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The country of origin principle in the E-commerce Directive: A conflict with conflict of laws?

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Contents

1.	A Background to the Problem	5
2.	The E-commerce Directive	7
3.	The Coordinated Field	11
4.	Solution 1: The E-commerce Directive Creates a Choice of Law Rule	15
5.	Solution 2: The E-commerce Directive Sets Certain Limitations to the Application of the Designated Law	18
6.	Solution 3: The Rules within the Coordinated Field are to be Seen as Internationally Mandatory	19
7.	Evaluation	26

1. A Background to the Problem

A controversy that has delayed the presentation of a Commission proposal for a Regulation on the law applicable to non-contractual obligations (Rome II) is whether the E-commerce Directive¹ actually has established a particular choice of law rule for e-commerce services or not.² The problem lies in the fact that the Directive on the one hand establishes what to many appears to be a particular choice of law rule for e-commerce, designating the law of the service provider as applicable, but on the other hand explicitly refutes that it does so.³

The business community wants such a choice of law rule⁴. However, this runs contrary to the designation of the law of the country where the loss is sustained, which is the solution chosen in the preliminary draft proposal for a Council Regulation on the law applicable to non-contractual obligations ("Rome II"). After great delay,⁵ the Commission on 3 May 2002 finally issued what is called a "preliminary draft Regulation on the law applicable to non-contractual obligations".⁶ The preliminary draft is to be seen as no more than a "Commission staff working paper for the sole purpose of consulting interested parties" but takes the form of a Regulation.

The purpose has obviously been to avoid a conflict with the E-commerce

¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce"), OJ L 178, 17.7.2000, pp. 1-16.

² I have been informed by Commission officials that there has been a controversy between on the one hand the Directorate General Internal Market, that listens closely to the "e-commerce lobby" and therefore wants the E-commerce Directive to establish a choice of law rule, and on the other hand the Directorate General Freedom, Security and Justice which adheres to more traditional private international law thinking and therefore is opposed to that idea.

³ See Articles 3 and 1(4) of the Directive.

⁴ See the Commission report "Summary and contributions of the consultation 'Rome II': Follow-up of the consultation on a preliminary draft proposal for a Council Regulation on the law applicable to non-contractual obligations ('Rome II')", under heading 4. The report is available at http://europa.eu.int/comm/justice_home/news/consulting_public/rome_ii/news_summary_rome2_en.htm last visited at 18 January 2003.

⁵ On 3 December 1998 the Justice and Home Affairs Council adopted the Vienna Action plan, OJ C 19, 23.1.1999, pp. 1-15, which envisaged that the drawing up of a legal instrument on the law applicable to non-contractual obligations should take place no later than two years after the coming into force of the Amsterdam Treaty (see para. 40). That would have been before 1 May 2001.

⁶ The preliminary draft is available at http://europa.eu.int/comm/justice_home/news/consulting_public/rome_ii/news_hearing_rome2_en.htm last visited at 18 January 2003.

Directive and to give it precedence. But since there is great uncertainty as to whether the E-commerce Directive actually creates a choice of law rule or not, this has led to the insertion of a highly unintelligible Article 23(2) in the preliminary draft Rome II Regulation:

2. This regulation shall not prejudice the application of Community instruments which, in relation to particular matters and in areas coordinated by such instruments, subject services to the laws of the Member State where the service-provider is established and, in the area coordinated, allow restrictions on freedom to provide services originating in another Member State only in limited circumstances.

Without explicitly saying so, this provision is designed to deal with the possible conflict between a future Rome II Regulation and the E-commerce Directive. A rather disrespectful interpretation of what is actually said is something on the lines of "whatever it is that Article 3 of the E-commerce Directive does, it should be given precedence over this Regulation".

The Commission asked for comments on the preliminary draft Rome II Regulation and received some 80 written opinions from academics, governments, business and practitioners' organisations. Those opinions were summarised in a report, according to which "[b]usiness insisted that there is an urgent need for the Commission to clarify the relationship between the country of origin principle set down in Internal Market instruments and rules on the conflict of laws."⁸ This is what this article will attempt to do.⁹ But before we jump to the heart of the problem, the E-commerce Directive itself merits an introduction.

⁸ *Supra* note 4, under heading 12.

⁹ J.J. van Haersolte-van Hof, "Richtlijn elektronische handel - internationaal privaatrechtelijke aspecten", [2000] *Nederlands tijdschrift voor Europees recht*, pp. 325-327 at 325 compares the chance of success of such an attempt to that of reading the future in coffee grounds.

2. The E-commerce Directive

E-commerce offers great opportunities for economic growth and employment and the potential of the new information technology is tremendous. Unfortunately, there is great uncertainty as to what rules apply to services provided over the internet. Many of the traditional connecting factors designating the applicable law are non-existent in cyberspace. Because of the borderless nature of cyberspace, traders might find themselves subject to a multitude of laws - an uncertainty that could discourage business.¹⁰

Against this background, in April 1997 the Commission issued a communication on *A European initiative in electronic commerce*,¹¹ which in November 1998 was followed by a proposal for a *Directive on certain legal aspects of electronic commerce in the internal market*.¹² After hearing the opinion of the European Parliament,¹³ the Commission adopted an amended proposal in September 1999¹⁴ and on 8 June 2000 the "E-commerce directive" was adopted.¹⁵ The directive entered into force on 17 July 2000 and Member States had until 17 January 2002 for transposition.¹⁶

The objective of the Directive is to contribute¹⁷ to the development of electronic commerce by removing obstacles such as diverging national rules and legal uncertainty as to which national rules apply, thus creating a legal framework to ensure the free movement of information society services.¹⁸ The information society services in question include: on-line newspapers, databases, financial services, professional services (such as lawyers, doctors, accountants, estate agents), entertainment services such as video on demand,

¹⁰ Graham Pearce & Nicholas Patten, "Promoting the Information Society: The EU Directive on Electronic Commerce", (2000) 6 *European Law Journal*, pp. 363-378 at p. 364; Ian Walden, "Regulating Electronic Commerce: Europe in the Global E-conomy", (2001) 26 *European Law Review*, pp. 529-547 at p. 539.

¹¹ COM(1997) 157 final, 16.4.1997.

¹² COM(1998) 586 final, 18.11.1998.

¹³ EP Report (A4-0248/99), 6.5.1999.

¹⁴ COM(1999) 427, 1.9.1999.

¹⁵ *Supra* note 1.

¹⁶ Article 22(1) of the E-commerce Directive.

¹⁷ Any EU solution in this field could only be a regional solution to what is a global problem. There are also global initiatives of a soft law nature by UNCITRAL, OECD and the ICC. See Ruth Nielsen, *E-handelsret* (Copenhagen, 2001), pp. 27-31 for a brief overview.

¹⁸ See *inter alia* recitals 2, 5, 6, and 8.

direct marketing and advertising, and services providing access to the Internet.¹⁹

In order to create this legal framework the Directive, *inter alia*, sets certain common standards concerning marketing, ordering and contracts (Articles 5-7 and 10). Furthermore, the Directive establishes that the law of the state where the service provider is established shall apply concerning the requirements that the service provider has to comply with (Article 3). This - by analogizing with competition law and the Merger Regulation - would amount to an e-commerce "one-stop shop" principle of control by the authorities of the country of origin, which is one of the cornerstones of the E-commerce Directive.²⁰ Finally, the Directive contains rules limiting the liability of intermediary service providers (Articles 12-14) and prohibits the imposition of a general obligation to monitor information that these intermediary service providers transmit or store (Article 15).

Certain issues are altogether excluded from the field of application of the Directive. Article 1(5) makes it clear that the directive is not applicable in the fields of taxation, cartel law, certain activities by notaries, representation of clients before the courts, and gambling activities. In addition, the Directive is also not applicable to questions relating to information society services covered by the Directives on protection of personal data and protection of privacy in the telecommunications sector.²¹

One of the many problem children in this Directive is its Article 3, which, as already said, was introduced to counter the uncertainty as to which of any Member State's authorities have jurisdiction to supervise and regulate the

¹⁹ Arno R. Lodder, "Chapter 4: Directive 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market" in: Arno R. Lodder & Henrik W.K. Kaspersen (eds.), *eDirectives: Guide to European Law on E-Commerce* (The Hague, 2002), pp. 67-93 at p. 71.

²⁰ The term "one-stop shopping" is most commonly used in connection with the Merger Regulation to describe the fact that the Commission has exclusive jurisdiction vis-à-vis national authorities over all concentrations with a "Community dimension". See Article 21 of the Council regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 395, 30.12.1989, pp. 1-12. One great advantage is that businesses need only apply for approval once to one single authority.

²¹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, pp. 31-50 and Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector, OJ L 24, 30.1.1998, pp. 1-8.

conduct of service providers. The Article establishes that the Member State on the territory of which a service provider is established shall carry out this control - "the country of origin principle".²²

According to Article 3 paragraphs 1 and 2 of the Directive, the country of origin principle consists of two central elements:

(1) Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.

(2) Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.

National provisions that fall within the "coordinated field" are further defined in Article 2(h) and will be dealt with later. Furthermore, Article 3(3) makes certain exceptions from the country of origin principle. These are listed in an annex to the Directive and those of greatest interest here pertain to the freedom of the parties to choose the law applicable to their contract, contractual obligations concerning consumer contracts, and formal validity of certain real estate contracts.

It has been submitted that Article 3(1) of the E-commerce Directive is in fact a choice of law rule designating the law of the country of origin as applicable.²³ If read in such a way, that would not rhyme well with Article 1(4) of the Directive,²⁴ which stipulates that:

(4) This Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts.

If the Directive gives birth to a choice of law rule at the same time as it purports not to create any additional rules of private international law, that

²² The terminology is by no means uniform. The terms "mutual recognition" and "home country control" are frequently used in English. "Country of origin principle", although also known to English writers, is more in line with German "Herkunftsprinzip" and Swedish "ursprungsprincip". This latter term more clearly indicates the possible implications for the question of the applicable law and is therefore preferred here.

²³ See Peter Mankowski, "Das Herkunftsprinzip als Internationales Privatrecht der e-commerce-Richtlinie", (2001) 100 *Zeitschrift für vergleichende Rechtswissenschaft*, pp. 137-181 at 138 f. with further references.

²⁴ See also recital 23.

would, to put it mildly, appear to be a problem. Firstly, it would be a problem on a theoretical level concerning the internal coherence of the law. Laws should not contradict themselves. Secondly, and most importantly, there is of course the practical problem of which law should apply - that of the country of origin or that stipulated by national or EC choice of law rules.

There are basically three ways in which the effect that Article 3 has on choice of law can be understood²⁵:

- The E-commerce Directive establishes a choice of law rule for the law applicable to e-commerce services (within the “coordinated field”).
- The country of origin principle of the E-commerce Directive only sets out certain limitations to the application of the designated law.
- The Directive makes the rules of the home country of the service provider, that are within the “coordinated field”, internationally mandatory and thus applicable irrespective of what law is applicable to the contract or tort etc.

In the following we will make an attempt to analyze the theoretical and practical feasibility of each of the three alternatives. But before doing so it is necessary to ascertain the scope of the E-commerce Directive, which is limited to provisions which fall within what the Directive terms “the coordinated field”. If, as some contend, the coordinated field is limited to public law rules it is possible to argue that the country of origin principle does not affect conflict of laws, or private international law, which allegedly only covers private law.²⁶ However, should the coordinated field include provisions of private law, then there is a possible conflict with conflict of laws.

²⁵ Cfr. Article 23(1) of the preliminary draft proposal for a Council Regulation on the law applicable to non-contractual obligations, which actually makes the unintelligible para. 2 redundant.

²⁶ See *inter alia* Gerhard Kegel, *Internationales Privatrecht*, 7. Aufl. (München, 1995), pp. 3, 118 and *passim*; Michael Bogdan, *Svensk Internationell privat- och processrätt*, 5:e uppl. (Stockholm, 1999), pp. 20 and 79; Peter North & James J. Fawcett, *Cheshire and North's Private International Law*, 13th ed. (London, 1999), p. 7.

3. The Coordinated Field

The coordinated field is defined in Article 2(h) of the E-commerce Directive as:

(h) "coordinated field": requirements laid down in Member States' legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically defined for them.

(i) The coordinated field concerns requirements with which the service provider has to comply in respect of:

- *the taking up of the activity of an information society service, such as requirements concerning qualifications, authorisation or notification,*
- *the pursuit of the activity of an information society service, such as requirements concerning the behaviour of the service provider, requirements regarding the quality or content of the service including those applicable to advertising and contracts, or requirements concerning the liability of the service provider;*

(ii) The coordinated field does not cover requirements such as:

- *requirements applicable to goods as such,*
- *requirements applicable to the delivery of goods,*
- *requirements applicable to services not provided by electronic means.*

One need not go into the intricacies of the difference between private and public law to discover that the coordinated field covers matters which are considered to be civil law matters in the laws of most Member States. Admittedly, the line between public and private law is not equally drawn in all legal systems and is also attributed varying importance.²⁷ The distinction between the two is also not quite clear and there are almost as many theories

²⁷ See Peter Stein, *Legal Institutions. The Development of Dispute Settlement* (London, 1984), p. 116 *et seq.*; René David & David Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law*, 3d ed. (London, 1985), p. 335.

about how to draw the line as there are scholars that have attempted to do so.²⁸ Nevertheless, it is submitted that the coordinated field goes into the sphere of private law for a number of reasons.

In this sense it goes further than previous expressions of the country of origin principle, which have, with the exception of rules on unfair competition, mainly included public law rules.²⁹ It is not my intention to try to give a precise definition of the coordinated field (in a spirit of self preservation!), which will have to be clarified in future case law, but only, in order to establish whether there is a conflict with conflict of laws, to establish whether the term covers rules of private law and if so to give an indication as to what private law rules might be covered.

It has clearly been the intent of at least the European Parliament and the Commission that private law rules should be included in the coordinated field. The Committee on Legal Affairs and the Internal Market in its recommendation for second reading on 12 April 2000 expressed its satisfaction with the fact that "Article 3 is applicable in all areas of national law, including private law (with the exception of the questions referred to in the annex)".³⁰ Representatives of the Commission have also in meetings with civil servants from the Member States concerning the proper implementation of the Directive expressed the view that private law rules are covered by the coordinated field.³¹

Among Member States, views appear to differ somewhat in this matter. The Swedish government in the preparatory works to the Swedish law on information society services, which transposes the E-commerce Directive, expresses the view that the coordinated area does not include private law rules. However, it does recognize that it cannot be excluded that some aspects

²⁸ The Swiss author Holliger, in his dissertation from 1904: *Das Kriterium des Gegensatzes zum öffentlichen Recht und Privatrecht* allegedly identified 16 different theories. From: H.-U. Stucki, *Der Grundsatz der Nichtanwendung fremden öffentlichen Rechts im schweizerischen Internationalen Privatrecht* (Zürich, 1971), p. 12.

²⁹ Gerald Spindler, "E-Commerce in Europa. Die E-Commerce-Richtlinie in ihrer endgültigen Fassung", *Multimedia und Recht-Beilage 7/2000*, pp. 4-21 at p. 8.

³⁰ European Parliament Recommendation for second reading on the Council common position for adopting European Parliament and Council directive on legal aspects of Information Society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (14263/1/1999-C5-0099/2000-1998/0325(COD)), p. 10. Available on the Internet at: <http://www2.europarl.eu.int/omk/OM-Europarl?PROG=REPORT&L=EN&PUBREF=-//EP//NONSGML+REPORT+A5-2000-0106+0+DOC+PDF+V0//EN&LEVEL=2> last visited 18 January 2003.

³¹ See Ruth Nielsen, *supra* note 17, p. 77 *et seq.* for an example.

of private law fall within this area and against this background it chooses not to explicitly make this statement in the law itself.³² There was active cooperation between the relevant authorities in the Nordic countries on the implementation of the E-commerce Directive with the goal of as far as possible finding a common framework for the implementation of the Directive and the Swedish view seems to be shared by its Nordic sister states.³³ Among other Member States there appears to be either differing opinions or great uncertainty.³⁴

Finally, in the annex to the Directive, certain areas of private law are explicitly excluded from the application of the country of origin principle in Article 3. Important examples of such derogations, which clearly belong to the private law domain, are: "the freedom of the parties to choose the law applicable to their contract", "contractual obligations concerning consumer contracts", and "formal validity of contracts creating or transferring rights in real estate". It is submitted that from the fact that certain areas of private law are expressly excepted, the conclusion can *e contrario* be drawn that they are within in the scope of the coordinated field and would otherwise have been included in the application of the country of origin principle.³⁵

The coordinated field covers requirements relating to *taking up* of an information society service. Most rules pertaining to the taking up of a service would be rules on the qualification of service providers - e.g. physicians, nurses, lawyers, architects etc (many practitioners of these professions now offer their services on line). Such rules are traditionally of a public law nature but could acquire a quasi private law nature if a certain professional organisation were given the right to lay down such rules. Article 4 of the E-commerce Directive precludes Member States from requiring prior

³² *Lag om elektronisk handel och andra informationssamhällets tjänster m.m.*, Prop. 2001/02:150, p. 59 et seq.

³³ *Ibid.*, p. 62 et seq. and Ruth Nielsen, *supra* note 17, p. 76 for references to official documents expressing this view.

³⁴ *Supra* note 32, p. 63.

³⁵ Cfr. the opposite opinion expressed by the Swedish government in the preparatory work to the Swedish Bill introducing a law on information society services, *supra* note 32, p. 62. The government emphasises that the text of the E-commerce Directive is the result of hard negotiations and full of compromise. For this reason normal methods of statutory implementation are not applicable. I disagree. Exactly for the very reason that the text is difficult to interpret is it important to at least adhere to traditional methods of interpretation. Otherwise there would be nothing left of legal certainty.

authorisation. This, though, only applies to authorisation schemes which are specifically and exclusively targeted at information society services.

The coordinated field also covers requirements in respect of the *pursuit* of an information society service and exemplifies this with “requirements regarding quality or content of the service, including those applicable to advertising and contracts”. This would of course include rules of a public law nature such as rules prohibiting child pornography or racist statements. Equally, though, it could be interpreted to include private law rules contained in most civil codes on what constitutes a faulty product.³⁶ Furthermore the coordinated field encompasses “requirements concerning the liability of the service provider”. A narrow construction of this expression would limit it to public law rules prohibiting certain behaviour, the violation of which creates civil law liability. However, it could just as well be understood as a reference to the tort law of the country of origin *in toto*.

If the latter more extensive interpretation is chosen there is certainly a conflict with the general rule of the law of the country in which the loss is sustained suggested in Article 3(1) of the preliminary draft Regulation on the law applicable to non-contractual obligations. To a lesser extent there could be a conflict with the 1980 Rome Convention on the law applicable to contractual obligations³⁷. To be sure, there is in Article 4(2) a presumption for the law of the habitual residence of the country of the party who is to effect the characteristic performance. This would in most cases lead to the same result as applying the law of the country in which the service provider is established, but not always. Furthermore, it is only a presumption, which can be rebutted if the contract in question should be deemed to have a closer connection to another country.

A possible way to avoid a conflict between Article 3 of the E-commerce Directive and its Article 1(4) would of course be to give the concept of “the coordinated field” a narrow interpretation. Given the place of Article 1(4) at the very beginning of the Directive under the heading “objective and scope” this would amount to a structural interpretation of the Directive. However,

³⁶ Under Swedish law, which lacks a general civil code, this would probably be solved through an analogous application of §§ 16-21 of the Sale of Goods Act (Köplagen).

³⁷ OJ 1980 L 266, 9.10.1980, p. 1-19.

Article 2(h) is placed under the same heading and both a literal as well as a teleological interpretation of the text speak for the wider interpretation. We will have to look for other solutions and it remains to be seen which of the three possible interpretations of Article 3 indicated previously is most plausible and rhymes best with Article 1(4).

4. Solution 1: The E-commerce Directive Creates a Choice of Law Rule

Recital 22 of the Directive, according to which “information society services should in principle be subject to the law of the Member State in which the service provider is established”, indicates that a choice of law rule is indeed intended, irrespective of the fact that Article 1(4) of the Directive makes the opposite interpretation.³⁸ Moreover, Article 3(4) concerning possible derogations from the country of origin principle clearly takes as its point of departure that the law of the country of origin is applicable. An indication of this is that before derogating measures are taken, Article 3(4) (b) stipulates that the Member State in question must first urge the Member State in which the service provider is established to take such measures.³⁹ Another argument is that Article 3 of the E-commerce Directive creates expectations for the actors in e-commerce as to what law will be applicable. It should therefore be interpreted as a conflict of laws rule.⁴⁰ Finally, there are also those that simply establish that Article 3 of the E-commerce Directive contains a choice of law

³⁸ Regarding the conflict this would create with Article 1(4), it has been submitted that it is not for the legislator to interpret its own legislation and that doing so would constitute a return to blind authoritarianism and legal positivism. See Mankowski, *supra* note 23, p. 138 f.

³⁹ Alexander Thünken, “Die EG-Richtlinie über den elektronischen Geschäftsverkehr und das internationale Privatrecht des unlauteren Wettbewerbs, (2001) 21 *IPRax: Praxis des Internationalen Privat- und Verfahrensrechts*, pp. 15-22 at p. 19.

⁴⁰ Peter Lenda, “Elektronisk handel på tvers av landegrens: Er vi vittne til en ny retning i Europeisk interlegal rett i forslaget til Direktiv om visse aspekter av elektronisk handel?” working paper at Institutt for Rettsinformatikk, Universitetet i Oslo (Oslo, 2000) heading 2.6. The line of reasoning bears likeness to the theory of the “hypothetical will of the parties” which had a strong influence on mainly German private international law at the turn of the 19th century. It seemed to have lost its attraction and is in modern legal writing considered as a predecessor to the theory of the closest connection used in the Rome Convention, see Christian von Bar, *Internationales Privatrecht. Erster Band. Allgemeine Lehren* (München, 1987), p. 483. However, e.g. Section 19 of the Introduction to the Latvian Civil Law (choice of law in contracts) seems to still adhere to it.

rule without further explanation.⁴¹

One way to preserve the unity of the Directive to some extent would be to give other private international law rules precedence (nevertheless, it could be argued that even if the new rules are subsidiary to old rules they would constitute such “additional” rules that Article 1(4) denies). What speaks against this is *inter alia* that both the Rome Convention in its Article 20 and the preliminary draft Rome II Regulation in its Article 23 in effect declare themselves subsidiary to the E-commerce Directive. We would thus find ourselves with an extremely complicated situation of dual subsidiarity.

Nevertheless, this was the solution chosen by the German legislator in Section 4(1) of an early draft to amendments of the teleservices law (*Teledienstgesetz*).⁴² An English translation of the draft provision reads as follows:

*(1) Service providers established in the Federal Republic of Germany and their teleservices shall be subject to its domestic provisions even where teleservices are commercially offered or supplied in another State within the area of application of the [E-commerce] Directive [...], save as otherwise provided by the rules of private international law. The law of another State as determined by the rules of private international law shall not, however, be applicable to such teleservices insofar as it would restrict freedom to provide services to a greater extent than do the requirements of German law.*⁴³

The Commission did not look kindly upon the draft provision law and made it clear that in its opinion all limitations to the country of origin principle that go beyond those explicitly stated in Articles 3(3) and (4) of the Directive and the annex constitute a violation of the Directive.⁴⁴ It is of the opinion that any further deviations - including giving priority to private international law rules -

⁴¹ See e.g. Nina Dethloff, “Europäisches Kollisionsrecht des unlauteren Wettbewerbs”, (2000) 55 *Juristenzeitung*, pp. 179-185 at 180 f.

⁴² § 4 Abs. 1 TDG-E.

⁴³ Text taken from the translation by the Council translation service in Council document 10481/01 ADD 1, Information on the transposition of the Directive on e-commerce in Germany, 10.7.2001, JUSTCIV 89. Available on the Internet at: <http://register.consilium.eu.int/pdf/en/01/st10/10481-a1en1.pdf> last visited at 18 January 2003.

⁴⁴ See letter from Commissioner Frits Bolkestein to state secretary Dr. Alfred Tacke at the German Ministry for Science and Technology dated 27 July 2001.

would be contrary to one of the primary goals of the Directive, viz. that of creating legal certainty (as to what law is applicable).⁴⁵ In the final version of Section 4(1) rules of private international law are no longer given precedence.⁴⁶

The business community would prefer that the country of origin principle is seen as a choice of law rule and that precedence is also given to it. The only way to preserve the logical consistency of the Directive would then be to allow for *renvoi*, i.e. referring to the law of a country including its conflict of laws rules, in the area of private law where there are choice of law rules.⁴⁷ However, even if in effect this would leave private international law untouched it would still amount to establishing an “additional” choice of law rule.

An example of how this *renvoi* solution would work in practice can be taken from the area of unfair competition. According to the country of origin principle the law of the place of establishment of the service provider, including its conflicts rules, would be applied. According to the private international law rules of most European states this would lead to the application of the law of the country whose market is affected. Although theoretically workable, it is not an appetizing solution. Private international law is moving away from the concept of *renvoi* and it would be unfortunate to re-introduce it to solve this problem. There are other and better ways.

There is of course always the possibility to simply give precedence to the country of origin principle and to disregard Article 1(4). However, as will be shown, there are ways of giving full effect to the country of origin rule without jeopardizing the internal coherence of the Directive.

⁴⁵ For the aims of the Directive see above p. 7 and recital 5.

⁴⁶ Adopted on 14.12.2001, BGBl I 2001, 3721.

⁴⁷ Spindler, *supra* note 29, at p. 9.

5. Solution 2: The E-commerce Directive Sets Certain Limitations to the Application of the Designated Law

An argument for repudiating the choice of law character of Article 3 is based on its position in the hierarchy of norms in EC law. Allegedly, the country of origin principle, which has evolved in primary EC law in relation to the free movement of goods and services,⁴⁸ does not have the character of a choice of law rule. The country of origin principle in primary EC law is only to be seen as a corrective to the rules on applicable law for marketing and unfair competition, which follow the effects principle. The rules of primary EC law, i.e. most importantly Articles 28 and 49 EC, do not affect the choice of applicable law as such but suppress certain effects of the applicable law (which in all the cases has been the law of the forum).⁴⁹ The country of origin principle in the E-commerce Directive is to be understood as a concretion of the country of origin principle in the EC Treaty and can therefore not go beyond it. Thus, it follows that Article 3 of the Directive does not contain a choice of law rule.⁵⁰

The viewpoint that Article 3 does not contain a choice of law rule has also been taken without reference to the country of origin principle in primary EC law. It is simply a logical consequence of Article 1(4). The consequence is that national rules on jurisdiction and applicable law are applied but that the law they designate is only applied to the extent that it does not restrict the freedom to provide information society services provided for in the state of origin.⁵¹

⁴⁸ See Jürgen Basedow, "Der kollisionsrechtliche Gehalt der Produktfreiheiten im europäischen Binnenmarkt: favor offerentis", (1995) 59 *Rebels Zeitschrift für ausländisches und internationales Privatrecht*, pp. 1-55 at pp. 6-12 for the evolution of the principle.

⁴⁹ Karl-Heinz Fezer & Stefan Koos, "Das gemeinschaftsrechtliche Herkunftslandprinzip und die e-commerce-Richtlinie", (2000) 20 *IPRax: Praxis des Internationalen Privat- und Verfahrensrecht*, pp. 349-354 at 350 f.

⁵⁰ *Ibid.*, p. 352 f.

⁵¹ Jürgen Apel & Tanja Grapperhaus, "Das Offline-Online-Chaos oder wie die Europäische Kommission den grenzüberschreitenden Werbemarkt zu harmonisieren droht", (1999) *Wettbewerb in Recht und Praxis*, pp. 1247-1259 at 1252; Gerhard Spindler, "Verantwortlichkeit von Diensteanbietern nach dem Vorschlag einer E-Commerce-Richtlinie", (1999) *Multimedia und Recht*, pp. 199-207 at p. 206.

Moreover, a strong argument for Article 3 not creating a choice of law rule is the place of Article 1(4) in the structure of the E-commerce Directive, in the very first article defining the objective and scope of the Directive. This would indicate that it is intended to limit the meaning of Article 3 - depriving it of any possible choice of law character. Finally, it has quite rightly been contended that if the Community legislator intended to create a choice of law rule, it would have done so quite explicitly as is the case in e.g. the Insurance Directives.⁵²

6. Solution 3: The Rules within the Coordinated Field are to be Seen as Internationally Mandatory

As always, there is a middle way, which recognizes that Article 3(1) of the E-commerce Directive not only sets certain limitations to the application of the designated law but also actually has an effect on the question of which law is applicable. It is quite possible for the country of origin principle in the E-commerce Directive to have such an effect without being a fully-fledged choice of law rule. It is that view which is submitted here.

It is clearly the legislative intent that "information society services should in principle be subject to the law of the Member State in which the service provider is established".⁵³ It is for this reason submitted that Article 3 does indeed affect the applicability of laws and that the country of origin principle in the E-commerce Directive goes beyond being a mere corrective to the otherwise applicable law. Article 3(1) of the Directive is a rule that affects the territorial applicability of substantive law rules. That does not necessarily

⁵² Article 7 of the Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC, OJ L 172, 4.7.1988, pp. 1-14 and Article 4 of the Council Directive 90/619/EEC of 8 November 1990 on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC, OJ L 330, 29.11.1990, pp. 50-61. See Norbert Reich, "Elektronischer Geschäftsverkehr und Grundfreiheiten: Die Bedeutung des Herkunftslandsprinzips gem. Richtlinie 2000/31", in: Alfred Büllesbach & Thomas Dreier (eds.), *Konvergenz in Medien und Recht: Konfliktpotential und Konfliktlösung* (Köln, 2002), pp. 21-58 at p. 29.

⁵³ See recital 22.

make it a choice of law rule as such.

To understand this distinction a brief digression into private international law theory is necessary. In legal writing the separation between "spatially conditioned internal rules",⁵⁴ "particular choice of law rules",⁵⁵ "functionally restricting rules",⁵⁶ "localizing rules",⁵⁷ and "self limiting provisions"⁵⁸ - restricting the rendition to terms in the English language - and choice of law rules has been upheld.⁵⁹ The underlying assumption is that certain substantive law rules have a specific territorial field of application - just as all rules have a substantive (or personal) field of application. A somewhat simplified example would be competition (antitrust) law rules that are substantively applicable when there is an agreement between undertakings that restrict competition. This is the substantive field of application. These competition law rules are territorially applicable when the agreement has effect on the market of the state that issued the rules. This would be the territorial field of application.⁶⁰

The concept of "spatially conditioned internal rules" is somewhat confused, since it seems to refer to the particular group of rules as such as opposed to those rules that do not have any given territorial field of application such as (most) rules in contract law.⁶¹ The other terms used in English language legal writing such as "particular choice of law rules",

⁵⁴ Arthur Nussbaum, *Principles of Private International Law* (New York, 1943), p. 71.

⁵⁵ J.H.C. Morris, "The Choice of Law in Statutes", (1946) 62 *Law Quarterly Review*, pp. 170-185 at 176.

⁵⁶ A. de Nova, "Conflict of Laws and Functionally Restricted Substantive Rules", (1966) 54 *California Law Review*, pp. 1569-1574 at 1569.

⁵⁷ David F. Cavers, *The Choice of Law Process* (Ann Arbor, 1965), p. 225.

⁵⁸ J. Unger, "Use and Abuse of Statutes in the Conflicts of Laws", (1967) 83 *Law Quarterly Review*, p. 427-448 at 429 and Lawrence Collins (gen. ed.), *Dicey and Morris on the Conflict of Laws*, 13th ed. (London, 2000), p. 20

⁵⁹ Nussbaum, *supra* note 54, p. 72 maintained that "[t]he realm of 'spatially conditioned' internal rules is wide and unexplored [... and to] be sure, it is separate from the traditional divisions of Private International Law, viz., choice-of-law and jurisdiction, but, nevertheless, it is indissolubly intertwined with them".

⁶⁰ Alternatively, is implemented on the market, if the state in question adheres to the doctrine of implementation. For an overview of the territorial applicability of competition law rules see: Ivo Schwartz & Jürgen Basedow, "Restrictions on Competition", in Kurt Lipstein (ed.), *International Encyclopedia of Comparative Law, Volume III, Private International Law* (Tübingen, 1995).

⁶¹ Those that adhere to the governmental interest approach developed by professor Brainerd Currie in a series of articles in the 1950's and 60's would argue that *all* rules have a specific territorial field of application, which can be construed via a governmental interest analysis. See Brainerd Currie, *Selected Essays on the Conflict of Laws* (Durham, 1963), p. 183 and *passim*.

"functionally restricting rules", and "localizing rules" aim at the particular element of the rule that tells us its territorial field of application.

The terminology was originally introduced to solve the private international law problem of *renvoi* in certain situations. In common law states *renvoi* was not practiced in the field of contracts.⁶² The problem was that of taking into consideration the territorial field of application of a foreign law without violating the ban on *renvoi*.⁶³ It did not make sense to apply a rule that was not intended to be applicable to the situation at hand. This could only be achieved by not treating the territorial field of application of a rule as a rule of private international law. Thus *Dicey and Morris* states that "[s]uch 'self-limiting provisions' as they have been called are clearly not rules of the conflict of laws whether multilateral or unilateral".⁶⁴

Most, if not all,⁶⁵ substantive law rules with a defined territorial field of application are so called (internationally) *mandatory rules*.⁶⁶ Mandatory rules is the term most commonly used in English language legal writing to describe what was originally coined in French by *Phokion Franceskakis* as *lois d'application immédiate*.⁶⁷ Mandatory rules are in Article 7(1) of the 1980 Rome Convention defined as "rules [that] must be applied whatever the law applicable to the contract" and in Article 16 of the 1978 Hague Convention on the Law Applicable to Agency as "those rules [that] must be applied whatever

⁶² Exclusion of *renvoi* is now the general rule in Article 15 of the 1980 Rome Convention on the law applicable to contractual obligations.

⁶³ See *Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society Ltd.* [1938] A.C. 224 (P.C.) for a real life example, which concerned the 1931 *Financial Emergency Act* of the Australian state Victoria.

⁶⁴ *Dicey and Morris on the Conflict of Laws*, *supra* note 58, p. 20.

⁶⁵ This would certainly be an interesting topic for further research and has been the object of some discourse: see *inter alia* D.S.L. Kelly, "Localising Rules and Differing Approaches to the Choice of Law Process", (1969) 18 *International and Comparative Law Quarterly*, pp. 249-274 at p. 253; Kurt Lipstein, "Inherent Limitations in Statutes and the Conflict of Laws", (1977) 26 *International and Comparative Law Quarterly*, pp. 884-902 at p. 894; F.A. Mann, "Unfair Contract Terms Act 1977 and the Conflict of Laws", (1978) 27 *International and Comparative Law Quarterly*, p. 661-664; T.G. Guedj, "The Theory of *Lois de Police*, A Functional Trend in Continental Private International Law - A Comparative Analysis with Modern American Theories, (1991) 39 *American Journal of Comparative Law*, pp. 661-697 at 667 ff.; Andrea Bonomi, (1999) 1 *Yearbook of Private International Law*, pp. 215-247 at p. 231.

⁶⁶ This would explain why French legal writing only speaks of "*lois d'application immédiate*" when trying to identify these rules and separate them from choice of law rules. See P. Graulich, "Règles de conflit et règles d'application immédiate", in *Mélanges en l'honneur de Jean Dabin, T. II Droit positif* (Bruxelles, 1963), pp. 629-644; Annie Toubiana, *Le domaine de la loi du contrat en droit international privé (contrats internationaux et dirigisme étatique)* (Paris, 1972), p. 228.

the law specified by [a] choice of law rules". However, the application of mandatory rules is in no way limited to the area of contract law.⁶⁸

Against this background, it is first of all submitted that those rules that form part of the coordinated field should be held to be territorially applicable to services provided by service providers established within the territory of the Member State in question. This would offer a solution that would satisfy both the presumption in recital 22 that the law of the service provider should apply and the statement in Article 1(4) that no new rules of private international law are established.⁶⁹

Secondly, it is also submitted that the rules within the "coordinated field" are also to be treated as mandatory rules overriding any choice of law made - be it objective or subjective.⁷⁰ It is clear from the annex concerning derogations from Article 3 that the Directive does not affect the freedom of the parties to choose the law applicable to their contract - party autonomy. The fact that the Directive explicitly allows for party autonomy in the field of contracts indicates that this otherwise would not have been possible, i.e. that the rules covered by the coordinated field are to be treated as mandatory.⁷¹

What is more, in the *Ingmar* case,⁷² which concerned the mandatory nature of Articles 17-19 of the Agency Directive,⁷³ the Court of Justice held those Articles to be of an internationally mandatory nature. The Court's reasoning focused on two characteristics of the rules in question. Firstly, they are (internally) mandatory and cannot be derogated from by contract (explicitly stipulated in Article 19) and secondly, they are intended to "eliminate restrictions on the carrying-on of the activities of commercial

⁶⁷ Phokion Franceskakis, *La théorie du renvoi et les conflits de systèmes en droit international privé* (Paris, 1958), pp. 11-16.

⁶⁸ See e.g. Article 12 of the Preliminary draft proposal for a Council Regulation on the law applicable to non-contractual obligations.

⁶⁹ This is a solution chosen by the Swedish legislator in Section 5 of the new Law on Information Society Services.

⁷⁰ An objective choice of law is done via a choice of law rule whereas a subjective choice of law is made by the parties to a dispute.

⁷¹ This interpretation is shared by Norbert Reich, "Der Vorschlag der EG-Kommission für eine Richtlinie des Europaparlamentes und des Rates über bestimmte Rechtliche Aspekte des elektronischen Geschäftsverkehrs im Binnenmarkt vom 23.12.98 und seine Auswirkungen auf das Vertragsrecht", in: Hans Schulte-Nölke & Reiner Schulze (eds.), *Europäische Rechtsangleichung und nationale Privatrechte*, pp. 79-106 at p. 101.

⁷² Case C-381/98 *Ingmar GB Ltd v. Eaton Leonard Technologies Inc* [2000] ECR I-9305.

⁷³ Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, OJ L 302, 31.12.1986, pp. 17-21.

agents, to make the conditions of competition within the Community uniform and to increase the security of commercial transactions [...] The purpose [...] is thus to protect [...] the freedom of establishment and the operation of undistorted competition in the internal market. Those provisions must therefore be observed throughout the Community if those Treaty objectives are to be attained".⁷⁴

The purpose of the E-commerce Directive is, similar to that of the Agency Directive, to create an area without internal frontiers and to remove the barriers to freedom of establishment and to provide services. The E-commerce Directive differs from the Agency Directive in that it allows for party autonomy in the field of contract law. Notwithstanding this, with the exception of party autonomy in the field of contract, the Directive intends for the rules within the coordinated field to be (internationally) mandatory.

If this line of reasoning is followed, there would be no contradiction between Article 3(1) of the E-commerce Directive and Article 1(4) of the Directive. As has been explained above, changing the territorial applicability of rules does not as such constitute an establishment of new rules on private international law - i.e. if the dichotomy between "self limiting provisions" and private international law rules is accepted.

What is more, at least as far as contract law is concerned, Article 7(2) of the 1980 Rome Convention already gives precedence to mandatory rules of the forum over choice of law rules. Thus, no additional rules of private international law are established if certain substantive law rules are given fields of application in accordance with the country of origin principle and are applied as mandatory before ordinary choice of law rules. It should also be pointed out that what is stated for international contract law in Article 7(2) of the Rome Convention is only an expression of what is generally accepted throughout the entire field of private international law.⁷⁵

⁷⁴ Case C-381/98, *supra* note 72, paras. 23-24. The case is commented by i.a. Michael Bogdan, "Ordre public, internationellt tvingande r ttsregler och kring endel ran i EG-domstolens praxis r rande internationell privatr tt", (2001) 86 *Svensk Juristtidning*, pp. 329-346 at p. 340-342 and Maarit J nter -Jareborg, "N r  r harmoniserade gemenskapsregler internationellt tvingande? Reflexioner f ranledda av m let Ingmar GB Ltd. och Eaton Leonard Technologies Inc.", (2001) 4 *Europar ttslig Tidskrift*, pp. 403-412.

⁷⁵ Giuliano, M./Lagarde, P., "Report on the Convention on the law applicable to contractual obligations", OJ 1980 C 282, 31.10.1980, pp. 1-50 at p. 27. See also Article 12 of the Preliminary draft proposal for a Council Regulation on the law applicable to non-contractual obligations.

Consequently, the Dutch legislator, in Article 6(1) and (2) of the Dutch law implementing the E-commerce Directive, gives the harmonised rules that have been transposed into Dutch law status of mandatory law, which applies in a case where the provider of a service is established in the Netherlands [...] irrespective of which law applies to the agreement.⁷⁶

The “self-limiting provisions” approach is also taken in Section 5 of the Swedish law on electronic commerce and other information society services. All Swedish laws that fall within the coordinated field are made applicable when the service provider is established in Sweden - even if the services are directed to recipients in another EEA state. The German legislator takes the same view in Section 4(1) of the Teleservices law. However, neither of the two laws seems to regard the rules as (internationally) mandatory.

A problem with this approach, which is admittedly only of a theoretical nature, is that the distinction between “self-limiting provisions” and choice of law rules is not generally recognised and at that very difficult to define.⁷⁷ To illustrate, the distinction does not appear to be known to German legal writing, which does not see the difference between a “self-limiting provision” and a unilateral choice of law rule, i.e. a choice of law rule that can only lead to the application of the law of the forum.⁷⁸

The difference, although a fine one, is that the unilateral choice of law rule declares that the law(s) of the forum are applicable to a given set of circumstances. The reference to the law of the forum includes all relevant laws that are applicable to the subject matter - be they one or many. The self-limiting provision only defines the territorial applicability of one single defined law or rule.⁷⁹

The solution is, as *Drijber* contends, a pharisaic one in that it takes back

⁷⁶ From the explanatory memorandum to the Dutch government bill.

⁷⁷ Dicey and Morris, *supra* note 58, at p. 20 claim that “[a]lthough the distinction between them is plain enough in principle, it is not always easy to distinguish between unilateral conflict rules and self-limiting provisions; nor has any writer succeeded in formulating a satisfactory test for distinguishing between them”.

⁷⁸ Schwartz & Basedow (both German), *supra* note 60, p. 118 f. recognize the difference but find “[t]he distinction between conflicts rules and rules determining geographic scope [...] extremely oversubtle”.

⁷⁹ See Maarit Jänterä-Jareborg, “Internationellt tvingande civilrättsregler, fastighetsförmedling och konsumenter - några reflexioner”, (1995) 80 *Svensk Juristtidning*, pp. 374-384 at p. 380 ff. and Michael Hellner, *Internationell konkurrensrätt. Om främmande konkurrensrätts tillämplighet i svensk domstol* (Uppsala, 2000), pp. 269-278.

with one hand what it gives with the other (untouched choice of law rules).⁸⁰ Its greatest weakness lies in the fact that the theory behind it is probably only understood by a happy few specialists in private international law and that it depends on distinctions that could be contested. However, its strength lies in the fact that it does preserve the theoretical consistency of the E-commerce Directive while respecting one of the trends of private international law, i.e. recognising the importance of mandatory rules.

⁸⁰ B.J. Drijber, "De Richtlijn elektronische handle op de snijtafel", (2001) 4 *Tijdschrift voor Europees en economisch recht*, pp. 122-138 at 133.

7. Evaluation

The version of the country of origin principle contained in Article 3(1) of the E-commerce Directive - in combination with the fuzzy concept of the “coordinated field” in Article 2 (h) - should never have been adopted. It extends the meaning of the principle in a manner which is not entirely thought through. Since the coordinated field is of such a diffuse nature and extends into private law, a Pandora’s box has been opened in the area of private international law. This was evidently quite clear to the Council working party that worked with the Commission’s proposal and the provision that the Directive does not establish additional rules on private international law in Article 1(4) was therefore added. It should also not be excluded that the understanding of the country of origin principle in the E-commerce Directive could have a contagious effect and that also in areas outside e-commerce this principle would be considered to have effects on the choice of law. This would change the very foundations of private international law in Europe and it would do so without proper prior analysis as to the consequences.

As has been shown, Article 3 of the E-commerce Directive has created what is in effect, if not in name and theory, a choice of law rule designating the law of the country of establishment of an electronic service provider as applicable to a wide range of questions. It remains to be proven whether this is the appropriate applicable law to all areas covered by the coordinated field. A more cautious and piecemeal approach utilising the traditional tools of private international law would have been preferable.

To always apply the law of the state of origin of the service provider would be an unusually blunt rule of a hard and fast nature that private international law has moved away from in the last decades. It would also cover an unusually large area of the law under one and the same choice of law rule.⁸¹ The country of origin principle might be a good rule to determine what country’s authorities should supervise the activities of a service provider but that does not also make it a good choice of law rule.

⁸¹ Spindler, *supra* note 29 at p. 8.

However, the law stands as it stands and the Directive has to be applied (first and foremost in the form of national laws that transpose it) regardless of its shortcomings. The main purpose of this paper has not been to criticise the law or to write an appeal for reform but to find a theoretical model that will allow Articles 3 and 1(4) of the Directive to coexist and facilitate day-to-day application of the law.

Of the various alternatives available, it is submitted that the solution that rhymes best with private international law theory and the legislative intent is to treat the rules covered by the coordinated field as mandatory rules and to give them precedence over the rules designated as applicable by private international law. What that means in practice is, due to the obscure scope of the coordinated field, another story.