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The Country of Origin Principle¹ and the Applicable Law for Obligations Related to the Benefit of Information Society Services²

The global nature of the Internet and the related ease of establishing international relations is conducive to the search for new conflict-of-law solutions. The need for users to take into account many national legal orders, often divergent legal regulations (e.g. in the scope of the permitted private use of digitized works, competition law rules, consumer protection provisions), which involves the application of traditional conflict rules, promotes radical striving to simplify the rules governing the determination of the applicable law. This applies not only to the way of indicating relevant substantive norms in the field of private law, but also to the scope of application of public law regulations (administrative, criminal or financial law). There's no doubt that for entrepreneurs conducting international operations using computer networks, it would be beneficial to use only one legal system – preferably of the country where their headquarters are located – to assess all elements of their activity. This would greatly facilitate the estimation of risk associated with conducting online sales or providing i.s.s. On the other hand, the unconditional assumption of the right of the state of the seat of entrepreneurs could encourage them to transfer their headquarters to the areas of countries adopting the lowest legal standards for online business (the phenome-

1 Hereinafter: c.o.o.p.

2 Hereinafter: i.s.s.

non referred to in the literature as the race to bottom).³ When looking for new, universal conflict-of-law solutions for the network, one should also take into account the interests of consumers, persons authorized from intellectual property rights, as well as other entities that may be harmed as a result of actions taken by “online” entrepreneurs.

Taking into account these fundamentally divergent interests, at least in principle, serves the so-called c.o.o.p. (French: principe d’origine, German: Herkunftslandprinzip) introduced by art. 3 of the e-commerce directive.⁴ It’s a specific internal market clause of an innovative, conflict-of-law nature.

It is assumed that the Public Procurement Law established pursuant to art. 3 d.e.c., is of fundamental importance for the development of international economic turnover carried out using electronic means of communication within the Community. However, there are serious doubts about the method and scope of its application. It undoubtedly covers the norms of public law of the country of establishment of the service provider (e.g. regarding the registration of specific activities). However, the question arises whether it also concerns private law standards (e.g. in the field of competition law). In the case of the Public Procurement Law, it also affected private-law relations, and the question arises as to whether it results from the requirement for Member States⁵ to establish a separate conflict-of-law rule.⁶ The impact of this rule on the indication of the law applicable to tort obli-

3 E. Łętowska, *Europejskie prawo umów konsumenckich*, Warszawa 2004, p. 254.

4 Directive 2000/31 from 8.6.00. on some legal aspects of the Act on commercial partnerships, in particular electronic commerce, Journal of Laws L 178, 17.7.00 (directive on electronic commerce, hereinafter: d.e.c.). Some other directives introduce, in the areas they regulate, a special type of “criminal law” (cf. Article 16 of the draft Directive on services in the internal market – Proposal for a Directive of the European Parliament and of the Council on the services in the internal market COM (2004) 2 final/3). In this study, the author uses this term in relation to art. 3 of e.c.d.

5 Hereinafter MS.

6 A. Thünken, *Multi-State Advertising Over The Internet and the Private International Law of Unfair Competition*, “International & Comparative Law Quarterly” 2008, vol. 51, issue 4, p. 939.

gations arising in connection with the provision of civil and commercial law should also be determined (in particular, commitments from torts of unfair competition). At this point, it should be noted that, unlike the other MSs, this principle was not regulated in the Polish Act on the provision of electronic services⁷, which implemented the provisions of d.e.c. Only the justification of the draft law⁸ refers – moreover, incorrectly – to the principle in question. The Polish legislation can be justified only by the fact the entry into force of the Act on the provision of electronic services took place before Poland’s accession to the EU. There is no doubt, however, that from 1 May 2004, the obstacle to explicit regulation of the c.o.o.p. 3 in the Polish legal system has been removed. Paradoxically, therefore, it seems that the Polish legislator is currently in a more favorable situation, because, as part of agreeing the content of the discussed principle with the specifics of the Polish legal system, it can take advantage of the experience of other IPs, which earlier introduced it into the internal legal order. No implementation of the c.o.o.p. to the Polish legal system, however, causes significant difficulties in practice, which is also associated with the problem of the direct effectiveness of conflict-of-law rules arising from directives.⁹ In the opinion of the author of this work, it is necessary to determine the impact of this principle on the method of indicating the applicable law. To this end, it will first be necessary to discuss the legal nature and origin of the principle, as well as the scope of its application, and then proceed to detailed conflict-of-law considerations.

7 Act of 18.7.02 on the provision of services by electronic means (Journal of Laws of 2002, no. 144, item 1204, as amended; hereinafter: the a.p.s.e.m.).

8 Print no. 409.

9 As for the last issue, see M. Szpunar, *Normy kolizyjne a europejskie prawo wspólnotowe*, paper delivered at the conference “Dostosowanie polskiego prawa prywatnego międzynarodowego do standardów europejskich”, Katowice, October 1998. See also M. Szpunar, *Prawo wspólnotowe przed organami krajowymi*, “Rejent” 2004, no. 3–4.

The Legal Nature of the C.O.O.P.

In the light of art. 3 of d.e.c., i.s.s. service¹⁰ is subject to the law of the Public Law in whose territory the seat of the service provider is located (c.o.o.p.). Two elements of this principle are the obligation imposed on the authorities of the country of establishment of the service provider to control its activities and the prohibition of discrimination against services (restrictions on their free movement)¹¹ directed to the state of “receiving” services. The combination of both these elements, as is commonly accepted, implies the principle of the jurisdiction of the country of residence of the service provider for the assessment of the services provided by it.¹²

The country where the service provider conducts business (has its registered office) is obliged to ensure i.s.s. that they are rendered in accordance with the substantive provisions of that country as well as the relevant provisions of the Community law. For this purpose, the MS must control the service provider’s activities effectively and effectively. That is emphasized by the d.e.c preamble, which states that the supervision of the US aims to ensure effective protection of the public interest (par. 18). In turn, according to the official interpretation of art. 3 clause 2

10 This expression in Polish law corresponds to the concept of “electronic services.” For the provision of electronic services, see X. Konarski, *Komentarz do ustawy o świadczeniu usług drogą elektroniczną*, Warszawa 2004, p. 13 and next; P. Litwiński in: *Prawo Internetu*, ed. p. Podrecki, Warszawa 2004, p. 167 and next; *Komentarz do ustawy o świadczeniu usług drogą elektroniczną*, Warszawa 2004, p. 13 and next. It’s worth noting the wide scope of the definition of the concept adopted in the Polish Act, going beyond the traditionally understood concept of services.

11 According to the text from the website of the Office of the Committee for European Integration (art. 3):

1. Each MS ensures that u.s.i. provided by the service provider established in its territory were in accordance with the national provisions applicable in this P.Cz. and falling within the coordinated field.
2. MS cannot, for reasons falling within the scope of the coordinated field, restrict the free movement of u.s.i. originating in another Roman Catholic church.
3. Par. 1 & 2 shall not apply to the areas specified in the Annex.

12 E. Łętowska states that “after fulfilling the conditions required by the law of the seat of the service provider, the supplier may act legally, and the applicable (material) law to assess his performance is the regime of his seat. C.o.o.p. is conducive to market opening and economic freedom.” E. Łętowska, *Europejskie prawo umów konsumenckich*, Warszawa 2004, p. 254.

of d.e.c. made by the European Commission¹³, any form of restriction on the free movement of services, except for the exceptions strictly specified in the Annex to the Directive, is prohibited. The EC understands this limitation of all activities to be aimed at prohibiting the provision of a given type of services (e.g. a service enabling the ordering of OTC drugs on websites) or only limiting their availability (e.g. by prohibiting advertising of a given type of services). The *Ratio legis* of this principle lies in the belief that service providers who meet the legal requirements of one MS (where it is located their headquarters) should not be subject to additional bans and restrictions (e.g. in the field of competition law) in the country where their services are “picked up.”

The EC attaches great importance to this principle, as evidenced by the fact that despite intense criticism of the draft directive and discussions lasting several months, the final wording of art. 3 clause 1 & 2 has remained essentially unchanged compared to the original EC draft.

The essential thing for the interpretation of c.o.o.p. is the interpretation of the service provider’s place of establishment.¹⁴ In accordance with art. 2 point c of the directive, the entrepreneur’s seat is located where the service provider conducts business, using a permanent enterprise established for an indefinite period. Therefore, the seat means the place where the entrepreneur actually conducts their business, and not the place of registration or the place specified in the statute of the legal person as its seat. Therefore, it should be recognised that the directive adopts the theory of actual residence, in a variation of the operating centre.¹⁵ As part of the location of the real seat of the entrepreneur, the directive rejects technical criteria, e.g. the location of technical devices, including serv-

13 Hereinafter: EC.

14 See L. Moerel, *The Country-of-Origin Principle in the E-Commerce Directive: The Expected “One Stop Shop”?*, in: *Computer Technology Law Report*, 2001, s. 185; D. Kot, *Dyrektywa Unii Europejskiej o handlu elektronicznym i jej implikacje dla prawa cywilnego*, KPP 2001, no. 1, pp. 52–53.

15 For the theory of headquarters in a variation of the operating center, see more broadly: W. Klyta, *Łącznik siedziby w niemieckim międzynarodowym prawie spółek*, KPP 1998, no. 2, pp. 249, 252.

ers used for data transmission in computer networks. Recognition of the server's location as the seat's indicator would create the danger of providing services using servers located in countries with the most liberal regulations, which do not provide the recipients with due protection. Entrepreneurs positively assess c.o.o.p. because of their fear of applying a foreign law unknown to them being applied in the event of a dispute. On the other hand, as arguments against its adoption, the possibility of transferring the seats of entrepreneurs online to countries with more favorable provisions on business activity is raised.¹⁶ It should be noted, however, that in the event the service provider directs all or most of its activities to the territory of another MS, it exceptionally retains the right to take appropriate legal measures against the service provider (e.g. under competition law). This is determined by the case-law of the TEU¹⁷, to which, moreover, it refers directly to recital 57 of the directive. However, the abovementioned exception applies only if the seat of the service provider is chosen in order to circumvent the legislation that would normally apply, i.e. the country where the service provider directs all or most of its activities. The authors who omit the nuances of private international law¹⁸ in their studies are distinguished (on the level of Community law) by the so-called the principle of the country of reception (French: pays de réception/destination principe).¹⁹ This consists in accepting the jurisdiction of the place where the services are

16 D. Kot, *Dyrektywa Unii Europejskiej...*, p. 53.

17 See ruling from 3.12.74 on Van Binsbergen, C-33/74 [1974] ECR -1299; orz. of 3.2.93 on Veronica, C-148/91 [1993] ECR I-487; orz. from 5.10.94 on TV10 S.A., C-23/93 [1994] ECR I-4795; judgment from 10.9.96 on KE v. Belgium, C-11/95 [1996] ECR I-4115. See D. Kot, in: *Podejmowanie i prowadzenie działalności gospodarczej w Internecie*, in: *Handel elektroniczny. Problemy prawne*, eds J. Barta, R. Markiewicz, Kraków 2004, p. 32.

18 Hereinafter: p.i.l.

19 J. Huet, *Le droit applicable dans les réseaux numériques*, Colloquium at the National Assembly 19–20 Nov 2001, *Internet Law: European And International Approaches. The Implementation Of Internet Laws. How To Resolve Cross-Border Disputes?*, p. 5 and next; M. Fallon, J. Meeusen, *Le commerce électronique, la directive 2000/31/CE et le droit international privé*, "Revue Critique De Droit International Privé" 2002, p. 480 and next; D. Kot, *Dyrektywa Unii Europejskiej...*, p. 53; D. Marino, D. Fontana, *European Parliament and Council Directive on Electronic Commerce*, CTLR 2000, p. 45.

“picked up.”²⁰ Depending on the type of legal relationship, this place is often identified with the place of: habitual residence of the recipient, performance of the contract or damage to the recipient. It is recognized that the use of a place is beneficial for entrepreneurs, and the application of the recipient country principle – for recipients (consumers, victims).²¹ The criticism of contemporary conflict-of-law regulations, including the Rome Convention on the law applicable to contractual obligations of 1980²², as well as the draft Rome II Regulation of 2003²³, raised by business associations is based on the assumption that the applicable law indicated on their basis may be the law of the state of “receiving” services. In the case of torts committed in connection with the provision of the Civil Code, as the law of the state of “receipt” can be understood, for example, as the law of the state of damage caused to the recipient (e.g. usually equated with the law of the state of its habitual residence).

The Treaty Sources of C.O.O.P.

According to the explanations of the EC, the purpose of the directive introduced in the PPA Directive is to guarantee the application of – with respect to i.s.s. – the basic principles of the internal market (French: *marché*

20 The concept of the recipient country is also used in art. 49 TEC, which provision establishes the freedom to provide services (State of the Community [...] of the person for whom the services are intended).

21 It can be reasonably argued that the party whose law governs the liability immediately gains a certain advantage over the contractor, which is not in accordance with the principle of maintaining an equal position of the parties in international trade. The national law of one side may be completely unknown or unfavorable to the other. See B. Fuchs, Statut kontraktowy a przepisy wymuszające swoje zastosowanie, Katowice 2003, pp. 39–40.

22 Consolidated version U. WE C027 from 26.1.98 The Polish text of the convention was published in PPHZ (1983), vol. 7, pp. 124 ff and in KPP’94, vol. 2, pp. 300–341 (transl. by W. Popiołek); PSM’84, vol. 4 and 6 (transl. by J. Poczobut). Poland acceded to the convention in April 2005. Its text has not yet been published in the OJ.

23 Especially of the basic conflict-of-law rule based on the link between the place of “direct” damage (Article 3 (1)). Project overview – Fabjańska M., M. Świerczyński, *Ujednolicenie norm kolizyjnych dotyczących zobowiązań pozaumownych*, KPP 2004, no. 3, p. 717 and next (together with the translation of the project).

interieur) within the meaning of art. 14 of TUE, and in particular ensuring compliance by the MS with the principles of the freedom to provide services referred to in art. 49–55 of the Treaty.²⁴ This principle has its source in one of the four basic freedoms of the EC.²⁵ With regard to the freedom to provide services, it is assumed that it does not require implementation in the internal regulations of the MS (at least until a derived law regulates the matter), just as other economic liberties do not require this.

Considering the development of the common market, the European Court of Justice²⁶ has repeatedly confirmed the need to counteract any broadly understood restrictions on the provision of services in the territory of other MSs than the country of establishment of the service provider. Burdening service providers based in the territory of other MSs with additional legal requirements puts them in a state of legal disadvantage compared to national service providers. As it has been repeatedly emphasized in the ECJ rulings, the introduction of specific advertising bans can also be a restriction on the free movement of goods or services. The purpose of d.h.e. is, among other things, the elimination of just such restrictions. However, it is worth noting that the use of services does not mean that this right will be more favorable to the entrepreneur than the right indicated, for example, by means of a market connector (in the case of acts of unfair competition). The C.o.o.p. is not intended to indicate the most favorable right for an entrepreneur. In accordance with art. 52 paragraph 1 of the Treaty, in order to ensure the liberalization of a particular service, the Council shall adopt directives, acting by a qualified majority on a proposal from the Commission and after consulting the Economic and Social Committee and the European Par-

24 See recital 22. More broadly: A. Cruquenaire, Ch. Lazarc, *La clause de marché intérieur: clef de voûte de la directive sur le commerce électronique*, in: *Le commerce électronique européen sur les rails ? Analyse et propositions de mise en oeuvre de la directive sur le commerce électronique*, Bruxelles 2001, p. 44; E. Crabit, *La directive sur le commerce*, “*Revue du droit de l’Union européenne : revue trimestrielle de droit européen*” 2000, 4, p. 753 and next.

25 See more broadly F. Emmert, M. Morawiecki, *Prawo europejskie*, Warszawa–Wrocław 2001, pp. 357–370.

26 Hereinafter: ECJ/CJEU.

liament. On this basis, the freedom to provide services is reflected in the provisions of secondary Community law. One of the examples of introducing a detailed principle of the country of origin on this basis is the regulation adopted in art. 2–2a of the Television Directive “without frontiers”²⁷, in which the freedom to provide TV services is guaranteed by the application of the principle of the law of the state of the establishment of the broadcaster. According to this principle, each MS is required to ensure that the TV programs in its area meet the conditions in the country of establishment of the broadcaster (art. 2). Other MSs should, in turn, ensure free access to the above-mentioned services and exclude all restrictions on broadcasting foreign TV programs (art. 2a). The content of art. 2–2a of the amended tv.w.f.d. was the prototype of art. 3 of d.e.c.

The doctrine did not prejudge the conflict-of-law nature of the rule resulting from tv.w.f.d.²⁸ Undoubtedly, the application of the sender’s country principle adopted in tv.w.f.d. affects the coordination of public law norms. However, the question is if it also affects the application of the p.i.l. standards. Proponents of this approach argue that since TV broadcasts should comply with the law of the broadcaster’s country, this also means taking into account the private law standards of that country.²⁹ However, this is not a position commonly shared in the literature. It should be noted, however, that there are significant differences between the abovementioned directive and e.c.d. While the c.o.o.p. “mechanism” is well known in Community law (it is provided for in many directives),

27 Council Directive of 3.10.89. on the coordination of certain laws, regulations and administrative provisions of the MS regarding the pursuit of television broadcasting activities (the Television without Frontiers Directive, hereinafter: tv.w.f.d.; 89/552/EC), OJ U. OJ L. 89.298.23 (amended by the EP and Council Directive of 30.6.97 [97/36/EC], OJ L.1997.202.60, which significantly expanded the provisions relating to the c.o.o.p.). See more broadly: A. Cruquenaire, C. Lazarc, *La clause de marché intérieur...*, pp. 43, 78–86; C.A. Jones, *Television Without Frontiers*, “Yearbook of European Law” 2000, no. 19, pp. 299–325; B.J. Drijber, *The Revised Television Without Frontiers Directive: Is it Fit for the Next Century?*, “Common Market Law Review” 1999, pp. 87–122.

28 Otherwise A. Thünken, *Multi-State Advertising Over The Internet...*, pp. 939–940.

29 N. Dethloff, *Europäisches Kollisionsrecht des unlauteren Wettbewerbs*, Juristenzeitung 2000, pp. 179–180; See also the considerations by B.J. Drijber regarding misleading advertising in: *The Revised Television Without Frontiers Directive...*, p. 101.

the scope of the principle expressed in e.c.d. prejudices its special, conflict-of-law nature.³⁰ It should also be noted that tv.w.f.d. does not contain exceptions of a private law nature from the Public Procurement Law.

For a special way of treating c.o.o.p. resulting from e.c.d., note M. Wilderspin and X. Lewis.³¹ The authors argue this is related to a very broad definition of the coordinated field (*formulé de manière extrêmement large*), to which the discussed principle applies.³²

The Scope of Application of the C.O.O.P.

The literature indicates that the scope of application of d.e.c. is threefold³³:

- a) the Directive applies only to selected issues of e-commerce (general principles for the provision of services, disclosure of information on the conclusion of contracts in electronic form, liability of intermediaries in the provision of i s.s.)³⁴;
- b) the Directive excludes its application to a certain type of information and services;
- c) the Directive binds its scope of application to Directives 98/34 and 98/48³⁵, which define the terms u.s.i. and distance trading.³⁶

30 A. Cruquenaire, C. Lazarc, *La clause de marché intérieur...*, p. 44.

31 M. Wilderspin, X. Lewis, *Les relations entre le droit communautaire et les règles de conflits de lois des États membres*, RCDIP 2002, p. 299 and next.

32 In addition, it is worth noting that tv.w.f.d. it largely harmonizes public law substantive provisions of the MS on TV broadcasts, while e.c.d. harmonizes only five basic areas in the field of u.s.i. See L. Moerel, *The Country-of-Origin Principle...*, p. 184; A. Cruquenaire, C. Lazarc, *La clause de marché intérieur...*, p. 89.

33 See E. Łętowska, *Europejskie prawo umów konsumenckich*, Warszawa 2004, p. 250. Compare D. Kot, *Dyrektywa Unii Europejskiej...*, p. 42 and next.

34 In particular, the Directive doesn't regulate matters of copyright, "computer piracy" and data protection. See more broadly: D. Kot, *Dyrektywa Unii Europejskiej...*, pp. 48–49.

35 Directive 98/34 / EC of the EP and Council of 22.6.98 laying down procedures for the provision of information in the field of technical standards and regulations (OJ EC L 204 of 21.7.98) as amended by Directive 98/48/EC of the EP and Council of 20.7.98. (OJ EC L 217 of 25.8.98).

36 This requires interpretation of the terms d.h.e., taking into account the definitions adopted in the above directives, which is a significant source of ambiguity as to the scope of its application – E. Łętowska, *Europejskie prawo umów...*, p. 250.

However, c.o.o.p. has a wider range of application than d.e.c.³⁷ It is not limited to areas regulated by e.c.d., but to all areas of law coordinated under Community law, as long as they relate to the provision of tax and civil liability

The scope of the coordinated field includes all the requirements that must be met to start a given activity (qualifications of the service provider, required licenses, procedures for notifying the relevant state authorities) as well as requirements for the services themselves (codes of conduct, quality requirements, rules for advertising services, as well as liability for the provision of the service).³⁸ However, the requirements for goods and services as such (e.g. labeling) or physical delivery are excluded from this scope.

C.O.O.P. in Light of D.A.M.S.³⁹

In the literature on the subject, the predecessor of d.a.u.m. was Directive 89/552/EEC.⁴⁰ The heritage of the latter was consolidated by Directive 2007/65/EC amending it.⁴¹ Recital 7) in the preamble to that amending directive stated that the basic principles of the amended tv.w.f.d. ‘Proved their worth’ and that is why they should be retained. In turn, recital 33) of this preamble – in accordance with the codified

37 See more broadly: O. Cachard, *La régulation internationale du marché électronique*, L.G.D.J., 2002, p. 104.

38 D. Kot, *Dyrektywa Unii Europejskiej...*, p. 47; O. Cachard, *La régulation internationale...*, p. 104.

39 Directive 2010/13 / EU of the EP and Council of 10.3.10. on the coordination of certain laws, regulations and admin. IF regarding the provision of audiovisual media services (Directive on audiovisual media services; OJ L 95, 15.4.10, pp. 1–24).

40 Council Directive 89/552 / EEC of 3.10.89. on the coordination of certain laws, regulations and administrative provisions of the Polish Partial Law, concerning the performance of television broadcasting activities (Directive on Television without Frontiers; Official Journal L 298, 17/10/1989 p. 0023–030; no longer in force; hereinafter: tv.w.f.d).

41 Directive 2007/65 / EC of the EP and Council of 11.12.07. amending Council Directive 89/552 / EEC concerning the coordination of certain laws, regulations and admin. IF regarding the performance of television broadcasting activities (Journal of Laws UE L from 18.12.07 332/27).

text – emphasized that c.o.o.p. is of key importance for the directive and should be applied to all audiovisual media services⁴² in order to guarantee certainty for legal service providers and the free flow of broadcasts and information.

In tv.w.f.d. c.o.o.p. is expressed in art. 2. After the changes introduced by Directive 97/36/EC, this provision is imposed on each MS. The obligation is to ensure that all TV broadcasts under their jurisdiction comply with the provisions applicable to broadcasts intended for universal reception in the relevant part. This general rule was supplemented by the reservation in recital 14) that all dispatches, and especially those that are directed for collection in another MS, should be in accordance with the law of the country of origin. This wording was formulated in the a.m.s. directive only in the context of the extended scope of application and as a result – a different conceptual grid, and despite the fact that the same c.o.o.p. was the subject of lively debate during the work on the directive.

C.o.o.p. complements the rule that only one MS may be the country of origin in a given situational and legal context. This means that a.m.s. may be subject to the jurisdiction of only one MS at a time. The practical implementation of this principle required determining, on the basis of the provisions of the directive, who the sender is and which country should be considered as the country of origin. Due to multiple doubts, regulations related to the Public Procurement Law were essentially extended in Directive 97/36/EC, which amended Directive 89/552/EEC. This applies to both the introduction of the definition of the term “sender” and the transformation of the content of Article 2, and the extension of criteria for determining the jurisdiction of a given state, adding Art. 2a and details of the derogation procedure. The introduced changes were to answer the problems with the implementation of the Public Procurement Law, which were the subject of the CJEU’s case law. The concept of “media service provider” was introduced to Directive a.u.m. instead of the concept of “broadcaster” and the criteria for determining

42 Hereinafter: a.m.s.

the jurisdiction of the MSs were based, on the main criterion of the seat in the MS (establishment) – with changes regarding satellite broadcasts.

The obligation of to ensure legal compliance – including in particular the minimal standards set by the directive – correlates with their obligation to guarantee freedom of reception and the prohibition of restricting retransmission of a.m.s. originating from other MS from reasons that fall within the fields of coordination according to d.a.m.s.⁴³ Permitted exceptions to this general rule are regulated there separately for linear⁴⁴ and non-linear⁴⁵ services. In art. 4 d.a.m.s., several significant changes were also made compared to tv.w.f.d. These provisions supplement the regulation on the application of the Public Procurement Law in situations apparently involving the circumvention of the law. The problem is then created when service providers make use of the option to choose their country of residence and, as a result, are subject to the jurisdiction of the country of their choice in accordance with d.a.m.s., but at the same time direct all or most of their services to the area of another MS. The Rules from art. 4 d.a.m.s. are intended to facilitate the resolution of such problems and specify the principles arising from the case-law paving the way in the *van Binsbergen* case in the context of a.u.m. As a general rule, HF they may impose on suppliers under their jurisdiction the obligation to comply with stricter or more specific rules subject to coordination – provided, of course, that these conditions comply with EU law. This provision expresses the idea of minimal harmonisation and establishing the possibility to create rules that go further but do not unreasonably restrict the treaty freedom to provide services. The regulation contained in art. 4 clause 2–5 d.a.m.s. only applies to broadcasters, so it only applies to the provision of TV instead of on-demand services. In d.h.e. there is no analogous regulation.

43 Art. 3 d.a.m.s.

44 Art. 3 ust. 2 d.a.m.s.

45 Art. 3 ust. 4 d.a.m.s.

The problem could arise, for example, if the service provider is based in one MS, but it offer all of its services only in the territory of another MS, which introduces stricter standards for MSs (e.g. for the protection of minors). In these types of situations, consider the following arguments. First of all: are the requirements met at the minimum level specified by the directive? Secondly, to the extent that the solutions adopted in relation to broadcasters result from an earlier jurisprudence, one may wonder whether excluding them from the scope of regulations on non-linear services would practically mean deliberate exclusion of applications resulting from the jurisprudence applied by analogy. Combined analysis of recitals 40)–42) of the preamble of d.a.m.s. leads to the conclusion that, in accordance with the general principle, the right of the enterprise to choose a registered office in the MS is allowed, where it doesn't offer its goods or services.⁴⁶ And in relation to broadcasters, the necessity of cooperation between the countries concerned and the need for a more effective procedure for controlling the measures applied by the country in whose area the service is directed is clearly indicated. However, the question of whether a given broadcast is wholly or mainly directed to the territory of another country is considered generally in the context not of broadcasters, but media service providers. However, there is no further reference to on-demand services. Thirdly, doubts arise in connection with the possibility of applying by analogy those provisions according to which the EC may declare such measures to be incompatible with EU law, which would result in their inability to apply. This solution is considered the most important in the context of the changes introduced by the directive. The view was expressed that in order to make decisions, the EC powers should be recognized in all cases of jurisdiction disputes, and not only in cases involving the circumvention of the law

⁴⁶ In this context, the following judgments were referred to in this preamble: C-56/96, VT4 Ltd v. Vlaamse Gemeenschap, Rec. 1997, pp. I-3143, par. 22; C-212/97, Centros P. Erhvevs-og Selskabsstyrelsen, Rec. 1999, I-1459; C-11/95, Commission v. Kingdom of Belgium, ECR 1996, pp. I-4115; C-14/96, Paul Denuit, Rec. 1997, pp. I-2785.

of a given MS. Such a solution, although not explicitly provided for in d.a.m.s., turns out to be simply advisable from a practical point of view.

The draft submitted by the EC did not provide for changes to art. 4 clause 2. This means this procedure still applies to linear services. However, as regards art. 2, it is suggested that paragraph 5b should be introduced there, which would stipulate that in the event of an unresolved dispute between the Acts for whose jurisdiction a given case falls under, each of them may ask the EC for a decision, which in turn may then consult the European group of regulators of audiovisual media services.⁴⁷ Such a provision may be a partial solution to the above problems.

C.O.O.P. in Light of D.E.C.⁴⁸

In the context of the c.o.o.p., interesting relationships between the provisions of the directives can be seen: d.a.m.s., tv.w.f.d. and d.e.c. The preamble of the latter states that the objectives of its provisions are similar to those of tv.w.f.d., which in turn found some “continuation” in d.a.m.s. That is why d.e.c. can be considered *lex generalis* in relation to d.a.m.s. The provisions of both these directives aim to “ensure a high level of regulation” and, as in the case of broadcasting activities, they strive to fully implement the objectives of the internal market for the information society.⁴⁹ So in a sense, solutions from tv.w.f.d. have become a model also for solutions from d.e.c.

Article 3 clause 1 of d.e.c. imposes on the MS the obligation to ensure that the i.s.s. provided by a supplier established in the territory of a given country are in accordance with the law of that country and the regulations included in its coordinated field. The MS cannot – for reasons related to the scope of the coordinated field – restrict the free movement of civil and

⁴⁷ Article 13 of the draft directive amending directive 2010/13/EU.

⁴⁸ Directive 2000/31/EC of the EP and Council of 8.6.00 on certain legal aspects of the Act on civil law, in particular electronic commerce within the internal market (Directive on electronic commerce; OJ L 178, 17.7.00, pp. 1–16). Next: d.e.c.

⁴⁹ Recital 4) of the preamble.

legal entities from other MSs.⁵⁰ Unlike d.a.m.s., the term “jurisdiction” is not used, but the concept of the service provider’s registered office is directly referred to.⁵¹ The criteria that make it possible to determine the state controlling the service provider are also complementary in the preamble, and the provisions of the directive do not contain specific regulations analogous to d.a.m.s. in relation to broadcasters.

The key concept for determining the scope of application of the c.o.o.p. to i.s.s. is the concept of a coordinated field. According to the interpretation of the CJEU on eDate Advertising⁵², the mechanism established in mandates ensure that the service provider based in a given country complies with the substantive requirements in force in that country within the coordinated field. At the same time, the same mechanism, according to the same interpretation, prohibits host countries from restricting the free movement of services for reasons that fall within the coordinated field. The term “subject to coordination” is closely related to the concept of coordination adopted in d.e.c., and is defined in its Article 2 lit. h). Pursuant to this provision, the fields subject to coordination were defined in general terms as the requirements laid down in the legal systems of MSs, which apply to the Act on civil law or to entities providing them, irrespective of whether they are general or specific. In accordance with the explanations contained in art. 2 lit. i), the coordinated field includes provisions regarding both the setting up and pursuit of service activities. So they concern u.s.i. in a comprehensive manner, covering both the service provider and the service itself, including potentially all stages of its implementation. In fact, in order to answer the question of whether a particular regulation is covered by the concept of “coordination”, it is necessary to analyze the exclusions provided for in d.e.c.

In this context, it suffices to mention art. 3 clause 3, where it is indicated that certain areas of the law were excluded, in accordance with the

50 Art. 3 clause 2 d.e.c.

51 Art. 2 lit. c d.a.m.s.

52 Paragraphs 60 & 61 of the judgment in this case.

annex to the directive. In turn, art. 3 clause 4 provides for the possibility of withdrawing from the Public Procurement Law in the enumerated cases of necessary protection: public order, public health, public safety and consumer protection. In these cases, when a given service violates or actually and seriously threatens to violate these goals, measures may be taken by c.o.o.p. only in relation to a specific service (therefore these exceptions are referred to as *casu ad casum*, or case by case) and in accordance with the principle of proportionality.⁵³ The application of such measures is subject to the special procedure provided for in Article 3 clause 4 lit. b). This procedure requires that the country of establishment of the service provider be notified, and that the European Commission⁵⁴ be notified, before such steps are taken. In urgent cases, the obligation to notify may be fulfilled as soon as possible after the measures have been taken – together with the notification that this was the case. The EC has the competence to assess whether the measures taken comply with EU law. Based on notifications from the MS side, it was found the application of exceptions from art. 3 clause 4 rarely occurs in practice. In total, there were only 30 notifications in 10 years. In most of these cases, these measures were taken to protect consumers and none of them was officially declared by the EC to be incompatible⁵⁵ with EU law. The reasons for such a surprisingly low number of notifications are not fully known. The EC Communication drew attention to some statistics – including notifications under Regulation 2006/2004⁵⁶ – included in the Consumer Protection Network. These statistics concerned the failure by service providers to fulfill some of the obligations set out in d.a.m.s., where the decline in notifications pursuant to Art. 3 clause 4

53 See e.g. the judgment of the CJEU on C-108/09, *Ker-Optika v ÁNTSZ Dél-dunántúli Regionális Intézete*, ECR 2010, pp. I-12213, par. 76.

54 Hereinafter: EC.

55 Commission Staff Working Document *Online Services, including e-commerce, in the Single Market*, p. 21.

56 Regulation (EC) No. 2006/2004 of the EP and Council of 27.10.04 on cooperation between national authorities responsible for enforcing consumer protection legislation (Regulation on cooperation in consumer protection; OJ L 364 of 9.12.04, p. 1, as amended).

lit. b) corresponds to the increase in notifications under the Regulation. This factor, however, is not considered to be a full and satisfactory explanation of such a low number of notifications.

Relationships Between the Provisions of D.A.M.S. and D.E.C. in the Context of A.M.S. on Demand

The relationship between the two directives is laid down in Article 4 clause 8 d.a.m.s. The principle introduced there stipulates that d.e.c. is generally applicable unless d.a.m.s. provides otherwise, and in the event of a collision between them d.a.m.s. takes precedence. This principle has yet to be corrected by the fact that, from the scope of the subject d.e.c., TV broadcasting services which fall under the scope of Directive 89/552/EEC are expressly excluded. This rule in relation to the Public Procurement Law can be interpreted in such a way that in the fields covered by the coordination in d.a.m.s. and in the absence of a different provision, the provisions of this directive apply – also when exceptions to the c.o.o.p. are permissible. The case is different in terms of other requirements that are imposed on service providers and which fall within the term “coordinated field” in the spirit of art. 2 lit. h d.e.c. There – according to the judgment in the eDating Service case – the obligation of the UE member states is to ensure that the service provider does not stay subject to more stringent regulations than those in force in the substantive law of the country of its seat. All exceptions to this rule are permissible only in situations provided for in the art. 3 clause 4 directives.

In d.a.m.s., c.o.o.p. is to oblige MSs to guarantee the greatest possible freedom of reception and retransmission of a.m.s. from other EU member states. In the context of the definition of the term “supplier a.m.s.” and the criteria for choosing the jurisdiction of a given MS, it can be seen that in d.a.m.s. these issues have been further detailed, in contrast to the general categories of d.h.e. The term “supplier a.m.s.”

was clarified primarily thanks to the criterion of editorial responsibility. This is intended to provide an answer to the question of who provides a specific media service on demand. One also has to agree with the diagnosis that the detailed directions contained in art. 2 clause 2 and 3 are used to precisely determine the seat of the service provider, while d.e.c. only provides guidance on determining the country of such residence. Therefore, the solutions of a.m.s. are much more detailed.

Uniform criteria for both linear and non-linear services have been adopted as to the determination of the service provider and the country of the relevant jurisdiction. It is significant that these criteria have not been changed in the context of the on-demand services referred to in art. 2 clause 4 d.a.u.m. Acceptable exceptions are regulated here. There is a great deal of talk about circumvention when it comes to TV broadcasting. In this discourse, certain solutions were developed, which, however, ultimately did not include on-demand services (see Article 4(2) of d.a.u.m.). The Reasons for not using the PP for non-linear services are the same as those included in d.h.e. The justification for this solution is not fully understood. It is also necessary to take into account the fact that the scope and actual effects of the application of d.a.u.m. they depend primarily on two factors: the field of coordinated fields and the scope of permissible exceptions. What's more, mutual relations between these two aspects of the PPP are extremely important. This means that the possibility of exceptions should be correlated with the scope of the coordinated domains. In favor of such a solution, there is a logical argument that if the principle of freedom of receipt of goods or flow of services is introduced in certain indicated areas, then it is necessary to consider in what types of situations there may be a need to introduce restrictions due to the protection of overriding interests. In the context of coordinated fields, a two-level scope of regulations was introduced – separate for linear and non-linear services. In practice, this means justification – at least to some extent – of the introduction of different exceptions for these two categories of media services. But do

these exceptions have to be identical to those provided in d.e.c.? On the one hand, another aspect of coordinated fields can be seen here. On the other hand, however, the adoption of exceptions from this last directive could only be dictated by the abovementioned relationship between this directive as a general law (*lex generalis*) and d.a.m.s. as a special law (*lex specialis*) in the field of non-linear services. In this respect, solutions from d.a.u.m. could be a supplement to the solutions from d.e.c., but at the same time remaining within the limits set in the latter.

However, such an argument is not entirely convincing, for the following reasons. First, in both directives on the c.o.o.p. are expressed slightly differently. D.a.m.s. insists on the unlimited nature of receiving and using audiovisual services on demand, while d.h.e. it is limited to imposing general restrictions on the provision of services. Secondly, it seems that the legal structure introduced here is based on technological criteria, and non-linear services are regulated in accordance with the model provided for all laws and regulations. The characterization of these services as consisting in the provision of audiovisual broadcasts, as well as the scope of coordinated fields, which is different in both these Directives, can be attributed to the background. Meanwhile, the basics for introducing restrictions should be introduced with analogy to the regulations on the distribution of TV instead of the broadly defined law.

Another extremely important issue in the relationship between the two directives is the legal framework for the potential requirement to obtain authorization to operate a given type. Article 4 1 d.e.c. requires MSs to ensure that undertaking and conducting activity in the scope of providing us with goods and services do not require authorization or measures with a similar effect. Recital 19) in the preamble to d.a.m.s., on the other hand, expresses the assumption that this directive does not affect the liability of and their bodies in the field of organizational activities, including licensing systems and administrative permits. On the other hand, recital 20 of this preamble indicates that no provision of the direc-

tive should oblige or encourage MSs to introduce new concession systems and administrative approvals in relation to a.m.s. in any category.

The formulation of the provisions of both directives reveals some incompatibilities between them. It can be concluded here that d.a.m.s. allows the introduction of, for example, a system of authorizations for the provision of non-linear audiovisual services, which is definitely incompatible with Article 4 clause 1 of d.e.c. However, it can be argued these issues are outside the scope of the subject of d.a.m.s., and the indicated recitals cannot be treated as provisions that would establish exceptions to the general rule expressed in art. 4 clause 1 d.e.c. Due to the relationship between the provisions of both Directives, there is a fundamental difference in the authorization system for the provision of linear and non-linear services. Potential further doubts should be resolved in the light of art. 11 par. 2 of the EU Charter of Fundamental Rights⁵⁷, whose provision expresses the principle of respect for the freedom of the media and the *acquis* in the field of the application of freedom of expression and the admissibility of exceptions thereto.

The Country of Origin Principle and the Applicable Law for Obligations Related to the Benefit of Information Society Services – the Abstract

The article deals with the issue of the titular country of origin principle as one of the crucial institutions of the legal system of the European Union – in this case within the context of information society services, especially of audiovisual media services (also on demand). The principle in question is one of the basic rules which constitute the fundamentals for the economic system of the European Union – especially where the context of its internal market is concerned. The article considers the genesis, history and evolution of this principle in order to give a generalized comprehension of why it is currently shaped and programmed to func-

⁵⁷ Official Journal of the European Union, C 326, 26 October 2012.

tion in such a way and not otherwise. The main points of references here are of course various acts of European Union law. Of this material, the most important acts of law are:

- Directive 2000 / 31 from 8th June 2000 on some legal aspects of the Act on commercial partnerships, in particular electronic commerce (Journal of Laws L 178, 17th July 2000, colloquially: directive on electronic commerce);
- Directive of the Council of 3rd October 1989 on the coordination of certain laws, regulations and administrative provisions of the Member States regarding the pursuit of television broadcasting activities (colloquially: Television without Frontiers Directive, 89 / 552 / EC, OJ U. OJ L. 89.298.23, amended by the EP and Council Directive of 30th June 1997 [97 / 36 / EC], OJ L.1997.202.60, which significantly expanded the provisions relating to the principle in question);
- Directive 98 / 34 / EC of the EP and Council of 22nd July 1998 laying down procedures for the provision of information in the field of technical standards and regulations (OJ EC L 204 of 21.7.98) as amended by Directive 98 / 48 / EC of the EP and Council of 20th July 1998. (OJ EC L 217 of 25.8.98);
- Directive 2010 / 13 / EU of the EP and Council of 10th March 2010 on the coordination of certain laws, regulations and administrative issues regarding the provision of audiovisual media services (OJ L 95, 15th April 2010, pp. 1–24, colloquially: Directive on audiovisual media services);
- Consolidated version of the Treaty on the functioning of the European Union (Official Journal of the European Union, C 326/49)
- Regulation (EC) No. 2006 / 2004 of the EP and Council of 27th November 2004 on cooperation between national authorities responsible for enforcing consumer protection legislation (OJ L 364 of 9th December 2004, p. 1, as amended; colloquially: Regulation on cooperation in consumer protection);

- Directive 2007 / 65 / EC of the EP and Council of 11th December 2007. amending Council Directive 89 / 552 / EEC concerning the coordination of certain laws, regulations and admin. issues regarding the performance of television broadcasting activities (Journal of Laws UE L from 18th December 2007, 332 / 27);
- and last but not least EU Charter of Fundamental Rights (Journal of Laws of C 326 from 26th November 2012, pp. 391–407).

References

- Cachard O., *La régulation internationale du marché électronique*, L.G.D.J, 2002.
- Commision Staff Working Document *Online Services, including e-commerce, in the Single Market*.
- Dethloff N., *Europäisches Kollisionsrecht des unlauteren Wettbewerbs*, “Juristenzeitung” 2000.
- Drijber B.J., *The Revised Television Without Frontiers Directive: Is it Fit for the Next Century?*, “Common Market Law Review” 1999.
- Fabjańska M., Świerczyński M., *Ujednolicenie norm kolizyjnych dotyczących zobowiązań pozaumownych*, KPP 2004, no. 3.
- Fallon M., Meeusen J., *Le commerce électronique, la directive 2000/31/CE et le droit international privé*, “Revue Critique De Droit International Privé” 2002.
- Fuchs B., *Statut kontraktowy a przepisy wymuszające swoje zastosowanie*, Katowice 2003.
- Huet J., *Le droit applicable dans les réseaux numériques*, Colloquium at the National Assembly 19–20 Nov 2001, *Internet Law: European And International Approaches. The Implementation Of Internet Laws. How To Resolve Cross-Border Disputes?*
- Jones C.A., *Television Without Frontiers*, “Yearbook of European Law” 2000, no. 19.

- Kłyta W., *Łącznik siedziby w niemieckim międzynarodowym prawie spółek*, KPP 1998, no. 2.
- Kot D., *Dyrektywa Unii Europejskiej o handlu elektronicznym i jej implikacje dla prawa cywilnego*, KPP 2001, no. 1.
- Kot D., *Podejmowanie i prowadzenie działalności gospodarczej w Internecie*, in: *Handel elektroniczny. Problemy prawne*, eds J. Barta, R. Markiewicz, Kraków 2004.
- Łętowska E., *Europejskie prawo umów konsumenckich*, Warszawa 2004.
- Marino D., Fontana D., *European Parliament and Council Directive on Electronic Commerce*, CTRLR 2000.
- Moerel L., *The Country-of-Origin Principle in the E-Commerce Directive: The Expected “One Stop Shop”?*, in: *Computer Technology Law Report*, 2001.
- Świerczyński M., *Zasada państwa pochodzenia a prawo właściwe dla zobowiązań związanych ze świadczeniem usług społeczeństwa informacyjnego*, “E-Biuletyn” 2005, no. 1.
- Thünken A., *Multi-State Advertising Over The Internet and the Private International Law of Unfair Competition*, vol. 51, issue 4.
- Wilderspin M., Lewis X., *Les relations entre le droit communautaire et les règles de conflits de lois des États membres*, RCDIP 2002.

SUMMARY

The Country of Origin Principle and the Applicable Law for Obligations Related to the Benefit of Information Society Services

The article takes all of the abovementioned legacy of European Union Law into consideration while analysing them in depth through the prism of the principle in question and via careful comparisons of each of them as well. Particular attention is paid to the following issues, namely: the legal nature of the principle in question, its treaty sources, its scope of application,

the principle in question in the light of the abovementioned directives – namely the Directive on audiovisual media services and the Directive on electronic commerce; and finally – relationships between provisions of the two aforementioned directives in the context of audiovisual media services on demand. While working on the text, all of the mentioned parts of the main subject turned out to be important enough to put them into separated sections of the text with their own individual headings. In the meantime, several interesting subject-related sentences by the European Court of Justice were also taken into account for a broadened pool of reference. To sum it all up: ultimately, the principle in question and its potential influence on the practical functioning of the European Union’s law and economy has been considered thoroughly.

Keywords: country of origin principle, European Union law, information society services, audiovisual media services, services on demand, electronic commerce, UE directives, ECJ judgments, television “without frontiers”, amendments.

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