The E-commerce Directive and Private International Law

by

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The question of the legal nature of the so-called country of origin principle in Article 3 of the EC E-commerce Directive causes great confusion. Many, including e-service providers, advocate that the provision should be understood as a choice of law rule designating the law of the place of establishment of the service provider as applicable. However, Article 1(4) of the Directive explicitly states that no additional rules of private international law are created. Is there a conflict within the Directive or can such a conflict be avoided?

There are basically three ways in which the country of origin principle could be understood:

(i) the E-commerce Directive establishes a choice of law rule for the law applicable to e-commerce services, irrespective of the provision in Article 1(4);
(ii) the country of origin principle in the E-commerce Directive only sets out certain limitations to the application of the designated law;
(iii) the Directive makes the rules of the home country of the service provider internationally mandatory and thus applicable irrespective of what law is applicable to the contract or tort etc.

This contribution analyses the three alternatives and advocates the last solution as the one, which is not only in line with the legislative intent but also permits the Directive to maintain logical coherence.

The country of origin principle in the E-commerce Directive only pertains to certain questions that are within the so-called co-ordinated field, viz. those relating to the taking up and the pursuit of an information society service. Hence, the coordinated field does not cover all obligations – contractual or non-contractual – that could arise in the context of the provision of e-services. For those aspects not covered by the coordinated field, the applicable law would still have to be determined according to the "traditional" private international law rules, viz. the Rome Convention on the law applicable to contractual obligations and in the future also by the Rome II Regulation on the law applicable to non-contractual obligations.

This would be a most unfortunate *dépeçage* situation, in which different laws could be applicable to different aspects of the legal relationship between the parties. This further complicates an already intolerably complicated situation.

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