terms of active and passive traders. Substantively, this terminology does not change much to the consequences of the old distinction. If a trader actively directs his activities to the consumer's Member State, the consumer may be deemed passive for the purposes of consumer protection. This is even the case if both the trader and the consumer are active.[295] In short, consumer protection in European private international law follows the country-of-destination approach.

4.3. The current state of the law

4.3.1. Legal basis

Art. 17(1)(c) BIR(r) and art. 6(1)(b) RIR, which stipulate the 'directed activity' criterion, are aimed at consumer protection. The basis for this consumer protection in the Treaties is the former art. 153 EC, which is now art. 169 TFEU.[296] It establishes the need 'to promote the interests of consumers and to ensure a high level of consumer protection', and may therefore be read in conjunction with art. 12 TFEU and art. 38 CFR. Nevertheless, art. 169 TFEU does not constitute the ultimate basis of art. 17(1)(c) BIR(r) and art. 6(1)(b) RIR. It *does* provide the aim that the EU legislator strives to achieve – consumer protection – but does not provide an autonomous legal basis for legislative action. Under art. 169(2)(a) TFEU, that is, the 'directed activity' criterion is formally based on art. 114 TFEU. While consumer protection may constitute its aim, this aim is subjugated to the needs of 'the establishment and functioning of the internal market'.[297]

4.3.2. Case law

The concept of 'directing activities' has been interpreted by the ECJ in its case law starting with *Pammer & Alpenhof*.[298] Although this case law focuses on art. 15(1)(c) BIR, it is, considering the

[289] See Tang 2009, pp. 174-181.
[290] Gillies 2008, p. 133.
[291] Asser/Kramer & Verhagen 10-III 2015/855; Bisping 2014, pp. 534-536.
[292] Gillies 2008, pp. 128-131, 134.
[293] Hill 2008, p. 143.
[294] Gillies 2008, pp. 138, 140.
[295] A causal relationship between the directed activities and the contract is not necessary for the application of art. 17(1)(c) BIR(r) and art. 6(1)(b) RIR. See the discussion of ECJ 17-10-2013, Case C-218/12, *Emrek*, ECLI:EU:C:2013:666 under para. 4.3.2.
[296] Gillies 2007, p. 89.
[297] Cf. Schmid 2011, p. 23.
[298] ECJ 07-12-2010, Joined Cases C-585/08 and C-144/09, *Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v. Oliver Heller*, ECLI:EU:C:2010:740.

principle of continuity, still of relevance for art. 17(1)(c) BIR(r).[299] Moreover, the principle of consistent interpretation makes this case law authority for art. 6(1)(b) RIR as well.[300]

In *Pammer & Alpenhof*, the ECJ stressed the importance of an independent interpretation, which refers 'principally to the system and objectives of the regulation, in order to ensure that it is fully effective'.[301] Although the aim of art. 17(1)(c) BIR(r) is to protect consumers, 'that does not imply that that protection is absolute'. If it were absolute, the EU legislature would not have laid down the condition of a directed activity. Moreover, recital 24 RIR stresses the fact that mere access to a website does not make that website directed to another Member State yet. Rather, courts should consider whether the professional had *the intention* to direct his business activities to the Member State of the consumer's domicile, in the sense that he was minded to conclude a contract with the consumer.[302] Only then are the interests of the consumer and those of the professional weighed properly, and can it be concluded that there is a directed activity in the sense of art. 17(1)(c) BIR(r). Not only clear expressions by the professional show such an intention; it can also be inferred from a holistic interpretation of his website.[303] The following factors point in the direction of a directed activity, but the list is not exhaustive:

> *the international nature of the activity at issue [...]; mention of telephone numbers with the international code; use of a top-level domain name other than that of the Member State in which the trader is established [...]; the description of itineraries from one or more other Member States to the place where the service is provided; and mention of an international clientele composed of customers domiciled in various Member States, in particular by presentation of accounts written by such customers.*[304]

Also the language and currency used on a website may constitute factors that contribute to the conclusion of directedness. They should then be different from the language and currency 'generally used in the Member State from which the trader pursues its activity'.[305]

In order to establish the existence of an intention to direct activities to a certain Member State, the ECJ not only regards as irrelevant the mere accessibility of a website, but also the mention of an e-mail address, geographical address, or a phone number without an international code. The irrelevance of these contact details can be explained against the background of the E-Commerce Directive,[306] on the basis of which such contact details are mandatory.[307] If the provision of these contact details were regarded as relevant factors in establishing directedness, this would arguably run counter to recital 40 RIR, according to which the RIR should not prejudice the application of other instruments of EU law that are directed at establishing an internal market.

In following case law the ECJ further specified the workings of art. 17(1)(c) BIR(r).[308] In *Mühlleitner*,[309] a consumer domiciled in Austria had contacted a motor vehicle retail business

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[299] Recital 34 BIR(r).
[300] Recital 24 RIR.
[301] ECJ 07-12-2010, Joined Cases C-585/08 and C-144/09, *Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v. Oliver Heller*, ECLI:EU:C:2010:740, para. 55.
[302] ECJ 07-12-2010, Joined Cases C-585/08 and C-144/09, *Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v. Oliver Heller*, ECLI:EU:C:2010:740, paras. 69-76.
[303] ECJ 07-12-2010, Joined Cases C-585/08 and C-144/09, *Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v. Oliver Heller*, ECLI:EU:C:2010:740, paras. 80-84, 92-94.
[304] ECJ 07-12-2010, Joined Cases C-585/08 and C-144/09, *Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v. Oliver Heller*, ECLI:EU:C:2010:740, para. 83.
[305] ECJ 07-12-2010, Joined Cases C-585/08 and C-144/09, *Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v. Oliver Heller*, ECLI:EU:C:2010:740, para. 84; recital 24 RIR.
[306] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'); see Stone 2015, pp. 10-12.
[307] Svantesson 2016, p. 475.
[308] See also Peschel 2016, p. 196.

established in Germany to ask for more information about products offered online. Following correspondence by telephone and by e-mail, the consumer travelled to Germany where she bought a car at the trader's premises and took immediate delivery of it. When the car appeared to be defective and the seller refused to repair it, the consumer started proceedings in Austria for rescission of the contract, claiming that the Austrian courts had jurisdiction based on the 'directed activity' criterion.[310] In subsequent proceedings it was established that the consumer was correct in stating that the seller's website was directed to her Member State. It remained unclear, however, whether the non-distance nature of the contract had any bearing on the protection afforded by art. 17(1)(c) BIR(r).[311] In its judgment, the ECJ ruled in favour of the consumer, stating that the 'directed activity' criterion does *not* presuppose a B2C contract to be concluded at a distance. Though conceding that consumer protection is not absolute, the ECJ adopted a literal interpretation of art. 17(1)(c) BIR(r) and concluded that it contains no express condition that the contracts falling within its scope have been concluded at a distance.[312] A non-distance contract, in short, is covered by the protection afforded by the 'directed activity' criterion on the condition that it falls within the scope of activities directed to the Member State of the consumer's domicile. If the contract is concluded at a distance, however, this *does* constitute evidence for such a connection between the contract and the directed activity as to bring the contract within the activity's scope.[313]

In *Emrek*, the ECJ was confronted with a similar case. A German consumer had travelled to France where he had bought a motor vehicle at the seller's premises. Claiming breach of contract, he subsequently started proceedings before the German courts, relying on art. 17(1)(c) BIR(r).[314] The interesting part of the case constituted the circumstance that the consumer was not aware at the time of contracting that the seller made use of a website which was directed to Germany, the consumer's place of domicile. For this reason, the question referred to the ECJ asked whether there needs to be a causal relationship between the directedness of business activities and the conclusion of a consumer contract so as to trigger art. 17(1)(c) BIR(r).[315] In its judgment, the ECJ established that there does not have to be such a causal relationship. If a consumer learns about the trader's business in the place of that trader's business, without ever consulting the internet, this is no hindrance to accepting a connection between the contract and the trader's directing activities via the internet.[316] Again, however, a causal relationship between the directed activities and the conclusion of a contract *does* constitute evidence for a connection between the contract and the directed activity.[317] Such evidence can also be found in the fact that a trader is established in an 'urban area extending on both sides of the border, and that he uses a telephone number allocated by the other Member State' which he makes available to consumers from that other Member State in order to 'save them the cost of an international call'.[318]

In *Maletic*, the consumer booked a hotel on lastminute.com, whose registered office is in Munich, Germany. As lastminute.com made use of the services of TUI, acting as the travel agent from its registered office in Vienna, Austria, the question was whether the consumer, living in Bludenz, Austria, could sue both lastminute.com and TUI before the court in Bludenz. More specifically, the question was asked whether the connection between the lastminute.com and TUI should lead to the conclusion that the consumer enjoys the same protection against TUI as against lastminute.com. Although the contract with TUI concerns a purely domestic situation, the

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309 ECJ 06-09-2012, Case C-190/11, *Mühlleitner*, ECLI:EU:C:2012:542.
310 ECJ 06-09-2012, Case C-190/11, *Mühlleitner*, ECLI:EU:C:2012:542, paras. 11-16.
311 ECJ 06-09-2012, Case C-190/11, *Mühlleitner*, ECLI:EU:C:2012:542, paras. 18-25.
312 ECJ 06-09-2012, Case C-190/11, *Mühlleitner*, ECLI:EU:C:2012:542, paras. 33-36.
313 ECJ 06-09-2012, Case C-190/11, *Mühlleitner*, ECLI:EU:C:2012:542, paras. 44.
314ECJ 17-10-2013, Case C-218/12, *Emrek*, ECLI:EU:C:2013:666, paras. 9-18.
315 ECJ 17-10-2013, Case C-218/12, *Emrek*, ECLI:EU:C:2013:666, para. 18.
316 ECJ 17-10-2013, Case C-218/12, *Emrek*, ECLI:EU:C:2013:666, paras. 19-26.
317 ECJ 17-10-2013, Case C-218/12, *Emrek*, ECLI:EU:C:2013:666, para. 26-29.
318 ECJ 17-10-2013, Case C-218/12, *Emrek*, ECLI:EU:C:2013:666, para. 30.

close connection with the international contract with lastminute.com brought the case under the protection afforded by the BIR. In short, the ECJ established that a purely domestic contractual relationship between a consumer and a professional can fall under art. 17(1)(c) BIR(r) if it is closely connected to a contract of the same consumer that falls *directly* under the 'directed activity' criterion of art. 17(1)(c) BIR(r).[319]

Where the consumer in *Maletic* was contractually linked to both TUI and lastminute.com, the ECJ had to determine in *Kolassa* whether a consumer was also protected by the BIR if his connection with a 'directing' professional could only be established via a chain of contracts. The consumer in that case, domiciled in Austria, had invested money in certificates that were issued by Barclays Bank, which is registered in the UK and has a branch in Frankfurt-am-Main, Germany. The consumer had done so through the Austrian bank direktanlage.at, which had bought the certificates from its parent company, DAB Bank, established in Munich, Germany. DAB Bank, in turn, had acquired the certificates from Barclays Bank. Claiming damages directly from Barclays Bank, the consumer held that the Austrian court should have jurisdiction based on art. 17(1)(c) BIR(r).[320] In its judgment the ECJ rejected the Austrian court's jurisdiction on three grounds. It noted, firstly, that there was no direct contractual relationship between the consumer and the professional, Barclays Bank; secondly, that art. 17(1)(c) BIR(r) concerns a derogation from both art. 4 and art. 7(1) BIR(r) and should therefore be interpreted narrowly; and thirdly, that the condition of a contractual relationship between the consumer and the professional is based on the principle of predictability.[321] The conclusion is therefore that a relationship via a chain of contracts does not fall within the scope of art. 17(1)(c) BIR(r).[322]

Finally, in *Hobohm*,[323] the ECJ dealt with the following scenario. A consumer and a professional had concluded two contracts, one of which clearly fell under the scope of art. 17(1)(c) BIR(r). The other contract did not fall under the provision's scope, as it was not based on activities directed to the consumer's Member State, but had a clear economic link with the first contract. Where the first contract concerned the purchase of an apartment, the second one concerned construction work on that same apartment. Both contracts therefore served the purpose of giving the consumer the effective enjoyment of his apartment. Ruling on the question of jurisdiction with regard to the second contract, the ECJ determined that the economic link between the contracts brought the second contract under the protection of art. 17(1)(c) BIR(r). Therefore, if a consumer contract with a professional is not concluded within the scope of a professional's directed activities *per se*, but serves the same economic objective previously settled in a contract that *does* fall within the scope of such activities, it is deemed falling under that same scope.

As is clear from the above, the ECJ specified the workings of art. 17(1)(c) BIR(r) in a series of case law. As said, the results are also valid for the application of art. 6(1)(b) RIR. Concluding from *Pammer & Alpenhof* and *Mühlleitner*, the ECJ adopts a case-by-case analysis when determining whether activities are directed to another Member State. When a contract in a B2C relationship is concluded by means of an order placed on the professional's website, the conclusion will normally be that the professional's activities were directed to the consumer's Member State.[324] *Maletic*, *Kolassa* and *Hobohm* further specified the approach of the ECJ when more than one contract is concluded. In general, one can see on the one hand that the principle of consumer protection is used for a broad reading of art. 17(1)(c) BIR(r) when the consumer has concluded several contracts that are factually connected to each other. On the other hand, the principle of predictability and the derogatory nature of art. 17(1)(c) BIR(r) serve as a brake on the

[319] ECJ 14-11-2013, Case C-478/12, *Maletic*, ECLI:EU:C:2013:735.
[320] ECJ 28-01-2015, Case C-375/13, *Kolassa*, ECLI:EU:C:2015:37, paras. 12-17.
[321] ECJ 28-01-2015, Case C-375/13, *Kolassa*, ECLI:EU:C:2015:37, paras. 26-30.
[322] ECJ 28-01-2015, Case C-375/13, *Kolassa*, ECLI:EU:C:2015:37, para. 35.
[323] ECJ 23-12-2015, Case C-297/14, *Hobohm*, ECLI:EU:C:2015:844.
[324] Stone 2015, pp. 8-9.

principle of consumer protection: the provision cannot be invoked against a professional with whom the consumer has no direct contractual link.

4.4. Directing activities and formalism

Criticising the case law of the ECJ, some commentators argue that recourse to the trader's intention to direct activities to the consumer's Member State must be viewed as an exception rather than as a rule,[325] also in cases concerning disputes over consumer contracts.[326] In so doing, these commentators refer to the cases discussed under paragraph 4.1, in which the concept of intentionally directing activities is subject to erosion or does not exist at all. Such references cannot, however, be decisive in an argument about the correct interpretation of the 'directed activity' criterion. Although art. 114 TFEU forms the basis of consumer protection in private international law, the legal consequences of art. 17(1)(c) BIR(r) and art. 6(1)(b) RIR must be analysed in terms of a Kantian view on party autonomy. The provisions may have as their object to open up the market for consumers and may therefore be in line with both art. 38 CFR and the policy-oriented underpinnings of art. 16 CFR,[327] but a coherent view on private international law necessitates one to interpret them in a way that corresponds to positive law's goal of protecting everyone's innate freedom in civil society.[328]

This formalist perspective on private international law is recognisable in the demand of the ECJ to establish the *intention* of a trader on the basis of its *external* behaviour. The fact that no causal relationship between the directed activities and a consumer contract is needed, may be justified on the basis that the trader *knew* that he was directing activities to the consumer's Member State. Although the ECJ's approach in *Mühlleitner* and *Emrek* has led to a situation in which the *consumer's* actual, subjective, activity or passivity does not play an important role anymore, the discussed cases *do* uphold the importance of the activity or passivity of the *trader*.[329] In formalist terms, this approach can be explained on the basis of a presupposition that the consumer wants his domestic law to apply and his home courts to have jurisdiction.[330] Such a presupposition is justified given the need to protect weaker parties in civil society, but only if the *trader's* intention, which cannot be presupposed in the same way, keeps being evaluated individually.[331] If, on the basis of the trader's external behaviour, it can be established that the trader was aware of his directing activities to the consumer's Member State, it is therefore justified to take the country-of-destination approach towards the trader's conduct. In so doing, the law takes into account both the freedom of the consumer and that of the trader. While it is necessary to help consumers who otherwise would be confronted with foreign laws and jurisdictions in a manner that is unforeseeable for them, this consumer protection must not go so far as to erode the foreseeability of private international law for traders. Under the scheme of the 'directing activities' criterion as interpreted by the ECJ, both parties are taken seriously in their capacity of being free. That is, the law enables them to act rationally. The judgments in *Maletic*, *Kolassa* and *Hobohm* also fit within this image: if the relationship between the consumer and the trader becomes too uncertain, it would be an infringement of the trader's right to freedom were he to comply with the law of the consumer's Member State. All in all, the ECJ's focus on the trader's intention under the directed activities criterion seems justified by private international law's theoretical underpinnings.

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[325] Stone 2015, pp. 3-4.
[326] Svantesson 2016, p. 475.
[327] See para. 2.5.
[328] See paras. 3.3.3. and 3.3.4.1.
[329] Bisping 2014, pp. 530-534, expresses fear that the ECJ's line of case law, due to its rendering unimportant the intention of the consumer, leads to mandatory consumer protection that is unpredictable for traders.
[330] See paras. 3.3.4.1 and 6.5.1.
[331] The Geoblocking Regulation seems to take away the importance of the trader's intention; see para. 5.2.3.

4.5. Conclusion

What can be concluded with regard to the position of party autonomy in the 'directed activity' criterion? Clearly, the criterion is meant to protect the consumer's interests. Simultaneously, the ECJ has stated that this protection is not absolute: the trader's interests have to be taken into account as well. This is done by seeing whether the trader really had the *intention* of directing his business activities to the consumer's Member State. By determining this intention on the basis of factors that are publicly ascertainable, the ECJ upholds the principle of publicity that follows from private international law's formal underpinnings. In the end, the 'directed activity' criterion comes down to a protective connecting factor that, in line with formalism, combines the principles of freedom of contract (art. 16 CFR) and consumer protection (art. 38 CFR), and stipulates how in B2C relationships the will of the parties should be construed.

5. PARTY AUTONOMY IN THE GEOBLOCKING REGULATION

Having discussed the conception of party autonomy that prevails in the 'directed activity' criterion, it is necessary to look at party autonomy in the Geoblocking Regulation. Firstly, it is discussed what geoblocking actually is, and what role it plays in the area of internet law. Then, the Regulation is discussed as to its contents. Art. 20(2) Services Directive, which formerly fulfilled the role on the internet that the Geoblocking Regulation should play now, is discussed as well in order to better understand the rationale that underlies the Geoblocking Regulation and the problems that it is meant to solve.

As the Regulation is purely an instrument of public interference, it does not, as did the 'directed activity' criterion, fall under the account of legal formalism presented earlier. Rather, it should be assessed in light of what has been discussed under chapter 2. For this reason, the discussion of the Geoblocking Regulation finishes with a review of how it relates to the demands of art. 16 CFR. In so doing, it should become clear which conception of party autonomy prevails in the Geoblocking Regulation.

5.1. The phenomenon of geoblocking

Geoblocking is the practice of withholding internet users from entering certain content on the internet. Normally, geoblocking is based on territorial limitations to the access of certain websites. The technique was originally developed in the private sector, and its use made it possible to partition the digital market geographically. Several areas of law necessitated content and service providers on the internet to do so in order to comply with, for instance, their obligations under intellectual property law. Under a license that only authorises the use of intellectual property within a territorially defined area, it is necessary for the license holder to mitigate the worldwide reach of the internet. Otherwise, customers from abroad can easily access the license holder's content via the internet. Geoblocking is the means for preventing this from happening. Next to limiting the reach of one's website for intellectual property purposes, geoblocking is used to enhance security by preventing access to websites from locations in which an authorised user is not expected to be located.[332]

The example of the private sector was followed by regulators and courts, which turned their eye on geoblocking in areas such as gambling law. By forcing providers of online gambling services to geoblock internet users from certain geographical areas, regulators could enforce their gambling laws, which are territorially limited, on the internet. By so doing they could partition the internet, which was once seen as an area of 'borderless law' comparable with the high seas, according to the territorial borders of states.[333]

5.2. The ban on geoblocking

Nevertheless, geoblocking has its downsides as it can be used by companies to discriminate between customers based on their nationality, place of residence or place of establishment. Making use of differences in welfare, companies can territorially differentiate between prices paid for a certain product or service. In the EU, moreover, artificially segmenting the market results in obstructions of the internal market. For this reason, the EU legislator has issued the Geoblocking Regulation in order to ban geoblocking in case it leads to unjustified discrimination between customers.

In general, geoblocking raises two kinds of obstructions to the well-functioning of the EU's internal market.[334] Firstly, it is often used by companies in order to withhold people from using their rights of access to copyright works abroad. Geoblocking can, for instance, be used to make it impossible to watch TV shows of one's home Member State when travelling cross-

[332] Trimble 2016, p. 49.
[333] Trimble 2016, pp. 47-51.
[334] Mazziotti 2015, p. 6.

border. Secondly, geoblocking may create an obstacle for consumers who wish to access websites from companies in other Member States in order to consume products offered on those websites. The first of these issues is the object of the Regulation on cross-border portability of online content services in the internal market.[335] The second one is treated by the Geoblocking Regulation.[336] This latter Regulation is the topic of this research, as it is here that geoblocking is used as a means to avoid entering into contracts with consumers. Before discussing it, however, some words must be said about art. 20(2) Services Directive.

5.2.1. Art. 20(2) Services Directive

Before the Geoblocking Regulation was adopted, the practice of discriminating foreign customers by refusing to enter into contracts with them was covered by art. 20(2) Services Directive.[337] This provision falls under section 2 of the Directive, which deals with the rights of recipients of services, and is regarded as the predecessor of the Geoblocking Regulation.[338] More specifically, art. 20 Services Directive lays down the principle of non-discrimination:

1. *Member States shall ensure that the recipient is not made subject to discriminatory requirements based on his nationality or place of residence.*

2. *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.*

This provision is directed to the *host* Member State, that is, to the Member State that hosts the service provider. Accordingly, if a customer receives services from a foreign service provider, he may not be discriminated against vis-à-vis customers that receive services from domestic service providers. Although Member States are the primary target of art. 20 Services Directive, its effects reach into the private sphere.[339] Not only are Member States themselves forbidden to discriminate, they should also ensure that customers are not discriminated against by foreign service providers.

Notwithstanding the far-reaching consequences of the Services Directive, its implications for geoblocking are not clear. First of all, it only concerns the provision of services, whereas the consequences of geoblocking are not confined to services but raise issues in the area of free movement of goods as well. Related to this problem is the fact that the Services Directive is not up to date with the latest developments in technology. In the digital era, goods and services 'are increasingly sold together as packages'.[340] The Directive's horizontal approach and 'neutrality' towards the environment in which services are provided,[341] give it a breadth that may easily result in uncertainties in specific areas such as geoblocking. Another shortcoming of the Services Directive is that it does not make clear what exactly constitute objective criteria that justify certain kinds of discrimination.[342] Last but not least, empirical analysis shows that the Services

[335] Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market.
[336] Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC.
[337] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.
[338] Sein 2017, p. 148.
[339] Barnard 2016, p. 443.
[340] De Minico & Viggiano 2017, p. 141.
[341] De Minico & Viggiano 2017, pp. 134-135.
[342] European Commission, *Explanatory Memorandum*, COM (2016) 289 final, pp. 2-3.

Directive has had no, or only a marginal, effect on geoblocking. In practice, that is, the use of geoblocking is still very common in the EU.[343]

5.2.2. The Geoblocking Regulation

In order to address the lack of legal certainty in the area of contracts concluded online, the EU legislator adopted the Geoblocking Regulation, which explicitly prohibits 'the blocking of access to websites and other online interfaces and the rerouting of customers from one country version to another'.[344] Under competition law the use of geoblocking could already be restricted under reference to artt. 101 and 102 TFEU,[345] but these restrictions were not far-reaching enough to really develop the internal market. The present proposal is based on art. 114 TFEU, which aims to develop the internal market, or more specifically, the digital single market. By aiming to ban geoblocking in its totality, the regulation goes further than art. 26 TFEU, the basic internal market provision. While the EU legislator normally only deals with *state* obstructions to the internal market, the Geoblocking Regulation is directed at obstructions caused by *private* parties.[346] By forbidding traders, including service providers, from unjustified geoblocking, the EU legislator aims to spread the benefits of the internal market. Where generally it is only traders that benefit from free trade, customers and, more specifically, consumers should benefit from it as well.[347] Geoblocking is, however, only banned in so far as it is unjustified according to the principle of non-discrimination.[348] Artt. 3 and 4 Geoblocking Regulation, in which this principle is laid down, are meant to clarify the non-discrimination principle in cyberspace. More specifically, art. 3 stipulates that traders are prohibited from geoblocking purely on the basis of the customers' nationality, place of residence or place of establishment. Art. 4 further specifies the situations in which geoblocking is not allowed. In art. 4(1)(a)-(c) the regulation mentions, firstly, the sale of goods without physical delivery, secondly, the sale of electronically supplied services and thirdly, the sale of services provided in a specific physical location.

Recognising the justified need of geoblocking in circumstances such as those mentioned earlier, the Geoblocking Regulation's ban on geoblocking is not absolute. Art. 3(3) lays down an exception in case the practice of geoblocking or redirecting is necessary to comply with 'a legal requirement laid down in Union law, or in the laws of a Member State in accordance with Union law, to which the trader's activities are subject'.[349] In art. 4(1)(b) the regulation expressly mentions traders' obligations under intellectual property law.

5.2.3. Active and passive traders

Concluding from the above, the Geoblocking Regulation is meant as a logical specification of art. 20(2) Services Directive. Where art. 20(2) Services Directive is directed at the Member State that *hosts* the service provider, and in the end, after implementation that is, seeks to protect the *passive* customer / consumer from discriminatory measures taken by the *active* service provider / trader,[350] the Geoblocking Regulation similarly protects passive consumers from geoblocking measures taken by foreign traders.

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343 Sein 2017, p. 148.

344 European Commission, *Explanatory Memorandum*, COM (2016) 289 final, p. 2; art. 1(1) Geoblocking Regulation.

345 See Kuipers & Van de Sanden 2016, pp. 249-251.

346 European Commission, *Explanatory Memorandum*, COM (2016) 289 final, p. 4; Basedow 2016, p. 642. The internal-market argument seems weak: although the regulation may open up the market for customers, it may discourage traders from entering in cross-border sales within the EU. The Geoblocking Regulation may therefore create an imbalance between consumer protection in art. 6 RIR, and the general rule in art. 4 RIR, which refers cases to the law of the country where the characteristic performer is situated and therefore encourages traders to enter in cross-border sales. Cf. Kuipers 2012, p. 24.

347 European Commission, *Explanatory Memorandum*, COM (2016) 289 final, pp. 2, 4.

348 European Commission, *Explanatory Memorandum*, COM (2016) 289 final, p. 6.

349 See also Basedow 2016, p. 641; Peschel 2016, p. 198.

350 See para. 4.2.

At this point, however, it is necessary to pause and think about the actual activity of traders. By prohibiting the use of geoblocking, the Geoblocking Regulation regards traders as being active merely because they use a website. As a consequence of using a website, therefore, they are made subject to the same non-discrimination principle that is laid down in art. 20(2) Services Directive. Is it, however, not by geoblocking that they want to avoid being active at all? The Geoblocking Regulation seems to overstep this argument. Here one can see the difficulties again that arise as a consequence of the internet. In paragraph 4.2 it was explained that online activities can be viewed in two ways. On the one hand, the user of a website may be taken as actively trying to reach customers abroad. On the other hand, the visitor of that same website can also be seen as actively seeking contact with foreign traders. Who is contacting whom? In terms of the 'offline', physical world, using a website may, due to its worldwide accessibility, be regarded as entering the jurisdiction of the consumer's Member State. This is what is done under the Geoblocking Regulation. If, however, use is made of geoblocking, the main argument for the applicability of the non-discrimination principle seems to disappear: the trader's website is not accessible anymore, and as a consequence the trader does not enter the jurisdiction of the consumer's Member State. Under art. 20(2) Services Directive this outcome could reasonably be reached. The Geoblocking Regulation, however, forces Member States to view website users as being active all the time. The leeway for domestic courts that existed under the Services Directive, is taken away under the pretence of taking away legal uncertainty. Traders using a website are, in short, subjugated to a *de facto* obligation of being active, and therefore, or so it seems,[351] obliged to direct their business activities to all Member States of the EU.

5.3. The values served

Although the Geoblocking Regulation serves the principle of non-discrimination laid down in art. 21 CFR, it becomes very clear from the discussion under paragraph 5.2.3 that the development of the internal market is the EU legislator's primary concern. Given the idea that non-discrimination constitutes the 'cornerstone of the four freedoms', this is not surprising: in paragraphs 2.3.1.1 and 2.4.1.2 it became clear that the European principle of non-discrimination often comes down to the principle of mutual recognition, thereby promoting free trade. Moreover, the horizontal effect of the principle of non-discrimination is not new either: already in *Kücükdeveci* it was established that art. 21 CFR has such effect.[352]

Further, the Geoblocking Regulation is said to comply with the demands of artt. 16 and 17 CFR, the freedom to conduct a business and the right to property. According to the Commission, traders 'can continue to decide where and when they offer their goods or services to customers'. The only limitation that is set by the Geoblocking Regulation, is the non-discrimination principle.[353] In this light, a potential justification of the Geoblocking Regulation may be to argue that customers should also profit from the freedom of contract that is incorporated in art. 16 CFR. Under art. 38 CFR, moreover, consumers should be protected against the strong position of traders. A restriction on traders' autonomy is then justified by the need to uphold the principle of party autonomy in general.[354]

Nevertheless, the way the Commission seeks to achieve that aim seems to take away the trader's freedom of contract in its entirety. The Geoblocking Regulation is therefore not as clearly defendable on the basis of party autonomy as it might seem. Being aimed primarily at the internal market, its connection with art. 16 CFR must be seen in light of the 'marketisation of autonomy' mentioned above.[355] Traders are free to determine with whom they want to conclude contracts, but this freedom is limited by the general aim to establish the internal market.

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[351] According to recital 13 and art. 1(6) Geoblocking Regulation this is not the case. See ch. 6.
[352] See para. 2.4.1.2; ECJ 19-01-2010, C-555/07, *Kücükdeveci*, ECLI:EU:C:2010:21.
[353] European Commission, *Explanatory Memorandum*, COM (2016) 289 final, p. 6.
[354] See paras. 2.2.3, 3.3.2-3.3.3.
[355] See para. 2.5.1.

In line with what has been said above,[356] party autonomy is not treated by the EU legislator as a value on itself, but as a means to achieve the ideal of a single market. The Geoblocking Regulation therefore results in a disbalance between the policy aim of attaining a European internal market and the fundamental right to freedom of contract.[357] It is primarily against the background of the internal market, therefore, that an explanation for the Geoblocking Regulation must be sought.

5.4. Conclusion

Concluding this chapter, it is clear that the Geoblocking Regulation fits well with general EU law on free movement and the Charter of Fundamental Rights. Although values such as consumer protection and the principle of non-discrimination are mentioned as the central objectives of the regulation, it ultimately serves the needs of the internal market. Just like what was concluded for art. 16 CFR above,[358] therefore, the Geoblocking Regulation on itself is no more than an instrument in order to achieve the digital single market.

[356] See paras. 2.5.1 and 3.2.1.
[357] See para. 2.5.
[358] See para. 2.5.1.

6. RECONCILING THE GEOBLOCKING REGULATION WITH THE DIRECTED ACTIVITY CRITERION

Having discussed both the 'directed activity' criterion and the Geoblocking Regulation separately, it is time to bring them together. Only then is it possible to answer the main research question, which asks what the consequences of the Geoblocking Regulation are for the ECJ's approach towards the principle of party autonomy as laid down in art. 17(1)(c) BIR(r) and art. 6(1)(b) RIR. The need to answer this question arises if one considers recital 13 and art. 1(6) Geoblocking Regulation, which essentially say that a trader's compliance by the regulation shall not be regarded as constituting 'directing activities' in the sense of art. 17(1)(c) BIR(r) and art. 6(1)(b) RIR.

> *In particular, where a trader, acting in accordance with Articles 3, 4 and 5 of this Regulation, does not block or limit consumers' access to an online interface, does not redirect consumers to a version of an online interface based on their nationality or place of residence that is different from the online interface to which the consumers first sought access, does not apply different general conditions of access when selling goods or providing services in situations laid down in this Regulation, or accepts payment instruments issued in another Member State on a non-discriminatory basis, that trader shall not be, on those grounds alone, considered to be directing activities to the Member State where the consumer has the habitual residence or domicile. Nor shall that trader, on those grounds alone, be considered to be directing activities to the Member State of the consumer's habitual residence or domicile, where the trader provides information and assistance to the consumer after the conclusion of a contract that has resulted from the trader's compliance with this Regulation.*[359]

Apparently, the relationship between the Geoblocking Regulation and the 'directed activity' criterion must be interpreted in a sense as though there is no tension as to the trader's party autonomy. Before potential reinterpretations of the 'directed activity' criterion are treated, therefore, it should be investigated which alternatives traders have to the use of geoblocking.

6.1. Alternatives to geoblocking

In practice, there are several ways in which traders can avoid their website being directed to certain Member States. In general, two alternatives are mentioned: disclaimers which expressly stipulate the countries a website is directed to, and drop down menus in which customers must select the country they are domiciled in or in which they have their habitual residence.[360] If consumers mislead the trader by selecting another country or otherwise, they – so it is assumed – lose their protection.[361] Nonetheless, both disclaimers and drop down menus seem in principle to be forbidden by the Geoblocking Regulation. Just like geoblocking itself, these alternatives expressly discriminate between consumers based on their nationality, place of residence or domicile, and are therefore liable to amount to a breach of the principle of non-discrimination. Yes, disclaimers can be used to narrow down the places of *delivery*, which would supposedly be justified under the Geoblocking Regulation and constitute an important factor in determining the 'directedness' of business activities.[362] Such use of disclaimers, however, is not possible if a trader trades in, e.g., internet services. Territorial restriction of business activities would then necessarily amount to a refusal to deal with consumers from outside the trader's chosen area of business, and result in a breach of the principle of non-discrimination. Even if only meant as a statement by which the trader informs consumers about the limitations of his chosen area of business, disclaimers are unlikely to narrow down the scope of the trader's area of business: they only have

[359] Art. 1(6) Geoblocking Regulation.
[360] Sein 2017, pp. 151-152.
[361] Cf. Hartkamp, Sieburgh & Devroe 2017, pp. 332-333.
[362] If, of course, contracting *itself* is not refused on grounds of nationality, place of residence or domicile.

legal effect if supported by an actual practice of hindering consumers from outside the trader's chosen area of business to enter a website. If not supported by such practice, disclaimers may lose their legal effect due to *venire contra factum proprium*, or abuse of law:[363] the consumer may get the impression that the trader will not make use of the disclaimer, and therefore deserves protection. Geoblocking therefore seems a necessary precondition for the validity of a disclaimer.[364] Finally, the usefulness of drop down menus is, just like that of disclaimers, restricted to a specific kind of business activity. That is, they only sort effect if the websites on which they are used are interactive. Companies that only trade 'offline' and use the internet just for advertisements, do not have the possibility to use drop down menus.[365] If they would use such menus in order to determine who can access their websites, this would presumably breach the obligations under the Geoblocking Regulation. Again, the Regulation takes away the effectiveness of a means of avoiding 'directedness' on the internet.

The argument against the effectiveness of 'unsupported' disclaimers may be challenged on the basis that the concept of abuse of law is a substantive-law concept and cannot therefore be used in private international law. Consumer protection in private international law, that is, seems not to give 'rights' to consumers that are to be evaluated against the background of a set of substantive norms. Rather, protective connecting factors are part of the wider category of objective connecting factors, which are procedural in nature.[366] Nevertheless, it seems justified to deprive a consumer of his protection under private international law if he misleads a trader. How, then, can such an outcome be justified legally? One possibility that springs to mind is that private international law is governed by the *lex fori*. This argument, however, is blocked by the fact that the BIR(r) and RIR are meant to completely harmonise their respective areas of law. It seems therefore not allowed to fall back on principles of domestic law. The interpretation should be conducted autonomously, and recourse to abuse of law must therefore be justified on the basis of European law. The question is, therefore, whether the Regulations incorporate a rule on abuse of law. On the basis of the ECJ's judgments in *Gasser* and *Turner v. Grovit* it has been argued that no such rule exists in the area of jurisdiction.[367] The referring courts in these cases, however, essentially asked whether they could rule on the abusive character of starting proceedings in a foreign court. This is a matter of comity, or in the words of the ECJ, mutual trust, and it is rightly argued that abuse of law was not considered by the ECJ: the courts in which proceedings are started have jurisdiction to rule on their own jurisdiction.[368] This leaves the question of abuse of law to the courts seized.

Seeking a way out of this conundrum, it could be argued that the concept of abuse of law is recognised as a general principle of EU law, or if not a principle, a maxim of interpretation. This is what many authors believe on the basis of ECJ judgments in other areas of law and may also be inferred from the common traditions of the Member States which inform the ECJ in distinguishing general principles of European law.[369] Moreover, both the principle of effectiveness and art. 38 CFR can be invoked in order to adopt a consumer-friendly interpretation of the 'directed activity' criterion. If, lastly, there is no principle of abuse of law, one could still rely on the ECJ's judgment in *MSG v. Les Gravières Rhénanes SARL*, in which case it

[363] A disclaimer applies: *venire contra factum proprium* and abuse of law are not the same legal concepts. For the purposes of this paragraph, however, they are regarded as functionally equivalent. For the idea of functional equivalence, see Zweigert & Kötz 1998, pp. 32-47.
[364] Peschel 2016, p. 197.
[365] Peschel 2016, p. 197.
[366] Briggs 2011, pp. 269, 271-272.
[367] ECJ 09-12-2003, Case C-116/02, *Erich Gasser GmbH v. MISAT Srl.*, ECLI:EU:C:2003:657; ECJ 27-04-2004, Case C-159/02, *Turner v. Grovit*, ECLI:EU:C:2004:228; Briggs 2011, pp. 262-264, 269-270.
[368] Cuniberti 2011, pp. 287-288.
[369] Hartkamp, Sieburgh & Devroe 2017, pp. 327-330; Lenaerts 2010.

established that parties could not abstractly define the place of performance in their contract.[370] For the purposes of art. 7(1) BIR(r), regard should be had of the *real* place of performance. In case of disclaimers, the case may be invoked in order to argue that a mere statement does not change the facts: a trader may say he does not deliver his goods or services to certain countries, but if he nonetheless does deliver there in practice, this is what matters for the purposes of art. 17(1)(c) BIR(r) and art. 6(1)(b) RIR.

Concluding, the current approach of the ECJ towards the 'directed activity' criterion gives the Geoblocking Regulation the effect of subjugating traders to the laws and jurisdictions of every Member State in which a consumer may live. For this reason, there is a tension with the principle of legal certainty. Art. 17(1)(c) BIR(r) therefore needs to be reinterpreted, in the words of the ECJ, 'in such a way as to enable a normally well-informed defendant reasonably to foresee before which courts, other than those of the State in which he is domiciled, he may be sued'.[371] The same can be said of art. 6(1)(b) RIR.

6.2. The two rationalities of European private law

This reinterpretation must occur against the background of what has been said in chapters 2 and 3. These chapters showed that European private international law is governed by two different theoretical frameworks, or rationalities.[372] On the one hand, as part of the EU's *acquis communautaire* it falls under the general scheme of the Treaties and under the uncertain principle of party autonomy that is laid down in art. 16 CFR. On the other hand, it has its own private law rationality, which can be found via the theory of legal formalism. Whereas the application of art. 16 CFR is dependent on the political goal of a fully integrated internal market, the conception of party autonomy that is inherent in private law thinking has its own, non-political rationale.

In short, European private law is governed by two different rationalities: the EU instrumental one, which regards private law as a means to attain political goals, and the 'classical', corrective-justice one.[373] Some may find that this dichotomy is somewhat farfetched, as domestic private law has a long history of being used as an instrument. What, then, is the big difference that is made by EU law? The difference lies in the fact that EU law goes a step further in its instrumentalisation of private law than domestic law has formerly done. Some even call it an 'excessive' use of private law to attain public policy goals.[374] In domestic private law, 'instrumental' rules are deeply embedded in the general corrective-justice rationale of private law. Although public policy goals behind certain private law rules must be taken into account, 'the ordering of private-law relationships must always respect the minimum requirements of justice among the parties'.[375] Consumer information rights, for example, are well defendable within the classical framework of private law. This has been showed above. Nevertheless, the EU takes instrumentalisation to a level that is said to be irreconcilable with the core of private law.

Take, for instance, the ECJ's ambivalent approach towards consumer protection. If European consumer law is at stake, the ECJ argues that consumers should enjoy their protection at all costs, even if they ignore their consumer rights completely. The protection afforded by the EU, that is, is interpreted broadly.[376] By contrast, if *national* measures of consumer protection come into play, the ECJ interprets it very narrowly. In such cases it regards the consumer as reasonably circumspect and well informed, as a consequence of which the domestic rules on

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[370] ECJ 20-02-1997, Case C-106/95, *MSG v. Les Gravières Rhénanes SARL*, ECLI:EU:C:1997:70. The further reason that was mentioned by the ECJ, namely that the parties could not rely on art. 7(1) BIR(r) to circumvent the conditions laid down in art. 25 BIR(r), has been interpreted as stipulating a rule against abuse of law; see Metzger 2011, pp. 244-245.

[371] ECJ 17-06-1992, Case C-26/91, *Handte*, ECLI:EU:C:1992:268, para. 18.

[372] This was touched upon already in paras. 2.3.1.2 and 3.2.1.

[373] Michaels 2011, pp. 139-158; Zimmermann 1996, pp. 582-584.

[374] Cherednychenko 2013, pp. 148-171; Schmid 2011, pp. 22, 25.

[375] Schmid 2011, p. 21; see also Comparato 2016, p. 622.

[376] See also para. 2.3.1.2.

consumer protection are often said to be in breach of the four freedoms. In short, when *European* consumer law is at stake, the ECJ adopts a wide interpretation of the protection afforded, but if *domestic* consumer law comes into play, it is interpreted narrowly.[377] This ambivalence of the ECJ cannot be justified from a purely private-law perspective, but must be seen in light of public policy goals. On the one hand, the ECJ has to deal with the European principle of *effet utile* when it deals with secondary law, or positive harmonisation, while on the other hand it has to promote the goal of a fully-integrated internal market, or negative harmonisation, if domestic law threatens to obstruct free trade. In this way, the ECJ fulfils its role in the separation of powers: it is neutral as to the policy choices that underlie European law. Simultaneously, however, it fails to bring these choices together in a coherent framework.[378]

The different rationalities of European private law, and consequently the theoretical frameworks discussed in chapters 2 and 3, may clash with each other, and it is exactly in this light that the clash between the Geoblocking Regulation and the 'directed activity' criterion must be seen. The Geoblocking Regulation, that is, does not take into account matters of corrective justice. Rather, it is meant as a top-down stimulus to the creation of a single digital market. Instead of focusing on the claimant-defendant nexus, or in other words the relationship between *individual* traders and consumers, the Geoblocking Regulation places this relationship in the context of public policy goals. In terms of formalism, therefore, the Geoblocking Regulation is an instrument of *distributive justice* rather than part of corrective justice. When its effects pertain to the domain of private international law, therefore, the clashes that result must be seen against the background of the opposition between corrective and distributive justice. In order to solve the main research question, the two forms of justice need to be reconciled in a coherent whole.

6.3. The balance between formalism and art. 16 CFR

In order to reconcile art. 16 CFR with the demands of formalism in private law, regard should first be had of the uncertain application of art. 16 CFR. As explained in paragraph 2.5, the ECJ does not stipulate clear higher-ranking norms that determine which principle should be applied in a given situation. Rather, it determines the outcome of cases on a case-by-case basis, and ultimately on the basis of policy goals. Given EU law's instrumental nature, the notion of 'system' in EU law comes under pressure, which begs the question of whether it is possible at all to reach conclusions about a reconciliation between the Geoblocking Regulation and the 'directed activity' criterion. Internal coherence does not seem to constitute one of EU law's characteristics. Taking it as a starting point when interpreting EU law then seems problematic.

Nevertheless, higher principles should exist if we may believe art. 19(1) TEU. It stipulates that the ECJ 'shall ensure that in the interpretation and application of the Treaty *the law* is observed'. According to Reich this provision ensures the rule of law in the EU, and therefore 'goes beyond a mere positivist concept of law'.[379] Following art. 19(1) TEU, therefore, it is justified to turn towards a theoretical account of the nature of EU law when confronted with 'hard cases'.[380] Given the 'internal perspective' adopted here, it is submitted that such an account leads to the conclusion that EU law should, regardless of the problems mentioned, be interpreted as though it forms a seamless system. Only in this way can conclusions about the content of EU law truly be reached.

The choice, in short, to interpret EU law as a system, is based on the inherent value in interpreting the law systematically. In literature it is argued that systematic interpretation is important for at least two reasons.[381] Firstly, it is necessary to uphold the principle of equality before the law. The notion of 'system' ensures that cases that fall under different EU law

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[377] Schmid 2011, pp. 25-28.
[378] See Unberath & Johnston 2007.
[379] Reich 2014, pp. 2-3.
[380] For 'hard cases', see para. 1.4.
[381] Riesenhuber 2003, pp. 6-10, 52-53; cf. Zimmermann 1996, p. 585. See further para. 6.3.1.

measures are in the end treated according to the same governing principles. Secondly, therefore, a systematic view of EU law promotes legal certainty: litigants are not subject to the whims of the EU legislator but are treated according to clear and intelligible principles. Conceding the instrumentality of EU law, therefore, it is argued in literature that the judiciary has a duty to ultimately treat EU law in the same way as domestic law.[382]

Some differences between EU law and domestic law remain. Firstly, it is noted that the notion of so-called 'gaps' in the law is not as problematic in EU law as it is in domestic law. Where judges should treat such gaps in domestic law as if they do not exist,[383] EU law expressly works with the premise that it is not a complete legal system: in case of gaps in EU law, judges must fall back on domestic law. In EU law, therefore, the difficulty is not so much to deal with gaps in the law, but rather to find a system among the different policy rationales underlying EU law. That is, the judicial task under EU law is to interpret it in a way that 'covers up', so to say, diverging policy objectives.[384] In the end, all policy objectives should be interpreted in a way as though they are part of the same unifying structure. Systematisation of law then occurs through its application.[385]

Secondly, and this also follows from EU law´s instrumental nature, it can be argued that EU law works with a different subdivision in fields of law than does domestic law. A clear separation between private law and public law does not exist under EU law. Rather, it is argued, EU law should be separated into ´functional´ areas, or sectors, such as product safety law or financial services law.[386] Within these areas of law, then, systematisation must occur. Although this theory matches EU law's instrumental nature, it gives rise to problems when taking the formalist view on law as it was formulated by Weinrib. Because of 'sectorisation', Weinrib's emphasis on the old distinction between private and public law threatens to become obsolete under EU law. Nevertheless, it is argued here that matters that would fall under private law according to the old *summa divisio*, remain at least to some extent governed by the old principles by which they were once governed entirely. As was argued earlier with regard to private international law,[387] private law concepts have a long history that cannot be neglected in any interpretation of their meaning. The formalist understanding of private law therefore remains important under EU law, although it should be weighed against other, instrumental, principles. In short, the challenge is to reconcile the old with the new.

In order to attain such a reconciliation, it is deemed fruitful at this point to turn to Lon Fuller's formalist natural-law thinking, which – in line with the argument made here – insists on the importance of coherence in law. As his theory transcends the boundaries between private and public law, it provides principles by which to reconcile private-law formalism as incorporated in the BIR(r) and RIR with the instrumental rationality that pervades all of EU law.

6.3.1. Formal justice

In his *The morality of law* Fuller distinguishes eight desiderata by which to determine the legality of a system of rules: some degree of compliance with these desiderata is necessary for norms to be properly called 'laws'. That is, norms must be (1) general, (2) publicly promulgated, (3) prospective, (4) understandable, (5) free of contradictions, (6) capable of being obeyed, (7) constant in time, and (8) their administration must be congruent with how the norms are announced.[388] These desiderata are, in Fuller's view, primarily a part of the 'morality of aspiration', in contradistinction to the 'morality of duty'.[389] This means that *full* compliance is not required for

[382] Riesenhuber 2003, pp. 52-53.
[383] See para. 1.4.
[384] Riesenhuber 2003, pp. 56-58.
[385] Cf. Purnhagen 2013, pp. 81-82.
[386] Comparato 2016, pp. 622-624; Purnhagen 2013, pp. 100-104; Micklitz 2009.
[387] See para. 3.3.
[388] Fuller 1969, p. 39.
[389] Fuller 1969, pp. 41-44.

there to be law. Rather, a system of rules must *aspire* to full compliance. Along the same lines he argues that the prohibition of murder falls under the morality of duty: without such a norm, society could not function at all. A prohibition of gambling, however, falls under the morality of aspiration: compliance is not directly necessary for a society to function, but does give reason to praise someone.[390] It is difficult to clearly determine the position of Fuller's desiderata within the scheme that reaches from duty to aspiration. On the one hand, the 'internal morality of law' does contain an element of duty in establishing a precondition for rules to be called 'laws' at all. On the other hand, full compliance is not possible in practice, as circumstances may require the legislator to violate one desideratum – e.g. the prohibition of retroactivity – in order to serve another one – e.g. the capability of laws to be obeyed.[391] This steers the analysis to the conclusion that Fuller's desiderata constitute a morality of aspiration.

Leaving this discussion apart, what *can* be concluded from Fuller's analysis is that there is a duty inherent in the law to treat people as *rational* beings: at the very least, people should have the opportunity to reflect on their acts in light of their lawfulness.[392] Whatever the content of law, it should allow people to act rationally. Fuller himself speaks of 'reciprocity': if the people are to obey the law, the lawgiver should respect the people as rational beings. As a consequence, the law must be distinguished from mere managerial direction:[393] 'law is not, like management, a matter of directing other persons how to accomplish tasks set by a superior, but is basically a matter of providing the citizenry with a sound and stable framework for their interactions with one another, the role of the government being that of standing as a guardian of the integrity of this system'.[394] In other words, this means that the inherent morality of law comes down to *formal justice*.[395] Whilst substantive justice considers the justice that must be done in a specific case, formal justice ensures that there is coherence in the law in general.[396] Read as formal justice, Fuller's desiderata form a minimum threshold of morality that law should pass in order to be truly respected by the people. Moreover, in Kantian terms formal justice, or Fuller's desiderata of legality, is what is needed in order to establish the transition from the natural condition to civil society. Positive law is needed in order to provide a system of 'acquired rights'.[397] In Fuller's words:

> *"Do not take what belongs to another" is about as trite an example of a moral precept as can be found in the books. But how do we decide what belongs to another? To answer that question we resort not to morals but to law.*[398]

What is especially important here, is that formal justice requires the law to work with *generalisations*. These generalisations make the law foreseeable and coherent, and thereby serve the people as rational beings. In private international law, the requirement of generalisation applies to the objective connecting factors used in European regulations. They may not become so specific that it becomes difficult to foresee what law is applicable or what forum is competent. In spite of the principle of legal certainty, however, it is noted in literature that European private international law loses track of formal justice.[399] By setting ever more specific rules for new

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390 Fuller 1969, pp. 5-9.
391 Fuller 1969, pp. 91-94.
392 See Simmonds 2007.
393 Fuller 1969, pp. 207-214.
394 Fuller 1969, p. 210.
395 See MacCormick 1978, pp. 73-99.
396 See also Fuller 1976, p. 94: 'Those responsible for creating and administering a body of legal rules will always be confronted by a *problem of system*. The rules applied to the decision of individual controversies cannot simply be isolated exercises of judicial wisdom. They must be brought into, and maintained in, some systematic relationship; they must display some coherent internal structure'.
397 See para. 3.3.2.
398 Fuller 1969, p. 205.
399 Kohl 2007, pp. 66-74.

situations, such as consumer contracts or, even more specifically, consumer e-contracts, the EU legislator focuses too much on substantive justice. In light of the growing importance of the internet in private international law, it is argued that a 'tipping point' will emerge, at which point 'the rules will tip in favour of non-territorial rules'.[400]

At the time of writing, however, this 'tipping point' has not yet taken place. For this reason it is argued here that we should take recourse to an interpretation of private international law in light of legal formalism. Thanks to the fact that formalism provides us with a general theory of private law, specific rules aimed at 'substantive justice' do not have to take away formal justice. In the end, all people are treated according to values inherent in the formalist, Kantian understanding of private international law. Such an outcome seems not only justified in light of the principles of generalisation and legal certainty, but also fits the moral grounding of formal justice. In emphasising the need to treat people as rational beings, formal justice comes very close to the Kantian conception of law, which is based on the notion of innate freedom. Read in this way, Fuller's argument further explains why the formalist approach to private law is so important. Furthermore, Fuller's theory is not only applicable to private law, but to the law in general. For this reason it is submitted that Fuller's idea of an 'inherent morality of law' is capable of overcoming the dichotomy of the two rationalities of European private law described above. It is, in short, what is meant by 'the law' in art. 19(1) TEU.

From the point of view of formal justice it must be concluded that cases should be treated according to the rationale that underlies the area of law in which they take place. From the 'classical' point of view of legal formalism, then, it follows that private law cases should only be treated on the basis of corrective justice, while public law cases are to be treated on the basis of distributive justice.[401] Even if EU law's 'sectorisation' into functional areas of law means that this distinction cannot be upheld in the abstract, it can still be argued that the BIR(r) and RIR form a coherent 'sector' of their own. Consequently, the Geoblocking Regulation should, in case the 'directed activity' criterion must be applied, conform to the rationality underlying the BIR(r) and the RIR. In the end, namely, the law applied in this situation should resolve a conflict of private international law, and therefore the 'sector' to be applied is that of the BIR(r) and the RIR. As regards the topic of this research this means, in short, that it depends on the nature of a dispute – public or private? – how a trader's practices should be judged. The difficulty underlying this research now comes close to a solution. Although the Charter is primarily important in cases involving 'instrumental' law, e.g. cases about general free movement law,[402] and although the Geoblocking Regulation falls within the area of such 'instrumental' law,[403] their influence on private international law should be considered in light of corrective justice. Although the Charter, which is superior to the BIR(r) and RIR from a positive-law point of view, *steers* the interpretation of European private international law, it is thereby constrained by private international law's formalist underpinnings. Only in this way can it be ensured that EU law is applied in a manner with no contradictions – an explicit demand of Fuller's fifth desideratum.

6.3.2. Combining the influence of formalism and the Charter on private international law

On the basis of this Kantian picture of party autonomy it can be understood how art. 16 CFR should be applied to private international law. In its relation to art. 38 CFR, art. 16 CFR ultimately serves the same goal: equal opportunities for everyone to pursue one's own choices. The 'very essence' or 'core content' of the freedom to conduct a business, as the ECJ calls it,[404] must thus be interpreted – at least in private law – in the sense of Kant's idea of party autonomy.

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[400] Kohl 2007, pp. 69-71.

[401] Efforts are made, however, to replace this classical dichotomy in European private law with a new concept of justice, such as 'access justice'. See Comparato 2016, p. 624.

[402] See para. 2.5.

[403] See ch. 5.

[404] ECJ 18-07-2013, C-426/11, *Alemo-Herron*, ECLI:EU:C:2013:521, para. 35; ECJ 22-01-2013, C-283/11, *Sky Österreich v. Österreichischer Rundfunk*, ECLI:EU:C:2013:28, para. 49.

This connects with the ECJ's contention in *Sky Österreich* that limitations on art. 16 CFR may, *inter alia*, be justified on the basis of 'the need to protect the rights and freedoms of others'.[405] Furthermore, a Kantian reading of art. 16 CFR can be justified on the basis of its status as a fundamental right. Fundamental rights have historically been justified on the basis of natural law thinking, and on this basis the freedom to conduct a business, and the principle of freedom of contract that is enshrined in art. 16 CFR, could well be seen as an elaboration of natural law, and therefore of Kantian legal thinking.[406]

Kantian party autonomy, however, not only incorporates freedom of contract. Weaker-party protection constitutes the other part. How should these two be weighed? An answer to this question can be found by reminding what has been said above about the relationship between artt. 16 and 38 CFR.[407] In light of the distinction between rights and principles in art. 52 CFR, and given the approach of the ECJ in *Alemo-Herron*,[408] it was argued that the introduction of art. 16 CFR has reduced the weight that must be put on weaker-party protection, while art. 38 CFR has not changed that much with regard to consumer protection. Freedom of contract constitutes a right in the sense of art. 52 CFR, whereas consumer protection only constitutes a principle. Within the area of private international law this means that the principle of freedom of contract may, if its 'very essence' or 'core content' is at stake, trump consumer protection rules, such as art. 17(1)(c) BIR(r) and art. 6(1)(b) RIR. At this point, however, one must beware of the specific balance struck in *Alemo-Herron*, which arguably puts too much weight on purely economic values.[409] If the Kantian view of party autonomy comes down to equal opportunities to pursue one's own choices in life, the judgment must be rejected regarding the merits on which it was given. More broadly, however, the ECJ's contention that the interests involved had to be balanced fairly, still holds ground.[410] Even if a directive one-sidedly favours the interests of weaker parties above those of stronger parties, as was the case in *Alemo-Herron*, the Kantian principle of party autonomy obligates the judge not to forget the rights of stronger parties. Furthermore, the case cannot be ignored, as Kantian natural law needs positive law to take away its inherent indeterminacy regarding the system of acquired rights.[411] Notwithstanding the justified critique on the specific merits of the case, then, *Alemo-Herron* and art. 16 CFR can be said to have given the European principle of party autonomy a bias in favour of freedom of contract above consumer protection.

Nevertheless, the influence of the Geoblocking Regulation on private international law puts at stake the principle of freedom of contract. As a justification, the EU legislator points at the needs of the internal market and the principle of non-discrimination. How should freedom of contract be weighed when confronted with such a regulation? Mere recourse to the Charter does not provide solutions. As the Geoblocking Regulation is aimed at upholding the principle of non-discrimination, it cannot be easily sidestepped under the Charter. As was discussed above,[412] non-discrimination has reached an equal status to freedom of contract in the Charter, and should be weighed with it under the 'double proportionality test'. It is at this point that the demands of formalism come into play. The 'double proportionality test', namely, should not lead to a result that contravenes the principle of party autonomy that follows from legal formalism. Read as constituting this principle, the 'very essence' or 'core content' of art. 16 CFR cannot therefore be sidestepped by means of the Geoblocking Regulation. Given art. 16 CFR's firm status and its formalist underpinnings, non-application of the Geoblocking Regulation then seems inevitable.

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405 See para. 2.2.3; ECJ 22-01-2013, C-283/11, *Sky Österreich v. Österreichischer Rundfunk*, ECLI:EU:C:2013:28, para. 48.
406 Basedow 2011, pp. 54-56; Schmid 2011, p. 22.
407 Para. 2.4.1.1.
408 ECJ 18-07-2013, C-426/11, *Alemo-Herron*, ECLI:EU:C:2013:521.
409 See para. 2.2.3.
410 Cf. Weatherill 2016, p. 180.
411 See para. 3.3.2.
412 Paras. 2.4.1.2 and 2.5.

Nevertheless, the issue at stake constitutes the application of art. 17(1)(c) BIR(r) and art. 6(1)(b) RIR. There seems, therefore, to be an alternative, which upholds both the right to freedom of contract and the right to non-discrimination. That is, the position of art. 17(1)(c) BIR(r) and art. 6(1)(b) RIR, which are aimed at consumer protection, is weak under art. 52 CFR. If the principles of freedom of contract and non-discrimination clash with each other at exactly this point, therefore, it should be investigated to what extent an adaptation in the degree of consumer protection could result in a reconciliation. This is exactly what is done further below.

6.4. The problem redefined

European private law should not, in short, be understood only in terms of public goal-setting. Rather, it must be defined in terms of legal formalism, and public interference should be justifiable under the Kantian principle of party autonomy. In protecting consumers against the great bargaining power of professionals, therefore, the law should respect the principle of proportionality: professionals' innate right to freedom may only be restricted in so far as is necessary with a view on consumers' innate right to freedom. Earlier, it was argued that the rationale of protective connecting factors can be found in private parties' unequal influence on their external relationship. Protective connecting factors restore the balance by giving consumers a certain advantage over professionals.

As regards the clash between the Geoblocking Regulation and the 'directed activity' criterion, it now becomes clear where exactly the problem finds itself. Under the Geoblocking Regulation, the formalist rationale of upholding every party's innate right to freedom is threatened to be undermined. If professionals have no means whatsoever to avoid their websites being directed to the consumer's Member State, art. 17(1)(c) BIR(r) and art. 6(1)(b) RIR cannot be said anymore to restore the balance in the power relationship of the contesting litigants. Furthermore, there are scholars that argue that the power relationship between professionals and consumers may have turned around on the internet: small and medium enterprises on the internet face consumers that have the ability to quickly compare several products with each other.[413] This argument only reinforces the conclusion that consumer protection becomes disproportionate if the 'directed activity' criterion and the Geoblocking Regulation are combined. Given the Geoblocking Regulation's incorporation of the principle of non-discrimination, which is protected as a right under art. 21 CFR, the formalist solution to the problem that is least invasive of the structure of general EU law must be sought in a re-interpretation of art. 17(1)(c) BIR(r) and art. 6(1)(b) RIR that mitigates the excessive consumer protection resulting from the Geoblocking Regulation.

6.5. Towards a dis-targeting approach?

One alternative to the current approach towards art. 17(1)(c) BIR(r) and art. 6(1)(b) RIR is the one formulated by Svantesson. He argues that the ECJ is mistaken in taking a 'targeting approach' towards the trader's dealings. That is, in order to establish jurisdiction or applicable law, it must be proven that the trader has 'targeted' that specific jurisdiction / applicable law.[414] The ECJ therefore stresses the importance of the trader's *intention*, focusing on the determination of whether the trader's *objective and outcome* are to win over consumers from other Member States.[415] According to Svantesson, this approach negates the fact that objective and outcome often differ: traders may not really intend to win over consumers from other Member States, but nonetheless reach such an outcome. Simultaneously traders *do* sometimes intend to attract consumers from other Member States, but do not reach that goal. As an example he mentions a trader from Greece who wishes to do business with people in Switzerland, but miscommunicates this

[413] Kohl 2007, pp. 68-69.
[414] Oster 2017, p. 134.
[415] See Opinion AG Trstenjak 18-05-2010, Joined Cases C-585/08 and C-144/09, *Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v. Oliver Heller* [2010] ECLI:EU:C:2010:740, para. 63.

intention to his marketing company as a consequence of which marketing is done in Sweden. In such a case, the objective was to target consumers from Switzerland, but the outcome is that not Swiss, but Swedish consumers end up buying the trader's products. A focus on intention, the approach of the ECJ, would then mean that Swedish consumers would not be protected by the BIR(r) and RIR. This result surely does not fit the European system of private international law.[416]

In order to deal with these factual difficulties of determining the trader's intention, Svantesson thinks the ECJ should only focus on outcome.[417] The 'subjective' 'targeting approach' then changes into an 'objective' 'dis-targeting approach': the ECJ would no longer seek for indicators that show an intention on the side of the trader to direct activities to other Member States, but rather start its investigation with the presumption that the trader has directed his activities to the contracting consumer's Member State. This approach not only meets the practical difficulties mentioned above, but seems also to be justified in light of actual praxis. If art. 17(1)(c) BIR(r) and art. 6(1)(b) RIR must be applied to a case, this means that there *is* a contract between the trader and the consumer. The contention that mere accessibility of a website does not lead to 'directedness', however correct, is not very relevant in this situation. The fact that a contract is concluded, brings the case already beyond the stage in which one can speak of mere accessibility, and it justifies the presumption that the website was directed to the consumer's Member State.[418]

Accordingly, if the outcome of business activities is the conclusion of a contract with a foreign consumer, the burden of proof regarding the directedness of these activities lies with the trader, who should prove to have taken active measures avoiding contact with the consumer's Member State.[419] The measures required are *reasonable steps*, to be viewed 'in light of technological developments'.[420] Svantesson alleges that his proposal would be beneficial to both traders and consumers. While consumers would be protected to a higher degree if the burden of proof lied on traders to 'dis-target' their activities from a particular jurisdiction / applicable law, traders would have more legal certainty by knowing in advance the interpretation the ECJ would give to their behaviour.[421] Moreover, the ban on geoblocking deprives the ECJ of a clear indicator of the trader's intention, and therefore makes it almost impossible to maintain the 'targeting approach'. Adoption of the Geoblocking Regulation therefore makes it even more pressing to replace the 'targeting approach' with a 'dis-targeting approach'.[422]

6.5.1. Targeting and dis-targeting in view of formalism

How do the targeting and dis-targeting approach relate to formalism? As was described above, formalism's Kantian underpinnings mean that the law is there to uphold every individual's innate right to freedom. Party autonomy thus conceived only restricts one's freedom if that is necessary in order to uphold the freedom of another individual. Consumer protection is needed in order to uphold the equality between contracting parties in civil society. Consequently, the interpretation of art. 17(1)(c) BIR(r) and art. 6(1)(b) RIR must not lead to protection of the consumer that goes further than necessary. In that regard, a focus on the trader's *intention* to direct activities to certain Member States seems reasonable. Ultimately, private international law is grounded on the principle of party autonomy, which stipulates that parties may choose the applicable law and the competent forum. The concept of objective connecting factors is based on this starting position, and therefore it is right to take into account both the will of the consumer and the will of the trader in the private international law process. The protective connecting factor of the 'directed activity' criterion changes this starting position to the effect that the consumer's will is

[416] Svantesson 2016, pp. 476-477; Svantesson 2018, p. 82.
[417] Svantesson 2015, pp. 231-232.
[418] Svantesson 2016, pp. 477-478; see also Hill 2008, pp. 144-146.
[419] Svantesson 2017, pp. 100-103.
[420] Svantesson 2011, p. 303.
[421] Svantesson 2011, pp. 302-304.
[422] Svantesson 2017, p. 103, nt. 47.

presupposed, as a consequence of which it remains only to be seen whether the will of the trader was aimed at targeting the consumer's Member State. This is what the ECJ aims to do in its case law starting with *Pammer & Alpenhof*.

In his discussion of the ECJ's case law, Svantesson accuses the ECJ of focusing on the trader's *internal* will.[423] This, he argues, is a delicate matter, and leads to uncertainty as to the law's application. If Svantesson's accusation would be correct, the ECJ would act in contravention of the principles that can be derived from formalism. Given the law's *external* focus, the parties' will may only play a role in so far as it is cognisable by the other party. This follows from the principle of publicity.

Svantesson's suspicion that the ECJ focuses on the internal will is, however, incorrect. Rather, the list of factors provided in *Pammer & Alpenhof* shows that the ECJ's approach very much relies on externally observable indicators of the trader's intention. In the example of a Greek trader who wishes to direct his activities to Switzerland but accidentally reaches Swedish customers instead, the ECJ's decision would therefore probably be – contrary to what Svantesson believes – to give Swedish consumers the protection afforded by art. 17(1)(c) BIR(r) and art. 6(1)(b) RIR. This does not negate, however, the benefits of Svantesson's alternative. The dis-targeting approach arguably results in more legal certainty and a less time-consuming procedure before the court. Moreover, the individual autonomy of traders is still respected, as traders have the opportunity to prove that their actions were not intended to be directed to certain Member States.

6.6. Reinventing Pammer & Alpenhof

Svantesson's dis-targeting approach may certainly contribute to legal certainty, and therefore to formal justice in the area of private international law. Traders do not have to await anymore whether their conduct is interpreted as directed to a certain Member State, but can act with the knowledge that any contract concluded with a foreign consumer will lead to the presumption of his activities being targeted. Simultaneously, however, the resulting burden of proof that lies with the trader further weakens the position of traders vis-à-vis consumers. Given the problems resulting from the Geoblocking Regulation, this is the opposite of what should be aimed for. Although a different approach with regard to burden of proof has its benefits, the ECJ should first and foremost change its position with regard to the factors that indicate the intention of the trader. If the principle of non-discrimination results in a *de facto* obligation to conclude contracts with consumers irrespective of their domicile or habitual residence, one cannot speak any more of a freely formed will. The task of the ECJ, then, is to approach the subject in such a way as to recognise the ability of traders to determine with whom to contract. It seems, namely, unjustified to invoke the doctrine of abuse of law if a party cannot act otherwise without disregarding his own will. Otherwise, the law would be interpreted in a way that does not match with its Kantian underpinnings. Rather than merely applying the legislator's policy choices to individual choices, the judge should play its own distinctive role in the development of the law. That is, where the legislator strives to achieve substantive justice or specific policy goals, the judge should uphold formal justice. In private law matters, at least, this means that the law can only be law in so far as it respects the basic principle of freedom. As regards the Geoblocking Regulation, this means that the judiciary should play a counterbalancing role vis-à-vis the legislator.

6.6.1. Towards a focus on information duties

More practically, disclaimers and drop-down menus should be interpreted differently than before. Although traders cannot live up to their own disclaimers anymore, these disclaimers should keep their role of helping the trader who wants to avoid the special consumer law rules in the BIR(r) and RIR. Instead of obliging traders to not conclude contracts – which they cannot do anymore due to the principle of non-discrimination – the ECJ should reinterpret disclaimers and drop-

[423] Svantesson 2016, p. 477.

down menus as means by which the trader *warn*s consumers of the trader's limited intention to target other Member States. If consumers then nonetheless decide to conclude a contract, they are not protected under art. 17(1)(c) BIR(r) and art. 6(1)(b) RIR. Consumers have their own responsibility to decide how to act, and their protection must not go beyond what is necessary. Information duties can be justified under Kantian paternalism, as they are meant to provide consumers with the information by which they can act rationally. If they then still act in a way that negatively affects their own interest, the opposing party cannot be held accountable for it. This would be the same as upholding a tortfeasor's argument that he was too stupid to know that his acts would damage the claimant's interests.[424]

6.6.2. The relationship with art. 19 BIR(r) and art. 6(2) RIR

If warnings are enough to circumvent the applicability of the 'directed activity' criterion, it could be argued that the consumer protection afforded by that criterion becomes an empty shell. That is, whilst an *explicit* choice of law or forum is restricted in favour of the 'directed activity' criterion,[425] an *implicit* choice of law or forum, by means of a disclaimer, would be more effective. How can this be justifiable? In order to understand why it *is* justifiable, one has to clearly distinguish the different stages of the private international law process in light of the principle of party autonomy.

As described above,[426] the principle of party autonomy allows parties to make a contractual choice of law or forum. If they do not do so, the parties' will is deduced from their external behaviour, which is, in view of the principle of foreseeability, done by means of objective connecting factors. As private international law prioritises contractual agreements over the outcome of objective connecting factors, it seems to follow that the two succeed each other in the same temporal order. That is, it seems to follow that the judge first has to look whether there is a contractual agreement about the applicable law or the competent forum, and only if he makes sure there is no such agreement, he applies the objective connecting factors. This temporal order, however, must be rejected if one considers the relationship between artt. 17(1)(c) BIR(r) and 6(1)(b) RIR on the one hand, and artt. 19 BIR(r) and 6(2) RIR on the other hand. These provisions already allow a trader to avoid consumer protection by merely showing an intention not to target the consumer's Member State, while an express agreement on the matter has only limited effect. The outcome of objective connecting factors is, in short, always present on the background, whereas the outcome of the subjective connecting factor of an express agreement on the matter is not.

The formalist explanation must run as follows. As objective connecting factors are, just like express agreements, based on the will of the parties,[427] the outcome of objective connecting factors must be seen as some sort of agreement as well. In case of a choice of law or forum, then, there are two agreements: a primary agreement, which follows from the parties' external behaviour, and a secondary agreement, which follows from the contract. The secondary agreement trumps the primary agreement.

If this is how the private international law process should be explained, then it becomes easy to explain why a mere warning by disclaimer is a stronger device to avoid consumer protection than an explicit choice of law or forum. Whilst a disclaimer puts into question the primary agreement, which would otherwise follow from art. 17(1)(c) BIR(r) and art. 6(1)(b) RIR, a contract clause only results in a secondary agreement. Art. 19 BIR(r) and art. 6(2) RIR, in short, protect the consumer in his expectations that, in spite of the existence of a secondary agreement, the primary agreement on applicable law or competent forum will be enforced. The primary

[424] See para. 3.3.2.

[425] Art. 19 BIR(r); art. 6(2) RIR; ECJ 28-08-2016, C-191/15, *Verein für Konsumenteninformation v. Amazon EU*, ECLI:EU:C:2016:612, paras. 61-71.

[426] Para. 3.1.

[427] See para. 3.3.4.

agreement itself, however, is at stake if the trader succeeds in dis-targeting his website from the consumer's Member State.

6.6.3. Consumer protection an empty shell?

In order to uphold both the consumer's and the trader's innate freedom, the ECJ should adapt its interpretation of factors that reveal the trader's intention. As a result, it becomes quite easy for traders to escape the 'directed activity' criterion: they cannot be held accountable for not acting in accord with disclaimers if the Geoblocking Regulation withholds them from doing so. Fuller's sixth desideratum expressly states that the law should be capable to be obeyed.[428] In practice, the result seems unsatisfactory: consumers are easily deprived from their protection under art. 17(1)(c) BIR(r) and art. 6(1)(b) RIR, which threatens to become no more than an empty shell. In theory, however, it is the result that logically follows from the formalist underpinnings of law. By adopting the Geoblocking Regulation, the EU legislator deprived traders of an essential means by which to show their intention under the 'directed activity' criterion. The balance struck in art. 17(1)(c) BIR(r) and art. 6(1)(b) RIR therefore becomes practically impracticable, as a consequence of which the judiciary should jump in in order to protect the *trader* in his innate right to freedom. By issuing the Geoblocking Regulation, the EU legislator overestimates its legal capabilities of protecting the consumer, thereby reaching the paradoxical result of weakening the position of the consumer vis-à-vis the trader.

This weakened position of the consumer gives an extra reason, beyond the goal of legal certainty, to adopt the dis-targeting approach that is suggested by Svantesson. Such an approach would mitigate the negative effects of the Geoblocking Regulation for the consumer by laying the burden of proof regarding the effects of disclaimers and drop-down menus with the trader. The ECJ should then develop an approach towards permissible and impermissible appeal to such 'warning signs'. It could be argued, for example, that traders can only make such an appeal if they are in good faith doing so. Otherwise, their conduct would amount to an abuse of law that cannot be tolerated. A disclaimer or a drop-down menu *on its own* will therefore not do: something more has to be shown that underlines the trader's *sincere* intention not to target the consumer's Member State.

6.7. Conclusion

In short, upholding the ECJ's old approach towards 'directing activities' would under the Geoblocking Regulation lead to a breach of the trader's innate right to freedom. The new approach, which considers the situation from the point of view of duties of information, makes it easier for a trader to keep his website 'passive', and more often regards consumers as 'active'.[429] In order to avoid the consequence that consumer protection in private international law becomes an empty shell, regard should be had of the trader's sincerity, or good faith, in using disclaimers and / or drop-down menus. The difference with the old approach then is that the doctrine of abuse of law must be applied differently in the evaluation of disclaimers and drop-down menus. Instead of focusing on the trader's practice of acting in accordance with these instruments, the ECJ should now regard them as 'warning signs' by which traders conform to an information duty vis-à-vis the consumer considering the reach of the trader's business activities. If supported by evidence of a certain degree of sincerity, not being an actual refusal to conclude contracts that comes down to unjustified discrimination, these 'warning signs' should suffice to liberate the trader from the consumer protection rules in the BIR(r) and the RIR. Following the dis-targeting approach, the burden of proof regarding such 'warning signs' should lie with the trader.

[428] Para. 6.3.1.

[429] See paras. 4.2 and 5.2.3.

7. CONCLUSION

The main question of this research asked what consequences the Geoblocking Regulation will have for the ECJ's approach towards the principle of party autonomy as laid down in the 'directed activity' criterion of art. 6(1)(b) RIR and art. 17(1)(c) BIR(r). Given this research question, the principle of party autonomy was of central concern. The research started off by investigating the status of party autonomy in general EU law, with a focus on the Charter of Fundamental Rights. Doing so, it became clear that the autonomy protected by art. 16 CFR has become 'marketised' and in this way subjugated to the political goal of establishing a well-functioning internal market. The lack of an abstract, non-political principle that guides its application, has led to legal uncertainty as to art. 16 CFR's application. Nevertheless, it was established that the Charter has given freedom of contract a higher status than it had before. As a right under art. 52 CFR, it can now – in contradistinction to the old approach of the ECJ – be individually relied upon by litigating parties. Non-discrimination is also a right in the sense of art. 52 CFR, but was already recognised as a powerful principle before its incorporation in art. 21 CFR. Consumer protection, as incorporated in art. 38 CFR, is merely a principle in the sense of art. 52 CFR, and therefore only plays a role in the interpretation of EU law. From a historical perspective, in short, both non-discrimination and consumer protection have lost weight vis-à-vis freedom of contract. The result is that freedom of contract and non-discrimination now have an equal weight in the balance of values, whereas the principle of consumer protection is of less importance.

In the following chapter, the focus narrowed down to the area of European private international law. Again, the question was asked what conception of party autonomy underlies the law. On the basis of legal formalism it was argued that private international law should be explained in terms of the 'innate right to freedom' that is central in the legal philosophy of Immanuel Kant. Objective connecting factors should therefore be seen as presuppositions regarding the will of the parties in the private international law process. The fourth chapter then focused on the 'directed activity' criterion, which was also explained in terms of formalism. It became clear that this criterion essentially consists of a balance between the interests of consumers and of traders. In other words, it incorporates a balance between art. 16 CFR and art. 38 CFR. The fifth chapter then dealt with the Geoblocking Regulation, which was shown to have as its central aim the establishment of a digital single market, while simultaneously protecting consumers against powerful traders and upholding the principle of non-discrimination. The Regulation may be perceived as incorporating not only the values laid down in art. 21 CFR and art. 38 CFR, but also art. 16 CFR, in protecting consumers' freedom of contract across borders. In the end, all the results of the preceding chapters were combined in chapter 6 and scrutinised in light of Fuller's general theory of law.

Considering the law from a theoretical perspective, it became clear that the EU legislator, by adopting the Geoblocking Regulation, overestimates its abilities in promoting consumer protection within the strictures of formalism in private international law. Stating that traders may not discriminate between consumers by means of geoblocking, the Geoblocking Regulation practically takes away traders' freedom to decide whom to do business with. Although art. 114 TFEU may allow for such legislation, a flagrant breach of the principles of formalism ensues, as a consequence of which the judge has a legal obligation to interfere. Only by interfering can the judge uphold the inherent structure of private international law, and protect the trader's innate right to freedom against excessive consumer protection. A problem that remains, however, is that the ECJ cannot rely solely on the principles of private international law, but has to deal with the Charter as well. Although art. 16 CFR incorporates the freedom to conduct a business and more specifically the trader's freedom of contract, its application is mostly confined to the strictures of free movement law. Moreover, as the Geoblocking Regulation serves the 'right' to freedom of contract as well, and next to that the 'right' to non-discrimination of art. 21 CFR, the ECJ cannot

simply overrule its application on the basis of art. 16 CFR as it is served by the 'directed activity' criterion.

Recourse should therefore be had to higher, non-positivistic principles that according to art. 19(1) TEU should guide the judiciary in the application of EU law. Following the eight desiderata of legality formulated by Lon Fuller, the discussion arrived at the concept of 'formal justice'. As this concept obliges judges to interpret the law according to the principle of reciprocity, it guides them towards an analysis of the relationship between the 'directed activity' criterion and the Geoblocking Regulation that fits the demands of private international law's formalist underpinnings. When confronted with the Geoblocking Regulation, then, judges should recognise the difficulties it raises for traders to show their intention of not targeting the consumer's Member State. Disregarding the Geoblocking Regulation on the basis of art. 16 CFR will however not do given its underlying principle of non-discrimination, which has in art. 21 CFR the same legal force as art. 16 CFR. Rather, the ECJ should take recourse to an approach which counterbalances excessive consumer protection by the legislator. Such an approach is necessary under the scheme of the Charter, which gives consumer protection, protected under art. 38 CFR, only a weak standing vis-à-vis art. 16 CFR and art. 21 CFR. Since consumer protection in the Geoblocking Regulation is closely interwoven with the principle of non-discrimination, the ECJ should focus its attention on a new approach towards its role in the 'directed activity' criterion. As this criterion incorporates a balance between the interests of the trader and those of the consumer, it allows the judge to treat consumer protection independently from the freedom-of-contract considerations that are protected by art. 16 CFR.

The answer to the main question amounts to a paradox. In trying to reinforce the position of consumers in the internal market, the EU legislator forces the judiciary into a position in which they must reinterpret the 'directed activity' criterion in a way that threatens to undermine consumer protection in its entirety. In cases where the trader would otherwise need to rely on geoblocking in order to make clear his intention *not* to direct activities towards the consumer's Member State, he should now have the opportunity to avoid directing activities by merely placing warnings on his website, such as disclaimers and drop-down menus. Given consumers' own responsibility as autonomous beings under Kant's philosophy of law, traders cannot be held responsible for a consumer's failure to understand a clear and intelligible 'warning sign'. In order to counter the possibility of abuse of law, then, the ECJ should resort to a dis-targeting approach and develop rules by which to evaluate traders' good faith in appealing to 'warning signs'. A list of factors such as given in *Pammer & Alpenhof* then remains relevant, if only in a different manner than before.

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