Caution, Loose Cornerstone: The Country of Origin Principle under Pressure

Wolfgang Schulz, Professor of Media Law and Public Law at the University of Hamburg, and Thorsten Grothe, Partner at Grothe Medienberatung, investigate how recent national and EU court rulings and diverging interpretations of the 'country of origin' principle may impact on the European Commission's plans for the Digital Single Market.

"Without the country of origin principle there is no single market."

The seamless cross-border delivery of all kinds of online services is essential to create a digital single market, and the coordination and harmonisation of national regulatory regimes are indispensable in achieving this goal. However, for as long as there isn't full harmonisation across different regimes, there remains a risk that service providers have to comply with different national regulation in different EU countries. This creates obstacles for the delivery of cross-border services.

The solution to this problem is of course reciprocity: all member states in which a service is delivered have to accept that only one member state's regulation applies. As a result, many European directives (such as the Audiovisual Media Services Directive – AVMSD, the General Data Protection Regulation – GDPR and the e-Commerce Directive) have established the principle known as 'country of origin', although not always in the same way. The principle works on the basis that when a service provider wants to provide its services in another member state, it must comply with the legal requirements of only the country where it is established.

No wonder that you can hear rather often in Brussels: "Without the country of origin principle there is no single market." However, in order for member states to accept reciprocity, it is vital that different member states do not follow divergent policy paths. In fields like culture, the EU recognises the importance of diverse national and regional approaches and European harmonisation is therefore limited.

Principle under Pressure

Recently, there have been cases in media and Internet governance which demonstrate how the application of the country of origin principle has been questioned, or indeed challenged completely. To mention just a few cases:

- The French government drafted a new transparency law for online platforms as an amendment to the law on Confidence in the Digital Economy. In March 2016, the European Commission formally expressed its doubts on the compatibility of the French law with the European e-Commerce Directive (amongst others), since foreign providers established in other member states would also fall under the new French transparency rules. This might endanger the functioning of the country of origin principle because the service provider would then have to comply with different national regulations.
- Italian law requires all companies with, or supplying, web-advertising to supply 'economic system information', e.g. financial information about their revenues, to the national regulator, AGCOM. Google Italy and Google Ireland did not comply. The Italian court dealing with the case has asked the Court of Justice of the EU (CJEU) for its opinion regarding the compatibility of the Italian law with the requirements of the European treaties, in particular with the principle of the free movement of services.

- In the Google Spain case, the CJEU interpreted the 'place of establishment' under the GDPR Directive in a new way, arguing that economic activity in a country is sufficient (in this case advertising). It is immaterial where the provider has its "centre of activities". This judgement might lead to additional derogations of the country of origin principle.
- Under the AVMS Directive, there is the longstanding problem of TV programmes that are delivered cross-border, but with the original advertising replaced with more targeted advertising of the audience of the reception country. There is a question about whether the broadcast programme can still be defined as an 'entity' and is therefore protected by the country of origin principle, or whether the 'one programme' notion is just a claim that is made in order to circumvent national regulation.
- In Germany, courts have applied a clause in the Unfair Trade Act so German regulation for the protection of minors also covers – indirectly by Unfair Trade Law based injunctions – providers located in another member state, even though protection of minors falls within the scope of coordination of the AVMS Directive.
- Latvia expressed concerns about Russian language programmes like RTR Planeta and Rossija RTR being broadcast into Latvia, which are watched by a large part of the Latvian population. Although these programmes are licensed by national regulators in other EU member states (such as Sweden and the United Kingdom), Latvia argues that regulators in those member states would not necessarily check that the content of these programmes adheres to standards against hate speech.

Given the importance of the country of origin principle, there has been little political and legal reflection on it, either in general or regarding specific directives. That is true even for one of the most debated current pieces of European legislation, the General Data Protection Regulation. Especially when a company has establishments in more than one member state there is still room for forum shopping, despite one of the objectives of the regulation being to stop companies like Facebook searching for a member state with an agreeable data protection law and a corresponding enforcement policy.

There is a lack of a coherent concept that sets out [1] for what purposes the country of origin principle is appropriate and [2] what rules should govern the responsible jurisdiction in cases where a company has no, or more than one, place of establishment in an EU member state.

Trajectories

There are clearly different reasons behind issues with the country of origin principle and solutions may follow different trajectories. What seems to be clear, however, is that there is a need to understand these trajectories.

For the AVMS Directive, the principle as such does not seem to be contested. However, it is necessary to clarify the scope of coordination, as demonstrated by the German case regarding the Unfair Trade Act. In its proposal for an amended AVMS Directive in May 2016, the European Commission does not meet this challenge systematically. Although the proposal is meant to support the country of origin principle, it allows member states to impose obligations on on-demand services which target their national audience, but established in another country, to invest in production and rights acquisition of EU works, or to contribute to national films funds. This mainly is another derogation of the country of origin principle. The Commission, however, does provide some indicators to determine whether a service targets a country, namely the main language of the service, as well as the fact that its content, advertising or promotions specifically target a country's audience. In addition, effective controls need to be put in place to ensure that service providers comply with the minimum standards laid down in the directive, such as Russian language programmes which target Latvian audiences but which are licensed by another member state.

For cases related to the interests of individual consumers, there seems to be a general consensus on restricting the application of the country of origin principle, as consumers cannot reasonably be expected to contest decisions in courts in other member states. A parallel can be drawn with cases related to data protection law, such as the Google Spain case.

The e-Commerce Directive, however, is more challenging. For a web-based service, it is still not entirely clear how 'place of establishment' is defined. This creates uncertainty for international players as shown by discussions on transparency regulation for online platforms in France (similar ideas have also been debated recently in Germany). Recital 19 of the Directive clearly states that it is not the place where the technology supporting its website is located or the place where its website is accessible, but the place where it pursues its economic activity. However it becomes less clear when the provider uses several locations. Unlike the AVMS Directive, the e-Commerce Directive lacks any concrete definition of this crucial matter of how to define 'centre of activities'.

Clarification is also needed in cases where member states try to protect users not in their role as consumers, but rather as citizens – such as the proposed transparency regulation in France and similar plans in Germany. Since similar instruments (e.g. transparency requirements) can be helpful for users in their role of both consumers and citizens, it has to be made clear how far harmonisation by the e-Commerce Directive goes.

Consequences

There is a clear need for a more systematic approach to evaluating the country of origin principle in the field of digital services, including a rough consensus between member states about the core aims and concepts of governance for those services.

To achieve this, it might be helpful to categorise different cases. For instance, one category could focus on cases for the protection of individual consumers. In these cases, the application of the country of origin principle should have clear limitations as it is unreasonable to expect consumers to pursue legal cases in courts in other member states. A second category could apply to the specific cultural needs of member states, which justify setting limits to the application of the country of origin principle. This category should be a narrow one. For all other cases related to digital services – and really, in any case – clear and comprehensible rules for the application of the country of origin principle are indispensable to prevent lengthy court procedures, and to strengthen the internal market.

This blog gives the views of the author and does not represent the position of the LSE Media Policy Project blog, nor of the London School of Economics and Political Science.

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