

ROME I - the law applicable to Contracts including Contracts with Consumers

Obstacle to the cross border of provision online consumer services

EDiMA, the European Digital Media Association, is an alliance of digital media and technology companies who distribute audio and audiovisual content on line. EDiMA members include Amazon, AOL Europe, Apple, Fnac, Microsoft, Music Choice Europe plc, Realnetworks, Yahoo! Europe, and many others. The services provided by EDiMA members include, webcasting, internet radio, pay-per download songs/films/games, streamed audio and audiovisual services of music and music videos.

The overall mission of the association is to contribute to the creation of a healthy business and legal environment in the EU for new media companies

We would like to express our strong concerns about the process behind, and content of, Commission proposal COM (2005) 650 (known as the proposed ROME I Regulation) which is currently under discussion in the European Parliament - and in particular its potential negative impact on online consumer services and SMEs in this field. EDiMA regrets that the proposed Regulation will fragment the online market for consumer services by increasing the regulatory burden and liability of online service providers through localisation of EU contract law.

I. Background Concerns

A. Lack of impact assessment despite far-reaching changes to substantive law

Firstly, the European Commission has presented COM (2005) 650 to the European Parliament without an impact assessment. This seriously undermines commitments to Better Lawmaking principles strongly endorsed by Members of the European Parliament in the "Common Approach to Impact Assessment" foreseen in the Inter-Institutional Agreement (IIA) on Better Lawmaking, agreed in November 2005. The Commission's decision to "refrain from making a formal impact assessment" on the basis that the proposal does "not set out to establish a new set of legal rules" from the existing 1980 EU Rome Convention is worrying in itself, but all the more so when the legislative text of the proposal introduces entirely new legal provisions with significant potential impact.

Indeed the Commission mentions throughout the text that the aim of the proposal is to "modernise" certain provisions of the existing Rome Convention, including "changes of substance" and the proposal of a "new conflict rule".

It goes without saying that the Commission cannot, on one hand, dismiss the need for an impact assessment by claiming no effect on substance from the 1980 Convention while at the same time indicating a substantial modernization of the 1980 Convention. This is certainly not a case of simply

converting an existing EU Convention (which incidentally has not been signed up to by all Member States) into an EU Regulation. We therefore very much regret the lack of impact assessment.

Were it the case that this proposed Regulation would simply take the text of the existing EU Convention and convert it to an EU Regulation, we could accept that there is no compelling reason (although perhaps still a process reason) for an accompanying impact assessment. However, this is not the case. The new proposal does indeed seek to introduce new substantive law.

B. Lack of justification for the proposed Regulation

EDiMA members are well acquainted with the EU's existing Rome Convention of 1980 and its provisions on contract law. EDiMA members are not aware of any problems that have arisen from the Convention that demand new solutions, any case law, or clarification through changes to existing instruments.

As with all legislation, it is imperative that the Commission justify why such a text should be brought forward with comments on its effect and proportionality. Given little evidence of the need to bring forward a new modernised text, EDiMA members are concerned that the draft Regulation is a threat to the well-established consumer protection norms already in existence with regards to online consumer contracts.

II. Content of the Proposal

A. Specific concerns about the CONTENT of the Commission proposal

Our comments focus on the provisions of article 5 on consumer contracts. The current proposal constrains the freedom for parties to choose the applicable law for consumer contracts where a consumer in another country has been proactively targeted by a foreign business. In such cases, the 1980 Rome Convention determines that the applicable law is the law of the consumer's residence. In principle EDiMA members accept this active targeting test as the best means to protect consumers whilst ensuring a balance of interests between consumers and legitimate service providers (including on the internet, many SMEs).

We share the Commission's view that foreign consumer law should not be applicable to services which are simply available to consumers from another EU country - "mere availability". This is no different from traditional offline consumer services which take sales from non-local customers. A store, for example, is not required to change its contractual terms dependent on the nationality of each EU consumer that happens to walk through the shop door. The concept of active targeting is all the more important in respect of online services which are inevitably "available" to a wider audience just by virtue of internet technology.

However, the new article 5 in the proposed Regulation, as currently drafted, does not deliver this continuation of the active targeting test in practice and in fact seriously weakens that of the 1980 Rome Convention. The proposed new article 5 contains no such clear prescription for separating

active targeting from mere availability. On the contrary, it specifies that the directing may be "by any means" (not exclusively active means).

Article 5 therefore needs to be brought into line with, or have functional equivalence with, the Convention's article 5 - that is to say, that it is only triggered by proactive conduct on the part of the service provider that precedes the making of the contract, eg. by a specific invitation to the consumer in another EU country or through targeted advertising. Furthermore the mere existence of a contract by itself cannot lead to the presumption that prior active targeting (as the draft Regulation suggests) took place, as this is rarely the case in practice.

The Guiliano/Lagarde Report (OJ 1980 C282 p.21) confirmed that specific invitation or advertising means that the trader must have done acts aimed specifically at consumers in the other country which amounts to a requirement for positive conduct on the part of the seller which precedes the involvement of the consumer of goods or services. Thus the trader must have done certain acts such as advertising in the press, or on radio or television, or in the cinema or by catalogues aimed specifically at that country, or he must have made business proposals individually through a middleman or by canvassing.

EDiMA urges decision-makers to adopt wording equivalent to article 5 of the 1980 Convention which makes clear that a supplier is not to be regarded as having directed activities at another member state (and therefore subject to the laws of that member state) unless s/he is shown to have done so by means of positive conduct, and that nothing other than positive conduct may be taken into account in determining that a supplier has so directed its activities (please see some suggested wording below).

Anything else would fly in the face of the Commission's statement that mere accessibility is not sufficient to trigger article 5 and call into question the affirmation of the Commission that this proposal merely converts the existing Rome Convention into a Regulation.

The potential impact of this change in the existing Convention, as proposed by the Commission text, will be negative for providers who offer online services without intending on targeting particular markets. Most importantly it will harm the availability of web services and SMEs.

A trigger that makes any online service provider subject to the varying contractual laws of all EU member states rather than just his/her own just because his/her online service is by the very nature of internet technology visible on an EU-wide (and global) basis is an extremely dangerous one.

- * It will act as a strong inhibitor to services being available to consumers online
- * The legal uncertainty and significant financial cost in understanding multiple jurisdictions' rules and Regulations will have a significant cooling effect on internet
- * It will be particularly detrimental to SMEs and local services - the very services that the EU has encouraged to use the internet as a means of growth and market entry

* It could lead to the blocking of services to EU consumers who have proactively sought and chosen to purchase goods or services from a supplier in another EU member state. This would have a discriminatory impact on consumers within the European internal market

* It may require collection by service providers of additional data about the European consumer including country of residence

Suggested amendment to article 5

We accept that a pure country of origin approach to applicable law may not adequately protect those consumers who are proactively targeted by a business based in another Member State. This was exactly the reason behind the introduction of the active targeting test of the Rome Convention which sought to protect consumers in this position. In order to maintain this balanced approach, we suggest the following small amendment to the Commission's proposed text:

<i>Commission text</i>	<i>EDiMA proposed amendment</i>
<p data-bbox="232 1430 545 1461"><i>Article 5 – Consumer contracts</i></p> <p data-bbox="232 1497 800 1623">1. Consumer contracts within the meaning and in the conditions provided for by paragraph 2 shall be governed by the law of the Member State in which the consumer has his habitual residence.</p>	<p data-bbox="823 842 1211 873"><i>New Recital (after Recital (10))</i></p> <p data-bbox="823 909 1393 1329"><i>With further reference to consumer contracts, “targeted activity” must be understood to refer only to positive conduct and not to include omissions, so that only positive conduct of a professional may be relied upon in support of a determination that he has directed his activities to a Member State; further, the mere fact that a contract has been concluded at a distance cannot be relied upon as positive conduct; further, the mere fact that an internet or similar site is accessible does not constitute such directed activities.</i></p> <p data-bbox="823 1430 1130 1461"><i>Article 5 – Consumer contracts</i></p> <p data-bbox="823 1497 1393 1787"><i>1a. Notwithstanding the provisions of Article 3, a choice of law made by the parties in a consumer contract within the meaning and in the conditions provided for by paragraph 2 shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence.</i></p>

<p>2. Paragraph 1 shall apply to contracts concluded by a natural person, the consumer, who has his habitual residence in a Member State for a purpose which can be regarded as being outside his trade or profession with another person, the professional, acting in the exercise of his trade or profession.</p> <p>It shall apply on condition that the contract has been concluded with a person who pursues a trade or profession in the Member State in which the consumer has his habitual residence or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities, unless the professional did not know where the consumer had his habitual residence and this ignorance was not attributable to his negligence.</p> <p>3. Paragraph 1 shall not apply to:</p> <p>(a) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence;</p> <p>(b) contracts of carriage other than contracts relating to package travel within the meaning of Directive 90/314/EEC of 13 June 1990;</p> <p>(c) contracts relating to a right in rem or right of user in immovable property other than contracts relating to a right of user on a timeshare basis</p>	<p><i>1b. Notwithstanding the provisions of Article 4, in the absence of choice in accordance with Article 3 consumer contracts within the meaning and in the conditions provided for by paragraph 2 shall be governed by the law of the Member State in which the consumer has his habitual residence.</i></p> <p>2. Paragraph 1 shall apply to contracts concluded by a natural person, the consumer, who has his habitual residence in a Member State for a purpose which can be regarded as being outside his trade or profession with another person, the professional, acting in the exercise of his trade or profession.</p> <p>It shall apply on condition that the contract has been concluded with a person who pursues a trade or profession in the Member State in which the consumer has his habitual residence or, <i>by means of positive conduct</i>, directs such activities to that Member State, <i>whether alone or one of</i> several States including that Member State, and the contract <i>results from such conduct</i>.</p> <p><i>Further, paragraph 1 shall not apply if</i> the professional did not know where the consumer had his habitual residence and this ignorance was not attributable to his negligence.</p> <p>3. Paragraph 1 shall not apply to</p> <p>(a) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence;</p> <p>(b) contracts of carriage other than contracts relating to package travel within the meaning of Directive 90/314/EEC of 13 June 1990;</p> <p>(c) contracts relating to a right in rem or right of user in immovable property other than contracts relating to a right of user on a timeshare basis</p>
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Summary

In conclusion, the Rome I proposal needs to be carefully reconsidered in light of the above arguments. The provision of online services, requiring a customer contract, is a growing market and one which provides much needed competition to retail services in the EU. It would seriously undermine the Internal Market should local liability for consumer contracts expand even further than the 1980 Convention.
