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

Position of the European Group for Private International Law on the draft Directive of the European Parliament and the Council on services in the internal market

The adoption of the country of origin principle in the draft directive appears to be based on the premise that a lessening of the disparities between the laws of different Member States would significantly favour trade and investment in the area of services. But it is clearly desirable, instead of adopting a general solution, to determine on a case-by-case basis the existence of significant hindrances to the freedom to provide services. In addition, we must have regard to the internal consistency of the Community legal system, something which constitutes an important aspect of legal certainty. The supposed advantages of a political solution based on the law of origin principle must be balanced against the undesirable results which that principle could entail in the area of services, since the application of this principle requires, in the first place, the harmonisation, or at least a sufficient degree of equivalence, of the substantive laws in conflict. Consequently, the wide area to which the draft will apply, together with the very limited number of provisions it contains on the harmonisation of substantive law, makes it impossible to accept that the above-mentioned requirement has been fulfilled.

In fact, in the area that has not been harmonised, as well as in those cases in which Community directives have not been completely transposed, the application of the law of the country of origin of the provider of the service will necessarily result in distortions of the market in each Member State. Having regard to the differences in law and commercial practices, consumers and local businessmen will be exposed to a multitude of different legal regimes according to the origin of the provider of the services. In particular, the exclusion of consumer contracts “to the extent that the provisions governing them are not completely harmonised at Community level” (Article 17 (21)) is very vague and risks exposing consumers to the law of the country of origin in areas in which harmonisation has not been completely put into effect in the Member States. Likewise, there is a risk that, despite the exceptions provided, employment contracts will be governed by the law of the State of origin of the provider of the services, something that could lead to “social dumping” to the disadvantage of employees in the country in which the work is carried out.

The draft directive appears to accept that choice-of-law rules do not constitute a hindrance to the cross-border performance of services in particular areas (specified in Article 17), while it modifies the rules presently applicable in certain other areas by introducing the country of origin principle, without there being any plausible reason for this difference of approach. The danger is particularly evident in the case of tort liability, to the extent that the law of the country of origin of the service provider would be applied: one thinks in particular of unfair competition, environmental pollution, defamation and privacy, as well as medical malpractice and services concerned with biotechnology. In these areas, the differences in the solutions adopted by different Member States are vast. In such cases, there is no reason to apply without limit just the law of the country of origin. Moreover, one cannot imagine that different tort systems could be permitted to operate together in the territory of one Member State, depending on the country of origin of the performer of the service. The country of origin principle could lead businessmen to incorporate their companies in the States with the lowest standards of protection and then to “export” those standards to other States. Particularly in the case of tort liability and the protection of employees, this result would be extremely negative for the European market in that it could lead to a “race to the bottom”.

Choice-of-law rules that exist at present or are in the process of development (Rome I and Rome II) ensure a harmonious division of legislative competence which gives due regard to the interests both of the providers of services and of consumers. These provisions, by reason of their uniformity, would not constitute a hindrance or an obstacle preventing businesses from offering their services across frontiers of the internal market.

In conclusion, the application of the country of origin principle gives rise to very serious difficulties with regard to choice-of-law in relations between Member States. The European Group for Private International Law proposes that it should be limited to the regulation of the activities of the provider of the service, but should not apply to obligations in either contract or tort resulting from those activities.

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