Groupe européen de droit international privé
European Group for Private International Law

Development of the position of the European Group for Private International Law on the proposed Directive on services in the internal market – The services Directive and private international law

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This paper comments on the problems that the proposed directive raises for private international law and suggests possible solutions.

The best solution

The best solution would be for the whole of the Directive to be without prejudice to the rules of conflict of laws.

Argument. The rules of conflict of laws (the most relevant of which have been, or are in the process of being, codified at Community level in Rome I, which deals with contractual liability, and Rome II, which deals with non-contractual liability) have evolved over the centuries to solve choice-of-law problems, taking account of the need for certainty and for the balancing of the interests of the different parties. They can achieve these objectives much better than could be done by the crude application of the country of origin principle.

Drafting. Article 16 (1) should be amended as set out below. Consequential amendments may be needed.

> Article 16 – Country of origin principle
>
> (1) Member States shall ensure that providers are subject only to the national provisions of their Member State of origin which fall within the coordinated field.
>
> Paragraph 1 shall cover national provisions relating to access to and the exercise of a service activity, in particular those requirements governing the behaviour of the provider, the quality or content of the service and advertising. It shall not, however, affect the rules of conflict of laws, especially as contained in the Convention on the law applicable to contractual obligations 1980, Regulation No. 00/00 of the European Parliament and of the Council on the law applicable to non-contractual obligations, or any Community instrument amending or replacing them.

Examples. Examples of specific problems caused by the application of the country of origin principle are given below.

What if the law of the Member States is harmonised?

It is sometimes argued that the application of the country of origin principle is justified where the law of the Member States is harmonised by a Community instrument. This might be true where that instrument is a regulation. It is not true where it is a directive. There are two reasons.

The first reason is that the directive might not be correctly transposed, or indeed transposed at all, in the State of origin. In cases involving the liability of the service provider, there will be no question of vertical direct effect; so it will not be possible for the court to apply the directive itself. The implementing legislation (if any) of the State of origin will be applicable. The law of the State of origin will have to be interpreted in conformity with the Directive, but this obligation applies only where it is possible to do so. If it is not possible, the law of the State of origin will have to be applied even if it is contrary to the Directive.

The second reason is that even if the directive is correctly transposed, the court in the State where the service is provided will still have to ascertain and apply the legislation of the State of origin. In some Member States, this will require evidence by an expert in the law of the State of origin, which could add greatly to the inconvenience and expense of bringing legal proceedings. In the case of proceedings by a consumer, for example, this could impose an excessive burden.

For these reasons, the fact that the law has been harmonised by a Community directive is not in itself a reason for applying the law of the State of origin.

The second-best solution

If the ideal solution proves impossible, there should be a wider range of exceptions. The following paragraphs consider problems that could arise in specific areas.

Tort

Injury, etc.

Article 17 (23) excludes liability resulting from an accident involving a person. It provides:

> Article 16 shall not apply to:
>
> (23) the non-contractual liability of a provider in the case of an accident involving a person and occurring as a consequence of the service provider's activities in the Member State to which he has moved temporarily.(1)

This provision is far from clear. It is not clear what constitutes an accident, nor what is meant by "involving a person": does it mean "involving injury to a person"? The following are examples of cases that might not be covered.

Example 1. A service provider from State X (doctor, lawyer, osteopath, etc.) provides a service in State Y. He is negligent, causing personal injury or financial loss. Under the Directive, his liability might be governed by the law of State X since there has been no "accident". The law of State Y should be applied (2).

Example 2. A firm in State X provides blood tests in State Y for the purpose of medical diagnosis. If it actively markets those tests in State Y, its liability if they are carried out negligently should be governed by the law of State Y. Under the Directive, its liability might be governed by the law of State X, since there has been no "accident".

Example 3. A building contractor (construction company) from State X markets its services in State Y. As a result, it obtains a contract with Mr A to erect a building there. During the course of the work, it wrongfully uses land belonging to Mr B to store materials. It also floods land belonging to Mr C, causing damage to buildings. Its liability to Mr B and Mr C might be governed by the law of State X under the Directive. It should be governed by the law of State Y.

Drafting. Article 17 (23) should be redrafted as follows:

> (23) The non-contractual liability of a provider for personal injury (physical or mental), financial loss, wrongful occupation or possession of property (whether movable or immovable), or interference with the property rights of another person, occurring as a consequence of the service provider's activities in the Member State to which he has moved temporarily.

Unfair competition

Unfair competition consists of any wrongful competitive practice or activity that harms competitors (3). It seems self-evident that if a service provider from State X enters the market in State Y and competes there, he should play the game according to the rules of State Y. Consequently, claims of unfair competition against him should be governed by the law of State Y, not that of State X, as would appear to be the case under the Directive. If the law of State X imposes a lower level of liability, the service provider from State X would have an unfair advantage over competitors in State Y: he could sue them under the law of State Y, but they would have to sue him under the law of State X.

Example. A service provider from State X enters the market in State Y and competes there. He falsely pretends that his activities are linked to, or approved by, one of his competitors. He also makes false remarks about the professional competence of another competitor (4). Both competitors should be entitled to a remedy under the law of State Y.

Drafting. A new paragraph should be added to Article 17, to read:

> (x) unfair competition;

Note: there is a significant overlap between the concept of unfair competition and that of intellectual property (discussed below). However, the overlap is not complete; moreover, the boundary between

the two concepts occurs in different places in different legal systems. For these reasons, they must both be dealt with.

Intellectual property

Article 17 (13) excludes intellectual property from the scope of the country of origin principle. It reads:

> Article 16 shall not apply to:
>
> (13) copyright, neighbouring rights, rights covered by Council Directive 87/54/EEC (5)and by Directive 96/9/EC of the European Parliament and of the Council (6)as well as industrial property rights;

This seems to cover a wide area. Directive 87/54 applies to topographies (layout-designs) of semiconductors and Directive 96/9 to databases. The term “industrial property rights” covers patents, registered trademarks and registered designs. However, there are other rights which may not be covered – for example, plant breeders’ rights, geographical indications and various rights against unfair competition. Trade secrets and other confidential information are probably not covered. The same is true with regard to unregistered trademarks and equivalent rights in the design and packaging of products. In some Member States, some of these rights may be covered by the concept of unfair competition, discussed above, but this would not be true in all Member States (7).

Example. A service provider from State X provides services in State Y. In the course of doing so, he discloses or uses confidential information, obtained from a competitor in State Y, without the latter’s permission. Under the Directive, the law of State X might have to be applied to determine whether the competitor has a remedy. This is clearly wrong: the law of State Y ought to be applied; otherwise the competitor would not be sufficiently protected.

Drafting. Paragraph (13) should read:

> (13) copyright, neighbouring rights, rights covered by Council Directive 87/54/EEC (8)and by Directive 96/9/EC of the European Parliament and of the Council (9), other intellectual and industrial property rights, rights in trade secrets and confidential information, and similar rights against other forms of unfair competition;

See the Note above on the relationship between this provision and that on unfair competition.

Environment

Some environmental proceedings may fall within the area of public law, but others are of a private-law nature. In all cases, however, the applicable law should be that of the State where the harm occurs. Otherwise, the environment may not be adequately protected (10).

Example. A service provider from State X provides a service in State Y, in the course of which he pours a dangerous chemical into a river in State Y. His liability should be governed by the law of State Y, not that of State X.

Drafting. A new paragraph should be added to Article 17, to read:

> (x) legal proceedings resulting from harm to the environment;

Restitution

Restitution (the usual term in English), quasi-contract, unjust enrichment and negotiorum gestio are not torts, but are nevertheless covered by the concept of non-contractual liability. They will fall within the scope of the projected Rome II Regulation (11). They raise complicated, but important, issues – for example, the circumstances in which money paid by mistake may be recovered. The determination of the applicable law should depend on the rules of conflict of laws. In some cases it might be appropriate to apply the law of the country of origin of the service provider; in others, it would not.

Drafting. A new paragraph should be added to Article 17, to read:

> (x) the provider’s liability arising out of the law of restitution, quasi-contract, unjust enrichment or negotiorum gestio;

Contract

The right of the parties to choose the applicable law:

Article 17 (20) provides that Article 16 shall not apply to:

> (20) the freedom of the parties to choose the law applicable to their contract;

This, however, does not make clear that their choice may be either express or implied.

Drafting. Article 17 (20) should be redrafted as follows:

> (20) the freedom of the parties to choose the law applicable to their contract, as laid down by Article 3 of the Convention on the law applicable to contractual obligations 1980 and any Community instrument amending or replacing it;

Applicable law in the absence of choice

Under Article 4 of the Rome Convention, a commercial contract will normally be governed by the law of the country in which the principal place of business of the service provider is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated. If "country of origin" is defined in these terms, the country of origin principle will normally produce the same result as Article 4 of the Rome Convention (12). However, this will be true only as regards contracts between the service provider and the receiver of the service, not as regards contracts with some other person.

Example. A service provider established in State X wishes to enter the market in State Y. It concludes a contract with a firm in State Y, under which the latter will act as its agent. This contract contains no express or implied choice of law. Since the agent would be carrying out the characteristic performance, the applicable law under Article 4 of the Rome Convention would normally be that of State Y. The country of origin principle ought not to apply in such a case.

Drafting. A new paragraph should be inserted into Article 17, to read as follows:

> (x) contracts between the provider and a person other than the receiver of the service;

Agency: rights of third parties

The question whether an agent can bind the principal with regard to third parties depends in principle on the scope of the authority given to him by the principal. However, in many legal systems there are some situations in which the rights of third parties may be wider than this – for example, if the principal holds the agent out as having wider authority than he actually has. This question should not necessarily be decided by the law of the country of origin, but by the normal rules of conflict of laws. This matter is not covered by the Rome Convention (13), but by the choice-of-law rules of the Member States.

Drafting. A new paragraph should be inserted into Article 17, to read as follows:

> (x) the question whether an agent is able to bind a principal;

Definition of place of establishment

For reasons explained above, "country of origin" should be redefined to take account of the definition in the Rome Convention.

Drafting. If "Member State of origin" means "the Member State in whose territory the provider of the service is established" (14), the definition of "establishment" in Article 4 (5) should be amended as follows:

> (5) as referred to in Article 43 of the Treaty, through a fixed establishment of the provider for an indefinite period; where the provider has more than one establishment, it shall be its principal place of business, unless the service is effected through another place of business, in which case it shall be that other place of business;

Note: a proposed revision of the Directive that would add a new Recital 18a incorporates the same idea. However, the point is sufficiently important to justify an amendment to the text of the Directive, rather than just to a Recital.

Consumer contracts

Under Article 17 (21), consumer contracts are excluded from the application of the country of origin principle “to the extent that the provisions governing them are not completely harmonised at Community level”. For the reasons explained above, consumer contracts should be excluded irrespective of harmonisation (15).

Employment contracts

If the service provider performs the service through his employees, he will have to conclude contracts of employment with the employees. If the employees are recruited in the country of origin and normally work there, it might be reasonable to apply the law of the country of origin to their contracts. This will not be true in other cases – for example, with regard to employees recruited in the country where the service is performed who will work only in that country. The best solution would be to exclude the country of origin principle entirely and allow the normal rules of conflict of laws to operate. If, as was proposed above, a new paragraph is inserted into Article 17 to provide for the exclusion of the country of origin principle with regard to contracts between the provider and a person other than the receiver of the service, contracts with employees will be automatically excluded. Otherwise, there ought to be a specific exception for “individual contracts of employment”.

Mandatory rules and public policy

The contractual and non-contractual liability of a service provider ought, irrespective of the governing law, to be subject to the mandatory rules of the State in which legal proceedings are brought. This is expressly laid down by Article 7 (2) of the Rome I Convention and Article 12 (2) of the proposed Rome II Regulation (16). Moreover, the application of foreign law ought to be subject to the public policy (ordre public) of that State, as laid down in Article 16 of the Rome I Convention and Article 22 of the proposed Rome II Regulation.

If it is accepted, as proposed above, that Article 16 (1) should be amended to make clear that the country of origin principle does not affect the operation of the rules of private international law, the principles of mandatory rules and public policy will apply automatically; otherwise special provision will have to be made for them. This could be done by stating in Article 16 (1)(17) :

Member States shall ensure that providers are subject only to the national provisions of their Member State of origin which fall within the coordinated field; however, in proceedings involving the contractual or non-contractual liability of the provider, this shall not restrict the application of the rules of law of the State in which legal proceedings are brought if those rules do not hinder the free movement of services and are mandatory irrespective of the law otherwise applicable to the contract; nor shall it require the application of the law of a foreign State where this would be manifestly incompatible with the public policy (ordre public) of the forum.

It might be desirable for an amendment to a Recital to provide that Article 16 will not prevent account being taken of mandatory rules of a third State, provided they do not hinder the free movement of services.

Procedure, evidence and remedies

It is obvious that procedure, evidence and remedies should be governed by the law of the State in which the court is sitting. To put this beyond doubt, a new paragraph should be added to Article 17, to read:

> (x) the law relating to procedure, evidence and remedies;

The third possible solution

The examples given above show that the proposed directive can cause problems for private international law in many situations. It is for this reason that a general proviso would be the ideal solution.

If this is not possible, a compromise would be to have a general proviso for non-contractual liability and specific exceptions for contractual liability. If this were done, the specific exceptions set out above under the headings of “Tort” and “Restitution” would be unnecessary. Instead, the second paragraph of Article 16 (1) could be amended to read:

> Paragraph 1 shall cover national provisions relating to access to and the exercise of a service activity, in particular those requirements governing the behaviour of the provider, the quality or content of the service, advertising and contracts. It shall not,

however, affect the rules of conflict of laws on the provider's non-contractual liability, especially as contained in Regulation 00/00 of the European Parliament and of the Council on the law applicable to non-contractual obligations, or any Community instrument amending or replacing it.

Alternatively, the reference to "the provider's liability" could be deleted from the second paragraph of Article 16 (1), and Article 17 (23) could be redrafted as follows:

(23) The non-contractual liability of the service provider, occurring as a consequence of his activities in the Member State to which he has moved temporarily.

1. Recital 46 states that this applies to physical or material damage suffered by the person.

2. In some situations, liability might be in contract, but in others it would be in tort.

3. In England, it would include passing-off actions. Passing off can cover services as well as goods. It occurs when a person wrongfully represents that his services are those of another person.

4. In English law the remedy would be for libel or slander.

5. OJ 1987, L 24/36.

6. OJ 1996, L 77/20.

7. In common law countries, such rights are protected through the tort of passing off (see note 3, above) and similar remedies.

8. OJ 1987, L 24/36.

9. OJ 1996, L 77/20.

10. For the reasons explained above, the problem is not solved if the law is harmonised by means of directives.

11. At present, Article 9.

12. See the amended version of Recital 37.

13. Article 1 (2) (f) of the Rome Convention.

14. See Article 4 (4) of the Services Directive.

15. Community harmonization in this area takes the form of directives.

16. Original proposal by the Commission.

17. The provision is drafted on the assumption that the amendments to Article 16 (1) proposed above are not adopted.