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The Significance of the Country of Origin Principle for the Conflict of Laws Issue of Unfair Commercial Practices

Abstract

The article discusses the country of origin principle in the TFEU, the Unfair Commercial Practices Directive, the Directive on electronic commerce and the Polish regulations that implement them. The analysis allowed for the conclusion that the country of origin principle, as expressed in the TFEU, cannot indicate the applicable law. Art. 3 paragraphs 1 and 2 of the Directive on electronic commerce does not provide a basis to indicate the law applicable to unfair commercial practices, and nor does the Polish legislation implementing the Directive. These provisions have only such a meaning that at the stage of the application of law, determined by means of conflict of laws rules of Rome II Regulation, a court of a Member State undertakes an interpretation of the provisions of the applicable law, having regard to these provisions in such a manner so as not to restrict the provision of services for the information society in the internal market.

Keywords: country of origin principle, private international law, unfair commercial practices, applicable law.

JEL Classification: K13, K33, K39.

1. Introduction

1.1. The Aim and the Scope of the Article

The aim of the article is to analyse how the country of origin principle influences the indication of law in cases of unfair commercial practices.

The scope of the analysis covers only the conflict of law issues concerning unfair business-to-consumer commercial practices. Business-to-consumer commercial practices are defined in art. 2 letter d of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (“Unfair Commercial Practices Directive”)¹. The term “unfair commercial practice” is defined in art. 5(2) of Directive 2005/29/EC. The article focuses on the conflict of law issues concerning the tortious consequences of B2C unfair commercial practices. Such issues may arise during court cases heard for compensatory relief as well as injunctive or protective relief.

1.2. Law Applicable to Unfair Commercial Practices

Unfair business-to-consumer commercial practices are acts of unfair competition directed against consumers. As a rule, such cases fall within the scope of application of art. 6 paragraph 1 of Rome II². In the case of unfair commercial practices the choice of law has been excluded in accordance with art. 6 paragraph 4 of Rome II.

However, for unfair commercial practices which violate only the interests of the specific consumer, the applicable law is indicated by the conflict of laws rule expressed in art. 4 of Rome II, which allows for them the choice of law in accordance with art. 14 of Rome II. An example of an unfair commercial practice from the insurance industry that violates the interests of only the specific consumer is when only that consumer in a single case is asked to deliver such documents during a procedure in front of an insurer, which makes the consumer give up exercising his rights under the insurance contract. Each

¹ Official Journal of the EU L 149, 11 June 2005, p. 22, hereinafter “Unfair Commercial Practices Directive”, abbreviated as “Directive 2005/29/EC”.

² Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (“Rome II”), Official Journal of the EU 199 of 31 July 2007, p. 40–49, hereinafter referred to as “Rome II Regulation”, in short: “Rome II”.

unfair commercial practice should be examined to determine whose interests are violated and if it is only the interests of a single consumer, then art. 4 of Rome II applies. The application of Rome II art. 4 does not depend on the number of parties on the plaintiff's side of the case (e.g. if one consumer initiates an individual compensatory procedure for the compensation of damage sustained by an unfair commercial practices, it does not mean that art. 4 of Rome II always applies).

In turn, for unfair commercial practices which directly prevent, restrict or distort competition, the applicable law is indicated by the conflict of laws rule expressed in art. 6 paragraph 3 of Rome II, and in their case, the choice of law is inadmissible³.

1.3. The Departing Hypothesis of the Article

However, in the opinion of some representatives of the doctrine, the country of origin principle should always be used to indicate the applicable law in the case of claims related to the provision of services or sale of goods⁴. This applies also to cases concerning unfair commercial practices.

Furthermore, in relation to unfair commercial practices, the “multi-state” character of the facts of the case may occur. The “multi-state” character of the facts of the case refers to the facts being arranged in such a way that the connecting factor used in the authoritative conflict of laws rule indicates not one but several laws. For example, bait advertising is published in a newspaper distributed in Germany and Austria. In this case, the conflict of laws rule indicating the law applicable to unfair commercial practices, as expressed in art. 6 paragraph 1 of Rome II, will indicate both German and Austrian law⁵. Accordingly, this raises the question of whether it is possible in such situations to make use of the country of origin principle as the basis for the indication of the applicable law. The country of origin principle would restrict the application

³ The issue of the law applicable to unfair market practices has been more broadly discussed in (Figura-Góralczyk 2015, p. 39–51).

⁴ More broadly (Dickinson 2008, p. 646). It is proposed to split the tort status and to indicate the law for multi-state torts according to the country of origin principle (Dethloff 2000, p. 179, 181). According to the modified position, the country of origin principle should be applied, if the law indicated in the absence of this rule caused a more troublesome situation for the service provider or for the exporter of goods. In German this position is referred to as *Günstigkeitprinzip* (Basedow 1995, p. 16–17).

⁵ Similarly, German and Austrian law will be indicated by the conflict of laws rule expressed in art. 6 paragraph 2 in conjunction with art. 4 of Rome II in case of the damage as the connecting factor as well as the conflict of laws rule expressed in art. 6 paragraph 3 letter a of Rome II.

of authoritative conflict of laws rule and indicate only one law in the scope of its application.

Moreover, the doctrine indicates that the application of the applicable law indicated by means of the conflict of law rules for unfair commercial practices must be corrected by the use of the country of origin principle (*Prawo prywatne...* 2015b, p. 792). Therefore, if the restriction of the applicable conflict of laws rule by the country of origin principle is not possible, the question arises as to whether in the case of unfair commercial practices the law indicated by means of the conflict of laws rule may be corrected on the basis of country of origin principle, and if so, then how such a correction should be performed.

Summing up, the departing hypothesis is that the applicable law indicated by means of the conflict of law rules for B2C unfair commercial practices should at least be corrected by the use of the country of origin principle.

2. Country of Origin Principle

2.1. Country of Origin Principle in TFEU and Directive on Electronic Commerce

In accordance with the country of origin principle (*Herkunftslandprinzip, principe de pays d'origine*) a trader established in the territory of the EU Member States shall be governed by the law of the Member State where it has its headquarters, within the freedom to provide services and the free movement of goods (*Prawo prywatne...* 2015a, p. 177–180; Całus 2013, p. 33 ff). This rule is intended to ensure compliance with one of the fundamental freedoms necessary for the functioning of the internal market in the European Union, namely the free movement of goods and services. It is now expressed in art. 26 of TFEU⁶ and art. 56–62 of TFEU⁷.

The country of origin principle can also be found in art. 3 paragraphs 1 and 2 of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“Directive on electronic

⁶ The Treaty on the Functioning of the European Union, consolidated version, Official Journal of the EU C 83/47 of 30 March 2010, p. 47–199; in short – “TFEU”. The equivalent to the existing art. 14 of the Treaty establishing the European Community (consolidated version), Official Journal of the EU C 321E of 29 December 2006, hereinafter abbreviated as “TEC”.

⁷ Equivalent to the existing art. 49–55 of TEC.

commerce”⁸. According to art. 3 paragraph 1 of the Directive 2000/31/EC, “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”. In turn, in light of paragraph 2 of this provision, “Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.” According to art. 3 paragraph 3 paragraphs 1 and 2 of article 3 shall not apply to the fields referred to in the Annex. In the annex to the directive, one of the derogations from art. 3 concerns contractual obligations concerning consumer contacts. However, it does not cover tort obligations concerning consumers, which cover unfair business-to-consumer commercial practices. Therefore the country of origin principle regulated in art. 3 paragraphs 1 and 2 applies to the unfair business-to-consumer commercial practices.

2.2. Article 4 of the Unfair Commercial Practices Directive

The country of origin principle was expressed in art. 4 paragraph 1 of the draft of the Unfair Commercial Practices Directive⁹. It stated that businesses will be subject to the rules specified by the country of origin principle¹⁰. The initial wording of art. 4 was the following: “1. Traders shall only comply with the national provisions, falling within the field approximated by this Directive, of the Member State in which they are established. The Member State in which the trader is established shall ensure such compliance. 2. Member States shall neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field approximated by this Directive”¹¹.

⁸ The Official Journal of the EC 17 July 2000, L 178/1, referred to as the “Directive on electronic commerce”, abbreviated as “Directive 2000/31/EC”.

⁹ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (“Unfair Commercial Practices Directive”) Official Journal of the EU L 149, 11 June 2005, p. 22, hereinafter “Unfair Commercial Practices Directive”, abbreviated as “Directive 2005/29/EC”; See all the legislative procedure on: <http://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex:32005L0029#357461>, accessed: 8.03.2018.

¹⁰ See, regarding the country of origin principle, the draft directive on unfair commercial practices (Nestoruk 2005, p. 156–158).

¹¹ Art. 4 of Proposal for a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive){SEC (2003) 724/

In the explanatory memorandum, point 47 clarified that “the convergence brought about by the proposed Directive creates the conditions for introducing the principle of mutual recognition of laws relating to unfair commercial practices. Thus art. 4 provides that traders are required to comply only with the laws of the Member State where they are established and prohibits other Member States from imposing additional requirements on such traders within the field co-ordinated by the Directive or from restricting the free movement of goods and services where the trader has complied with the laws of the Member State of establishment”¹².

During the legislative procedure, art. 4 was changed following the first reading of the European Parliament on 20th April 2004 by adding paragraphs 3, 4 and 5, which received the wording: “3. This Directive is without prejudice to the competence of the Member States to take measures in sectors not harmonised by this Directive, such as health, the protection of the physical, mental or moral wellbeing of minors and public security. 4. By way of derogation, for a period of five years from the transposition of the directive, Member States shall be able to take national measures in the sector harmonised by this directive which are more rigorous or restrictive than those of the directive, and on the basis of the minimum harmonisation clauses contained in existing directives, in sectors harmonised by those directives. These measures must be aimed at ensuring that consumers are adequately protected against unfair commercial practices and must be proportionate to the objective pursued. 5. Member States shall notify the Commission without delay of national measures referred to in paragraph 4”¹³. This complicated wording of art. 4 was simplified in the Common Position (EC) No 6/2005 of 15 November 2004 adopted by the Council¹⁴. From that moment of

COM/2003/0356 final – COD 2003/0134 /; <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2003:0356:FIN>, accessed: 4.04.2018.

¹² Explanatory memorandum, point 47, p. 11, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2003:0356:FIN>, accessed: 4.04.2018.

¹³ Position of the European Parliament adopted at first reading on 20 April 2004 with a view to the adoption of European Parliament and Council Directive 2004/.../EC concerning unfair business-to-consumer commercial practices in the Internal Market and amending Directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive), P5_TCI-COD(2003)0134, Official Journal of the European Union from 30.4.2004, C 104 E/261, https://eur-lex.europa.eu/resource.html?uri=cellar:ac6f228d-a6f0-4aed-bb20-5c4a70616a88.0006.01/DOC_2&format=PDF, accessed: 4.04.2018.

¹⁴ Common Position (EC) No 6/2005 of 15 November 2004 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive), OJ C 38E, 15.2.2005, p. 1–20 (ES, CS,

legislative procedure, art. 4 received the wording “Member States shall neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field approximated by this Directive”. This wording of art. 4 became the final version of this prescription. This article expresses not the country of origin principle but the principle of free movement of goods and services¹⁵. According to this provision, the EU Member States shall not limit the freedom to provide services or restrict the free movement of goods within the scope of the Unfair Commercial Practices Directive.

3. The Country of Origin Principle as the Basis of Indicating Applicable Law

3.1. The Advantages of the Country of Origin Principle

As already indicated in the introduction, part of the doctrine asserts that the country of origin principle should always be used to indicate the applicable law in the case of claims related to the provision of services or sale of goods (Dickinson 2008, p. 646; Dethloff 2000, p. 179, 181; Basedow 1995, p. 16–17).

The country of origin principle leads indeed to a situation in which the entity providing a certain type of services within its entire business (also the unfair commercial practices) is subject to one particular law — that of the state where it is established. Assuming that the scope of this principle also includes unfair commercial practices, the whole case would be resolved on the basis of one law, also in cases of “multi-state” unfair commercial practices. This is particularly important in the case of “multi-state” acts, because one law applies regardless of the number of countries in which the consequences of violation or damage occurred.

3.2. The Disadvantages of the Country of Origin Principle

Given the above advantages, it has to be asked whether the country of origin principle may help indicate the law applicable to “multi-state” unfair commercial practices.

Assuming that the country of origin principle specifies the applicable law, it should be assumed that the TFEU (formerly TEC) aimed to introduce its own

DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, MT, NL, PL, PT, SK, SL, FI, SV), <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52005AG0006&from=EN>, accessed: 4.04.2018.

¹⁵ See more about the principle of free movement of goods and services in (Stefanicki 2007, p. 63–68).

system of conflict of laws (Dickinson 2008, p. 646). Meanwhile, TFEU (formerly TEC) has a completely different aim. TFEU (formerly TEC) introduces only the rules to ensure the efficient functioning of the EU internal market (such as the freedom to provide information society services from another Member State). Introducing this freedom does not automatically mean that a given freedom will have delimiting effect on Member State legal systems. As a rule, in other words, a given freedom does not apply to solving the conflict of laws problems.

The assumption that the fundamental freedoms of the internal market have an impact in the field of conflict of laws would lead to legal uncertainty. The courts could indeed apply either the law indicated by the conflict of laws rules or the principles of the EU treaties. This would lead to a “bursting” of the current rules of the private international legal system. At the same time, there would be no reason for the EU legislator to adopt the normative acts concerning the conflict of laws, such as, for example, Rome II Regulation, since the conflict of laws was governed by the EU Treaties.

In addition, the country of origin principle results in a return to the applicable law designated by a personal connecting factor of the place (headquarters, residence) of the perpetrator of unfair commercial practices. This is, as a consequence, a “step backwards” in relation to the solution introducing – as the law most closely related to unfair commercial practice – the place of the occurrence or most probable occurrence of an infringement of competition relations or of the collective interests of consumers or the market where unfair commercial practices occur or most likely occur.

Moreover, the country of origin principle causes a number of other drawbacks. First, it can cause a “race to bottom” as traders seek to move their headquarters to the territories of the countries with the lowest standards (Świerczyński 2006, p. 263; Mankowski 2001, p. 158). Second, it may cause so-called reverse discrimination (*Inländerdiskriminierung*), where entities domiciled in a given country are subject to more restrictive regulations than entities established abroad in the European Union and operating in the market of a given country (Mankowski 2001, p. 161). Third, it causes entities headquartered in EU Member States to be subject to the indication of applicable law on the basis of country of origin principle. At the same time, entities located in third countries are subject to the indication of law on the basis of conflict of laws rule (Mankowski 2001, p. 163).

Additionally, in the case of the unfair business to consumer commercial practices, one party in the case is a consumer, who is, as a rule, the weaker party. The country of origin principle would cause the law of the country where the headquarters of the trader that has infringed the consumer’s interests to be invoked. This effect precipitated the derogation of country of origin principle

in the case of contractual obligations concerning consumer contacts in art. 3 paragraph 3 and annex to the Directive on electronic commerce.

It is therefore correct that the country of origin principle exists only to ensure the free movement of services and goods within the European Union (Dickinson 2008, p. 648). It is a consequence of the proper functioning of the internal market, since it deems as equivalent the provisions of the Member States that apply to particular freedoms of the EU (Cañus 2013, p. 49). It is also a signal for the Member States to respect the requirements for traders domiciled in another Member State, including ones in the field of competition law (Świerczyński 2006, p. 268). Therefore, the mere country of origin principle cannot justify the application of the law of the headquarters (residence) of a trader that provides given services or sells particular goods. This principle should be expressed in a clear conflict of laws rule which uses the connecting factor of the law of the headquarters of such a trader (Świerczyński 2006, p. 285, 288; Dickinson 2008, p. 648; Dethloff 2000, p. 179 ff.; cf. *Prawo prywatne...* 2015b, p. 792).

4. The Country of Origin Principle Expressed in Article 3 Paragraphs 1 and 2 of Directive 2000/31/EC

4.1. Introductory Remarks

The question is whether art. 3 paragraphs 1 and 2 of Directive 2000/31/EC, being an emanation of the country of origin principle in respect of unfair commercial practices, is such a conflict of laws rule.

The scope of application of the country of origin principle is restricted in art. 3 paragraph 3 of Directive 2000/31/EC as it does not apply to the fields referred to in the Annex. One such field is contractual obligations concerning consumer contacts. However, unfair commercial practices consider only tortious relations between businesses and consumers. Additionally, on the basis of recital 57 of the preamble of Directive 2000/31/EC, a Member State has the right to take measures against a service provider that is established in another Member State but directs all or most of his activity to the territory of the first Member State if the choice of establishment was made with a view to evading the legislation that would have applied to the provider had the provider been established on the territory of the first Member State.

4.2. Judgment on eDate

Art. 3 paragraphs 1 and 2 of Directive 2000/31/EC was interpreted by the CJEU in its judgment of 25 October 2011 on eDate (Joined Cases C-509/09 and

C-161/10)¹⁶. This judgment concerned the country of origin principle expressed in art. 3 paragraphs 1 and 2 of Directive 2000/31/EC, according to which Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.

The judgment on eDate addresses the question referred for a preliminary ruling of whether art. 3 paragraphs 1 and 2 of Directive 2000/31/EC should be interpreted thus: that these provisions should be treated as the conflict of laws rules in the sense that they require, also in the field of civil law, exclusive application of the law in force in the country of origin, thus displacing domestic conflict of laws rules, or that these provisions have a corrective function at the level of the substantive law, modifying in the terms of the content the substantive effect of applying the governing law, in accordance with the national conflict of laws rules and limiting it to the requirements of the country of origin.

In this judgment the CJEU explained that the Directive on electronic commerce is a part of private law, but it does not contain conflict of laws rules. According to the CJEU, the Directive on electronic commerce does not establish conflict of laws rules, but mandatory rules that must be respected regardless of the law applicable in a given case. In the opinion of the CJEU, such a principle is the country of origin principle, which in accordance with art. 3 of the Directive 2000/31/EC indicates that a given service cannot be subject to stricter regulations than those in the country of the sender's headquarters. In other words, the law indicated by the conflict of laws rules of a Member State would not restrict the freedom to provide e-commerce services. This would happen in such a situation when the said law was "stricter" than the one applied in the country in which the service provider is established. In this case, according to the CJEU, such "stricter" law provisions of the applicable law should not apply, if in a given case there was to take place a violation of the free movement of services.

The literature, on the other hand, reports on several mutually exclusive approaches to the country of origin principle in the context of the Directive on electronic commerce (Hellner 2004, p. 193–213). According to the first, the Directive on electronic commerce establishes conflict of laws rule in art. 3¹⁷, despite the wording of art. 1 paragraph 4. The second one provides that the country of origin principle causes restrictions in the application of the law designated. In turn, the third one assumes that the country of origin principle is

¹⁶ Judgment of the Court (Grand Chamber) of 25 October 2011 – eDate Advertising GmbH v X (C-509/09) and Olivier Martinez and Robert Martinez v MGN Limited (C-161/10), Joined Cases C-509/09 and C-161/10, European Court Reports 2011 p. I-10269, hereinafter: judgment on eDate; cf. (Bogdan 2011, p. 483–491; Reymond 2011, p. 493–506).

¹⁷ (Szpunar 2007, p. 189). Differently: (*Prawo prywatne...* 2015a, p. 180).

applied regardless of the applicable law designated by the authoritative conflict of laws rule¹⁸.

4.3. Implementation of the Directive on Electronic Commerce into Polish Law

The implementation of art. 3 paragraph 2 of Directive 2000/31/EC into the Polish legal system in art. 3a paragraph 1 of the Act on Electronic Services¹⁹ states: “provision of electronic services is subject to the law of the Member State of the European Union and the European Free Trade Association (EFTA) – parties to the Agreement on the European Economic Area in which the service provider has its residence or place of establishment”²⁰. Art. 3a of Electronic Services Act was added by the Act dated 7 November 2008 amending the Electronic Services Act²¹, which entered into force on 20 December 2008. The norm expressed in this provision uses a connecting factor of the place of residence or the place of establishment of the service provider in order to determine the law applicable to information society services. Within the meaning of the above provisions, the place of establishment of the trader is understood as the real headquarters, namely the place where the trader actually operates.

To assess the relationship between the country of origin principle for the information society as expressed in art. 3a of Electronic Services Act and Rome II Regulation, it is essential to consider art. 27 of Rome II and recital 35 of the preamble to that Regulation²². The German doctrine expressed the view that, under the said provision, art. 3 paragraphs 1 and 2 of Directive 2000/31/EC takes precedence over art. 6 paragraph 1 of Rome II (*Juris PraxisKommentar...* 2009, p. 865). However, in the Polish doctrine it was indicated that, in accordance with art. 27 of Rome II, it is possible to correct the result of the application of the law designated on the basis of art. 6 paragraph 1 of Rome II on the basis of the country of origin principle expressed in Directive 2000/31/EC²³. This view

¹⁸ This approach is favoured by (Całus 2013, p. 41).

¹⁹ The Act of 18 July 2002 on electronic services (i.e. of 24 June 2017, Journal of Laws of 2017, item 1219, as amended), hereinafter abbreviated “Electronic Services Act”.

²⁰ This norm uses the term “residence” or “place of residence” of the service provider to determine the law applicable to information society services. Within the meaning of the above provisions, the place of establishment of the trader is understood as a real establishment, namely the place where the trader actually operates. The concept of the place of establishment is not identical to the place of establishment set forth in the company’s articles of association (Świerczyński 2006, p. 268).

²¹ Journal of Laws, No 216, item 1371.

²² Contrary view, for example (Handig 2008, p. 30).

²³ Both art. 6 paragraph 1 and art. 6 paragraph 2 of Rome II (*Prawo prywatne...* 2015b, p. 792).

corresponds to the content of the judgment of the CJEU on eDate concerning art. 3 paragraphs 1 and 2 of Directive 2000/31/EC.

The applicable law – both foreign and national – is always indicated on the basis of conflict of laws rule under the private international law. This rule may be either directly expressed in a legal provision or it should be interpreted from legal provisions (including the substantive provisions). The mere indication of applicable law does not result in applying this particular law in a given case²⁴. According to the standpoint the CJEU expressed in the eDate case, the country of origin principle expressed in art. 3 paragraphs 1 and 2 of Directive 2000/31/EC is the basis for the correction of the law designated by the conflict of laws rule at the stage of the application of law, if in a given case there has occurred a violation of the free movement of services. Although the CJEU stated that art. 3 paragraphs 1 and 2 of Directive 2000/31/EC does not express the conflict of laws rule in accordance with art. 1 paragraph 4 of Directive 2000/31/EC, the judgment of the CJEU on eDate, using “back doors”, assigns to these provisions the meaning of conflict of laws rule, because on that basis at the stage of the application of law there takes place a “correction” of the norm provided for in the applicable law.

However, with the above assumption – that the indication of the applicable law always takes place on the basis of conflict of laws rule – it should be considered that art. 3 paragraphs 1 and 2 of Directive 2000/31/EC expresses the unilateral conflict of laws rule²⁵. This was followed by the Polish legislator in art. 3a of the Electronic Services Act by establishing the conflict of laws rule according to which the provision of electronic services is subject to the law of the Member State of the European Union and EFTA, on whose territory the service provider is a resident or has the place of establishment²⁶. It seems, however, that this norm should be formulated differently. The law of the place of residence or place of establishment of service provider within the EU should be applied only if the application of the law of the Member State of the EU which would be governing in a given case, would cause a breach of the free movement of information society services in the internal market. That is, if in this respect it would regulate in a “stricter” way the requirements for the provision of electronic commerce services than in the country of the place of establishment of the service provider, on the assumption that in the Member State of the place of establishment of the service provider Directive 2000/31/EC was implemented correctly. Meanwhile,

²⁴ Here should be differentiated the law indicated by the conflict of laws rule and the applicable law which will be in effect applied in a given case (Mączyński 1994, p. 235).

²⁵ Contrary view: (*Prawo prywatne...* 2015b, p. 180).

²⁶ Similarly also with regard to art. 3 paragraph 1 of the Directive on electronic commerce (Szpunar 2007, p. 189).

art. 3a of the Electronic Services Act contains the prescription to apply the law of the place of residence or the establishment of the trader, regardless of whether this law is more stringent or more lenient in relation to the law set forth by any authoritative conflict of laws rule and irrespective of whether Directive 2000/31/EC has been correctly implemented. It would be advisable to regulate the application of the provisions guaranteeing free movement of services in the field of electronic commerce, so that they were covered by an authoritative conflict of laws rule which “would operate” only where the law of the EU Member State of the business establishment or residence of the service provider was more favourable to it than the law of the Member State indicated by an authoritative conflict of laws rule – art. 6 paragraph 1 of Rome II and provided that Directive 2000/31/EC was implemented correctly in the state of its business establishment or residence.

It seems that in order to achieve such a result, the construction of a corrective alternative indication (Mączyński 1994, p. 239)²⁷ could be applied. This construction makes it possible not to apply the substantive law indicated by the conflict of laws rule “in the first place”, but instead to apply the other substantive law indicated by the conflict of laws rule “on the second place” in order to achieve the particular result. This construction, unfortunately, does not lead to the applicability of a single law. Moreover, it makes the process of indication of the applicable law dependent on the substantive law result (Mostowik 2014, p. 115). This results in legal uncertainty, because the court for the needs of the given case on the basis of judge’s assessment has to compare the results of application of the law indicated “on the first place” and the law indicated “on the second place” (Mączyński 1994, p. 241). In addition, the provisions should be compared with the standard established by Directive 2000/31/EC, which binds only in the case of its implementation.

4.4. A Proposed Interpretation of Article 3 Paragraphs 1 and 2 of Directive 2000/31/EC

However, it appears that it is possible to adopt another approach to art. 3 paragraphs 1 and 2 of Directive 2000/31/EC, as these are the rules that have been addressed to the EU Member States. That is why they only have implications for the manner of the implementation of Directive 2000/31/EC as regards the freedom to provide information society services and, therefore, for

²⁷ An alternative indication can be explained using the following scheme: one norm of the conflict of laws – several connecting factors – an indication of a number of laws – the application of one of these laws. This distinction must be made when the conflict of laws rule has at least two different connecting factors (Mączyński 1994, p. 236, 242).

interpretation of the implemented provisions by the authorities of the Member States. In essence, therefore, neither the implementation nor the application of the provisions with regard to the coordinated field may restrict the provision of information society services in the internal market. At the stage of applying the provisions, an assessment is undertaken by the court of a Member State, expressly in the context of adjudicating on the merits (interpretation of the provisions in the spirit of the regulation of the directive) and not at the stage of determining the applicable law. With such an interpretation of art. 3 paragraphs 1 and 2 of Directive 2000/31/EC, art. 3a of the Electronic Services Act should be removed. In turn, the provisions introduced to the Member States' national laws through the implementation of the Directive on electronic commerce can be applied, if they belong to the applicable law on the basis of an appropriate conflict of laws rule expressed in the Regulation Rome II (Dickinson 2008, p. 412)²⁸.

The above interpretation is also confirmed by the wording of the Unfair Commercial Practices Directive. In accordance with art. 3 paragraph 4 of Directive 2005/29/EC, in the case of conflict of laws between the provisions of this Directive and other Community legislation (now the EU legislation) governing the specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects. It is assumed that the conflict of laws rules of private international law are contained within the specific aspects of unfair commercial practices. Therefore, pursuant to art. 3 paragraph 4 of Directive 2005/29/EC, priority is given to the provisions of the Rome II Regulation in relation to the provisions of the Unfair Commercial Practices Directive. This is also confirmed by the removal of paragraph 1 from art. 4 of the draft of the Unfair Commercial Practices Directive.

5. Conclusions

The country of origin principle should not serve as the basis to indicate the law applicable to any unfair commercial practices, including those that have a "multi-state" character of the facts of the case. This means that the facts are arranged in such a way that the connecting factor used in the authoritative conflict of laws rule indicates not one but several laws. The indication of the law applicable to unfair commercial practices takes place on the basis of conflict of laws rules relevant to those cases, as expressed in Rome II Regulation, referred

²⁸ In addition, as the second basis for the application of the Unfair Commercial Practices Directive, A. Dickinson indicates the recognition of the provisions of this Directive as the overriding mandatory provisions (Dickinson 2008, p. 412). Such an understanding of the overriding mandatory provisions goes beyond the scope of this institution as set forth in art. 16 of Rome II.

to in the introduction to this article. It is only at the stage of the application of the provisions of the law, indicated by means of the above relevant conflict of laws rules, that the court of a Member State, acting within the framework of the decision on the merits of the case, undertakes the interpretation of the provisions of the applicable law, having considered and applied art. 3 paragraphs 1 and 2 of the Directive 2000/31/EC, in such a manner as not to restrict the provision of services for the information society in the internal market.

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Znaczenie zasady państwa pochodzenia dla kolizyjnoprawnej problematyki nieuczciwych praktyk rynkowych

(Streszczenie)

W opracowaniu podjęto próbę odpowiedzi na pytania, czy w przypadku nieuczciwych praktyk rynkowych zasada państwa pochodzenia może stanowić podstawę wskazania prawa właściwego oraz czy zastosowanie prawa właściwego wskazanego miarodajną normą kolizyjną dla tych praktyk można skorygować za pomocą zasady państwa pochodzenia. W tym celu omówiono m.in. przepisy Traktatu o funkcjonowaniu Unii Europejskiej (TFUE), dyrektywy o nieuczciwych praktykach handlowych oraz dyrektywy o handlu elektronicznym. Przeprowadzona analiza pozwoliła sformułować wniosek, że zasada państwa pochodzenia, wyrażona w TFUE, nie może stanowić podstawy wskazania prawa właściwego. Następnie na podstawie analizy m.in. dyrektywy o nieuczciwych praktykach handlowych, art. 3 ust. 1 i 2 dyrektywy o handlu elektronicznym stwierdzono, że wskazanie prawa właściwego dla nieuczciwych praktyk rynkowych następuje na podstawie miarodajnych dla tych spraw norm kolizyjnych, wyrażonych w rozporządzeniu rzym-

skim II. Natomiast art. 3 ust. 1 i 2 dyrektywy o handlu elektronicznym ma tylko takie znaczenie, że na etapie stosowania przepisów prawa właściwego, wskazanego za pomocą międzynarodowych norm kolizyjnych wyrażonych w rozporządzeniu rzymskim II, sąd państwa członkowskiego w ramach rozstrzygnięcia merytorycznego dokonuje wykładni przepisów prawa właściwego w duchu regulacji tego przepisu.

Słowa kluczowe: zasada państwa pochodzenia, prawo prywatne międzynarodowe, nieuczciwe praktyki rynkowe, prawo właściwe.