# The transposition of the e-commerce directive

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# Transposition of the e-commerce directive : some critical comments[1]

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## *Introduction*

Transposing the e-commerce directive is no sinecure. Indeed, some of its provisions require an in-depth analysis of the genesis of the directive to be duly understood. The scope of the e-commerce directive is very large and ambitious. It imposes Member States to sometimes review important elements of their legal systems[2].

To properly implement the e-commerce directive, it is first necessary to observe the formal requirements laid down by the transparency directive (I.).

Concerning the content of the e-commerce directive, one has to take into account its main objective which has guided its structure (II.).

This structure is made up of two elements : harmonisation provisions on some issues which raised problems for the free movement of Information Society services (III.) and an internal market clause (IV.) which is the cornerstone of the e-commerce directive.

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[1] This paper is a free adaptation of the speech made by the author in Lisbon in the framework of the post-graduate program on Information Society law organised by the University of Lisbon and the Portuguese Association for Intellectual property (5 February 2003).

[2] Cf., for instance, the problem of legal obstacles to electronic contracts (see *infra*).

## *I. Transparency directive requirements*

Considering the fact that technical regulations can be used by Member States to create barriers to the free movement of goods or services, the European legislator enacted in 1983 a first transparency directive[3]. This instrument has been substantially amended and finally replaced in 1998 by 98/34/EC directive[4] (amended by 98/48/EC directive[5]).

The concept of "technical regulation", which determines the scope of the directive, is broadly interpreted[6].

Concerning the e-commerce directive, the definition of "service" contained in the transparency directive is very important since e-commerce directive refers to it : "*any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services*" (art. 1.2. of 98/34 directive)**.**

Transparency directive therefore applies to e-commerce regulation since it precisely covers the provision of Information Society services.

Transparency directive mainly imposes two obligations to Member States : obligation to notify any draft technical regulation to the European Commission ; obligation to observe a stand still period enabling the Commission and/or the other Member States to make their comments on said draft regulation.

Pursuant to article 8 of 98/34 directive, Member States shall notify any draft technical regulation to the Commission together with all legislative or administrative texts or provisions the knowledge of which is needed to assess the implications of the draft technical regulation.

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[3] Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 109, 26 April 1983, p. 8.

[4] Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 204, 21 July 1998, p. 37.

[5] Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 217, 5 August 1998, p. 18.

[6] Article 1.11 of 98/34 directive: "*technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing, provision of a service, establishment of a service operator or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States, except those provided for in Article 10, prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider*".

Member States shall observe a 3 months stand still period from the date of receipt of the notification by the Commission (article 9). During this period, Member States will not be allowed to adopt the draft regulation notified to the Commission. If the Commission or a Member State send a detailed opinion on the draft regulation within this period the stand still period is extended to 4 months and the concerned Member State will have to justify why it does not follow the transmitted opinion.

At first glance, this formal procedure seems to regard only relations between Member States and the Commission or Member States between themselves. It is however not the case. Indeed, the European Court of Justice has clearly ruled that the failure to observe this formal requirements has important practical implications for individuals.

In the *CIA International* case, the Court ruled that "*articles 8 and 9 of Directive 83/189 lay down a precise obligation on Member States to notify draft technical regulations to the Commission before they are adopted. Being, accordingly, unconditional and sufficiently precise in terms of their content, those articles may be relied on by individuals before national courts*" and that individuals may therefore "(…) *rely on them before the national court which must decline to apply a national technical regulation which has not been notified in accordance with the directive*" [7].

This inapplicability of the national technical regulations which have been adopted in contravention of the transparency directive requirements can also be invoked in legal proceedings between individuals[8].

[7] ECJ, 30 April 1996, *CIA International*, C 194/94, *European Court reports*, 1996, p. I-2201, pt. 8.

[8] ECJ, 6 June 2002, *Sapod Audic & Eco-Emballages*, C - 159/00, not yet published, pt. 50.

## *II. Structure of the e-commerce directive*

The main objective of the e-commerce directive is to enable European citizens to provide Information Society services over the whole European Union internal market without additional legal evaluation costs.

Pursuant to recital nr. 3, "*Community law and the characteristics of the Community legal order are a vital asset to enable European citizens and operators to take full advantage, without consideration of borders, of the opportunities afforded by electronic commerce; this Directive therefore has the purpose of ensuring a high level of Community legal integration in order to establish a real area without internal borders for information society services*".

Article 1.1 recalls this principle : "*this Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States*".

To achieve this objective, a complete harmonisation of all issues relating to e-commerce was practically not possible since it would have been much too broad. Furthermore, it would have been contrary to the principle of subsidiarity.

A partial harmonisation was the only possible solution. The risk was however high that Member States try to apply general law provisions to rule Information Society services. For instance, if a national provision rules the provision of a given service, the concerned Member State will naturally try to apply this national rule concerning online provision of said service.

It was therefore necessary to couple the partial harmonisation with a mechanism determining the competence to control an Information Society services provider. This mechanism is called in the e-commerce directive the "internal market clause" (article 3).

Pursuant to the internal market clause, the control of Information Society services providers is the responsibility of the Member State where the concerned service provider is established (Member State of origin)[9].

Further control by Member States of reception of the Information Society services is in principle prohibited (mutual recognition principle)[10].

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[9] Article 3, §1, and recital nr. 22.

[10] Article 3, §2.

This control made by the Member State of origin is based on its national legislation. Indeed, for all aspects relating to an Information Society service, the law of the country of origin will in principle apply.

This mechanism prevents Member States from trying to apply their national general law provisions to Information Society services provided on their territory from another Member State.

The structure of the e-commerce directive is therefore made up of two elements : harmonising provisions and internal market clause.

### *III. Harmonisation of some specific issues*

To comply with subsidiarity principle, the e-commerce directive harmonisation is limited to specific issues which raised problems for the free movement of Information Society services[11].

These harmonised questions are the following : establishment of service providers (1) ; commercial communications (2) ; electronic contracts (3) ; liability of online intermediaries (4) ; self regulation and out-of-court dispute settlements (5) ; court actions (6).

(1) Establishment :

The concept of "*established service provider*" has been defined by reference to the case law of the European Court of Justice[12]. Pursuant to article 2, c, it is "*a service provider who effectively pursues an economic activity using a fixed establishment for an indefinite period*".

The location of the technological resources is therefore not decisive[13].

The e-commerce directive also prohibits any prior authorisation to be required by Member States to allow Information Society services provision from their territory (article 4, § 1). Mandatory accreditation systems are therefore not allowed.

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[11] See recital nr. 6: "*In the light of Community objectives, of Articles 43 and 49 of the Treaty and of secondary Community law, these obstacles should be eliminated by coordinating certain national laws and by clarifying certain legal concepts at Community level to the extent necessary for the proper functioning of the internal market; by dealing only with certain specific matters which give rise to problems for the internal market, this Directive is fully consistent with the need to respect the principle of subsidiarity as set out in Article 5 of the Treaty*".

[12] Recital nr. 19.

[13] " *(…) the place of establishment of a company providing services via an Internet website is not the place at which the technology supporting its website is located or the place at which its website is accessible but the place where it pursues its economic activity; in cases where a provider has several places of establishment it is important to determine from which place of establishment the service concerned is provided; in cases where it is difficult to determine from which of several places of establishment a given service is provided, this is the place where the provider has the centre of his activities relating to this particular service*" (recital nr. 19).

(2) Commercial communications :

Article 6 of e-commerce directive imposes to clearly identify commercial communications as such.

Some basic information have to be provided to the recipient of the Information Society services[14].

The question of spamming (unsolicited commercial communications) is not completely resolved since the directive did not make any choice between opt-in and opt-out approaches[15]. The e-commerce directive only provides for that this kind of commercial communication has to be identified as such and that Members States shall ensure that opt-out registers will be consulted on a regular basis by the service providers.

Commercial communications have to be authorised concerning regulated professions (art. 8).

(3) Electronic contracts

Article 9 of e-commerce directive states that "*Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means*".

Member States have therefore to withdraw any legal[16] obstacle to the use of electronic means to conclude contracts.

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[14] Article 6 : "*In addition to other information requirements established by Community law, Member States shall ensure that commercial communications which are part of, or constitute, an information society service comply at least with the following conditions:*
*(a) the commercial communication shall be clearly identifiable as such;*
*(b) the natural or legal person on whose behalf the commercial communication is made shall be clearly identifiable;*
*(c) promotional offers, such as discounts, premiums and gifts, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions which are to be met to qualify for them shall be easily accessible and be presented clearly and unambiguously;*
*(d) promotional competitions or games, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented clearly and unambiguously*".

[15] Cf. article 7.

The idea is very easy to understand. It is however much more complicated to implement.

Two solutions can be considered : to withdraw all formal requirements preventing from the use of electronic means to conclude contracts ; to provide for a general clause enabling electronic means to be assimilated to “traditional” means.

Concerning the first solution, practical difficulties are very important since it is a very hard task trying to identify all form requirements existing in all national laws. This technique is very hazardous since it is practically impossible to find all form requirements from all laws. Problems would therefore occur with the forgotten legal requirements.

The second solution has the advantage to bypass this practical problem of identifying all existing form requirements. Its difficulty is to draft a clause which covers all types of form requirements.

Some authors therefore recommend to combine these two approaches to ensure that the adaptation of the legal framework will enable to effectively withdraw all legal obstacles[17].

The e-commerce directive also imposes some information to be provided to the recipient of the service (art. 10) and to observe some principles concerning the placement of orders online (art. 11).

(4) Liability of online intermediaries

This question was one of the most debated since the case law from the different Member States was diverging and the positions of the interested parties exacerbated.

Articles 12 to 15 deal with this issue.

The first important principles laid down by the e-commerce directive are the principle of the absence of any obligation for online intermediaries to monitor the content they transmit or host and to actively look for illegal materials (article 15).

The section 4 of the directive provides for a limitation of liability for three types of activities, insofar some conditions are satisfied : mere conduit, caching and hosting.

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[16] E-commerce directive does not imposes the withdrawal of practical obstacles to the use of electronic contracts. Article 9 only refers to legal obstacles (recital nr. 37).

[17] Cf. D. GOBERT & E. MONTERO, “Les contrats conclus par voie électronique”, in *Le commerce électronique européen sur les rails ? Analyse et propositions de mise en œuvre de la directive sur le commerce électronique*, Cahiers du CRID, n° 19, Bruxelles, Bruylant, 2001, pp. 241-242, nr. 442.

The key element which ensures the intermediaries not to be liable is their passivity : insofar they do not intervene on the content transmitted or hosted, their activity will benefit the limitation of liability regime. Some additional requirements have to be met concerning caching[18] and hosting[19] considering the specificities of these activities.

Some critical issues are not resolved by the directive, as the determination of the degree of knowledge which is required to impose the hosting provider to remove some content. Is any claim from a third party sufficient ? Has the claim to be at first glance justified ? The setting-up of notice and take down procedures[20] enables to deal with these issues and can ensure the intermediaries to remain completely neutral[21].

(5) Self-regulation and out-of-court dispute settlement

The e-commerce directive encourages self-regulation (use of codes of conduct, article 16) and use of alternative dispute resolution mechanisms (ADR, article 17).

The economic actors of e-commerce have an important role to play since they can find technical or practical solutions to legal problems which are difficult to solve through a law.

They can act at two steps.

First, they can contribute to define rules to be observed by a category of actors. The observance of codes of good practices can be imposed through the recourse to labelling systems the adherence to which is submitted to the approval of these sectoral rules.

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[18] Article 13 details these conditions « (…) *(b) the provider complies with conditions on access to the information; (c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry; (d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and (e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement*".

[19] Article 14 : « *(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information*".

[20] The creation of such procedures is not imposed by the directive (see article 21 concerning re-examination of the directive content).

[21] The limitation of liability system of the directive obliges intermediaries to become judges to assess the merits of a claim.

Secondly, they can enhance the process of dispute resolution by offering alternative mechanisms to the judicial proceedings (ADR). Some of these ADR systems are working very well, like in the context of cybersquatting disputes[22].

The e-commerce directive encourages these two types of initiatives.

(6) Court actions

The fact that alternative dispute resolution has to be encouraged by Member States does not exempt them to offer efficient judicial recourses.

Indeed, article 18 of the e-commerce directive imposes Member States to "*(…) ensure that court actions available under national law concerning information society services' activities allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved*".

Member States shall therefore assess the existing judicial recourses applicable in this field of law and, if needed, enhance their way of working or create new proceedings.

[22] Cf. A. CRUQUENAIRE, *Le règlement extrajudiciaire des litiges relatifs aux noms de domaine. Analyse de la procédure UDRP*, Cahiers du CRID,n° 21, Bruxelles, Bruylant, 2002.

### *IV. Internal market clause*

The internal market clause is contained in article 3 of the e-commerce directive, which wording is the following : "*1. Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.*

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

*3. Paragraphs 1 and 2 shall not apply to the fields referred to in the Annex.*

*4. Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled:*

*(a) the measures shall be:*

*(i) necessary for one of the following reasons:*
*- public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,*
*- the protection of public health,*
*- public security, including the safeguarding of national security and defence,*
*- the protection of consumers, including investors;*

*(ii) taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;*

*(iii) proportionate to those objectives;*

*(b) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:*
*- asked the Member State referred to in paragraph 1 to take measures and the latter did not take such measures, or they were inadequate,*
*- notified the Commission and the Member State referred to in paragraph 1 of its intention to take such measures.*

*5. Member States may, in the case of urgency, derogate from the conditions stipulated in paragraph 4(b). Where this is the case, the measures shall be notified in the shortest possible time to the Commission and to the Member State referred to in*

*paragraph 1, indicating the reasons for which the Member State considers that there is urgency.*

*6. Without prejudice to the Member State's possibility of proceeding with the measures in question, the Commission shall examine the compatibility of the notified measures with Community law in the shortest possible time; where it comes to the conclusion that the measure is incompatible with Community law, the Commission shall ask the Member State in question to refrain from taking any proposed measures or urgently to put an end to the measures in question*".

This provision is divided into three parts : the principle (§§ 1 and 2), the general derogations (§3) and the specific derogations (§§4 to 6).

1. The principle: application of the law of the country of origin

The first problem to deal with is the meaning of article 3, §1. If the text seems relatively clear, its combination with article 1, § 4, which provides for that "*this Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts*", makes it dark.

There are mainly two opinions concerning the meaning of article 3, §1 : according to a minimalist approach, this provision does not interfere with private international law rules ; pursuant to another approach (maximalist), this provision clearly derogates from private international law rules and in particular from the Rome convention on the applicable law to contractual obligations.

The first approach can rely on the wording of article 1, §4, which seems to exclude any impact of the e-commerce directive on private international law. The definition of the coordinated field (article 2, h), which determines the scope of the internal market clause, is also invoked since it refers to legal systems of the Member States (legal systems contain material rules but also conflict of law rules like the Rome convention).

There are however much more convincing arguments which lead to favour the second interpretation.

Different elements from the preliminary works from the e-commerce directive indicate the internal market clause derogates from the Rome convention rules and therefore plead for this interpretation[23]. One can in particular mention the recommendation for

[23] See A. CRUQUENAIRE & C. LAZARO, "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 œuvre de la directive sur le commerce électronique*, *op. cit.*, nr. 81 and ff.

the second reading of the Parliament which confirms the derogation from the Rome convention provisions[24].

More fundamentally, the coherence of the e-commerce directive imposes to consider that the internal market clause derogates from private international law rules. Indeed, some of the general derogations contained in the annex would be useless if article 3 did not derogate from the Rome convention rules. The derogations concerning the possibility for the parties to choose the law applicable to their contract and concerning the law applicable to consumer contracts are clearly established to preserve some of the main elements of the Rome convention regime. If Rome convention still applies notwithstanding the existence of the internal market clause, these derogations would be a nonsense.

Recital nr. 56 of the e-commerce directive provides for that "*this Directive does not affect the law applicable to contractual obligations relating to consumer contracts; accordingly, this Directive cannot have the result of depriving the consumer of the protection afforded to him by the mandatory rules relating to contractual obligations of the law of the Member State in which he has his habitual residence*". It confirms, *a contrario*, the derogation from the Rome convention rules concerning the other situations.

The final version of the definition of the coordinated field clearly refers to material law rules (reference to liability of the service provider, quality of the services, etc.) rather than to conflict of law rules.

Concerning the combination of article 3 and article 1, §4, this latter has to be interpreted as a provision indicating that the internal market clause does not constitute a private international law rule since its scope is broader (covers all fields of law, and not only private law)[25]. It does not mean that article 3 has no impact on private international law.

Article 3, § 1, of the e-commerce directive therefore provides for that the provision of Information Society services is governed by the law of the Member State where the service provider is established.

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[24] Commission juridique et du marché intérieur du Parlement européen, Recommandation pour la deuxième lecture relative à la position commune du Conseil concernant la proposition de directive du Parlement européen et du Conseil relative à certains aspects juridiques des services de la société de l'information, et notamment du commerce électronique, dans le marché intérieur ("Directive sur le commerce électronique"), *P.E. Doc.*, A5 – 106/2000 du 12 avril 2000, p. 11.

[25] E. CRABIT, "La directive sur le commerce électronique. Le projet "Méditerranée"", *Revue du droit de l'Union européenne*, 2000/4, pp. 798-799.

## 2. Scope of the internal market clause

The scope of the internal market clause is determined by the definition of the coordinated field (article 2, h) : "*requirements laid down in Member States' legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically designed for them.*
*(i) The coordinated field concerns requirements with which the service provider has to comply in respect of:*
*- the taking up of the activity of an information society service, such as requirements concerning qualifications, authorisation or notification,*
*- the pursuit of the activity of an information society service, such as requirements concerning the behaviour of the service provider, requirements regarding the quality or content of the service including those applicable to advertising and contracts, or requirements concerning the liability of the service provider;*
*(ii) The coordinated field does not cover requirements such as:*
*- requirements applicable to goods as such,*
*- requirements applicable to the delivery of goods,*
*- requirements applicable to services not provided by electronic means*".

To prevent Member States from applying general law rules to the provision of Information Society services, it is required to give the internal market clause a broad scope.

The reference to legal provisions from a general nature enables to extend the scope of the internal market clause to all aspects regarding information society services, and not only to harmonised aspects.

This extension is crucial to ensure the free movement of information society services. Otherwise, Member States would have be able to invoke general law provisions to regulate information society services. For instance, if a given service is ruled by a specific law in a Member State, this State will not be allowed to invoke its legal rule concerning the online provision of this service.

From this very broad definition, one can conclude that the internal market clause is applicable to all online aspects of the activity of providing Information Society services.

If a service is partly provided offline, only the online part of the activity will be governed by the internal market clause. The remaining part of the activity will be submitted to private international law rules.

This solution is logical since the e-commerce directive scope is of course limited to information society services (online services) and can therefore not cover offline aspects.

## 3. Derogations from the internal market clause

The e-commerce directive provides for a double system of derogation from the internal market clause : general derogations concerning some particular topics (annex) and specific derogations.

### (1) General derogations

General derogations are listed in the annex.

It notably covers : copyright, neighbouring rights, rights referred to in Directive 87/54/EEC and Directive 96/9/EC as well as industrial property rights ; the emission of electronic money by institutions in respect of which Member States have applied one of the derogations provided for in Article 8(1) of Directive 2000/46/EC ; the freedom of the parties to choose the law applicable to their contract ; contractual obligations concerning consumer contracts ; formal validity of contracts creating or transferring rights in real estate where such contracts are subject to mandatory formal requirements of the law of the Member State where the real estate is situated ; the permissibility of unsolicited commercial communications by electronic mail.

The main elements of the Rome convention regime (choice of applicable law and applicable law to consumer contracts) are therefore preserved from the application of the internal market clause.

The scope of the internal market clause is reduced concerning sensitive issues like consumer contracts.

### (2) Specific derogations

Specific derogations can only be admitted insofar a prior mechanism of consultation with the Member State of origin is observed and some very restrictive conditions are satisfied.

Member States can only take specific measures against a given information society service. A general measure against one type of services is therefore not admitted[26].

The considered measure has to be necessary for one of the following reasons : public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons ; the protection of public health ; public security, including the safeguarding of national security and defence ; the protection of consumers, including investors.

The concerned information society service must prejudice these objectives or present a serious and grave risk of prejudice to those objectives.

Finally, the measures have to be proportionate to those objectives.

In addition to these conditions regarding the measures which can be taken, the Member State of reception of the concerned information society service has to observe a prior process of consultation. Indeed, before taking the measures in question, the Member State must first ask the Member State of origin to take measures, and this latter failed to do so or has taken inadequate measures. Afterwards, the Member State whishing to take some restrictive measure has also to notify the Commission and the Member State of origin of its intention to take such measure.

In case of emergency, measures can be adopted without observing this process, but they have to be duly justified afterwards, as the invoked emergency.

The aim of these very restrictive conditions and this very constraining process of consultation is to ensure the faculty of specific derogation will not be used by Member States to bypass the internal market clause effects. Specific derogations will therefore remain very exceptional.

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[26] E. CRABIT, "L'univers de la directive sur le commerce électronique", contribution au colloque *L'internet et le droit*, organisé les 25-26 septembre 2000 par l'Université de Paris I, p. 22. See also the case law of the Court of Justice which excludes general measures : ECJ, 16 December. 1992, *Commission vs. Belgium*, C-211/91, *Rec. C.J.C.E.*, 1992, p. I-6757, pt. 12.

## 4. Practical impact of the internal market clause

Beyond the theoretical discussions regarding the meaning of article 3, §1, of the e-commerce directive, it is important to bear in mind that this does not constitute a revolutionary provision.

Indeed, the practical solution given to specific situations is not fundamentally different from the solution given by the Rome convention rules.

The main rule of the Rome convention is the ability for the parties to choose the law applicable to their contractual agreement (article 3). The e-commerce directive contains a provision in its annex which states that the internal market clause does not prevent the parties from the possibility to choose the law applicable to their contract.

If no law is chosen by the parties, article 4 of Rome convention refers to the law of the country where the party carrying out the characteristic prestation is established (country where the service provider is established). The internal market clause also refers to the law of the country where the service provider is established.

Article 5 of Rome convention provides for a specific regime to protect consumers. Annex of e-commerce directive excludes application of the internal market clause concerning consumer contracts. The Rome convention regime remains therefore applicable to consumer contracts.

This comparison between the situations before and after the internal market clause of the e-commerce directive demonstrates that if the legal basis changes, the practical solutions do not. From a practical point of view, these strong discussions concerning the relations between the internal market clause and private international law rules could therefore be viewed as a storm in a teacup.

Even if the internal market clause does not revolutionise the existing rules concerning conflict of laws, it has a major interest for e-commerce actors : it establishes a clear regime by providing the clear and easy understandable principle of the application of the law of the country of origin. It indicates to economic actors that if their activities comply with the existing rules in their country of establishment, they can extend them through the use of e-commerce without any further legal evaluation cost. Private international law rules do not present the same level of clarity since they use connecting factors which are not always clear for non specialists.

## Concluding remarks

First of all, transposition of the e-commerce directive has to be done in the framework of the transparency directive. Member States which do not comply with the notification and stand still period requirements of said directive will risk troubles concerning the further application of their legislation by their national courts.

Concerning the e-commerce directive itself, its implementation requires to duly take into account its structure which is made up of two elements: harmonisation provisions and internal market clause.

The problem will mainly occur concerning the second one since the internal market clause was very debated during the process of adoption of the directive and even later on.

A transposition of the e-commerce directive reducing the scope of the internal market clause or denying its impact on private international law rules would break the balance of the directive and would prevent from achieving the directive's main objective (free movement of information society services).

The very ambitious scope of the directive makes its transposition within a eighteen months period not very realistic. That's why several Member States are late.

The implementation of the e-commerce directive will certainly not resolve all legal problems relating to e-commerce. It is however a very important step towards the development of new online activities over the European Union market.