THE PMCA ABANDONS WELL-ESTABLISHED CHOICE OF LAW PRINCIPLE IN RELATION TO ONLINE MARKETING

Introduction

In a recent judgment, the Swedish Patent and Market Court of Appeal (PMCA) modifies the application of the well-established choice of law principle in marketing law in relation to online marketing. Swedish courts have historically applied the *country-of-effect principle,* which means that the courts shall apply the law of the country where the contested marketing has had an effect. The PMCA now finds that within the field of the e-Commerce Act – which according to the court includes online marketing – the *country-of-origin* principle shall instead guide the choice of law. This means that the courts shall now apply the law of the country where the party responsible for the marketing is established.

Maria Bruder and Siri Alvsing discuss and analyse the legal implications and the potential impact this judgment may have on Swedish courts' assessments in marketing law cases.

Key legislative issues

The country-of-effect principle has long been the guiding choice of law principle applied by Swedish courts, i.e. the law of the country where the marketing has effect is to be applied. Factors such as language, contact details, currency and place of delivery are decisive in determining whether the marketing has effect in Sweden. The place of establishment of the party responsible for the marketing activities has not been considered decisive; on the contrary, it has been a long-held and established view in Swedish case law to apply Swedish law (i.e. the Marketing Act) on marketing activities, whether online or in printed publications, directed to the Swedish market also when such activities derive from a legal person established abroad (MD 2001:19, MD 2004:17 and MD 2015:7).

Economic online activities within the EEA shall, under certain conditions, be governed by the e-Commerce Act (the Act implements the e-Commerce Directive (2000/31/EC). The e-Commerce Act designates the country-of-origin principle for the choice of law and stipulates that a 'service provider' (not to be confused with an ISP under e.g. the InfoSoc Directive, 2001/29/EC) shall be entitled to provide 'information society services' within the 'coordinated field' to natural or legal persons in Sweden without prejudice to Swedish law, if said "service provider" is established in another EEA Member State, while Swedish law shall apply to service providers established in Sweden.

Prior to this judgment, Swedish courts have not tried whether online marketing falls within the scope of the e-Commerce Act, and therefore also not considered whether the country-of-origin choice of law principle shall prevail over the country-of-effect principle in such cases.

Facts

The Swedish Consumer Ombudsman ("SCO") initiated proceedings against the Swedish whisky producer Mackmyra Svensk Whisky AB before the Patent and Market Court ("PMC"). Mackmyra marketed alcohol on its Instagram and Facebook account. The SCO alleged that certain provisions under the Swedish Alcohol Act were violated by the marketing activities and that they should be prohibited. One question before the PMC was whether the marketing was covered by the e-Commerce Act and if the country-of-origin principle should therefore prevail. The PMC stated that as the marketing had effect in Sweden and Mackmyra was established in Sweden, the question of which choice of law principle to follow was irrelevant as both principles would designate Swedish law. The PMC thus found that Swedish law was applicable to the marketing. The PMC also found that Mackmyra had breached the relevant provisions under the Alcohol Act.

Mackmyra appealed the judgment to the PMCA. The PMCA examined the scope of the e-Commerce Act and its prerequisite 'information society services' to examine whether Swedish law would apply to the marketing activities. With reference to case law from the CJEU, the Court found that online marketing constitutes an 'information society service'. The Court found Mackmyra to be a 'service provider' as Mackmyra provided the marketing on the company's own Instagram and Facebook account. The e-Commerce Act was thus found to apply. Pursuant to the country-of-origin principle set out in Section 5 of the e-Commerce Act, Swedish law should, according to the Court, apply to the marketing activities at issue as Mackmyra is established in Gävle, Sweden. The Court also stated that the country-of-origin principle under the e-Commerce Act shall prevail over the country-of-effect principle.

Comment

It is neither questionable nor surprising that the PMCA's concludes online marketing (under certain conditions) to fall within the scope of the e-Commerce Act. Nor is it surprising that the Court finds the country-of-origin principle to prevail over the country-of-effect principle regarding marketing within the scope of said Act.

However, the judgment will undoubtedly result in a less straightforward and more complex choice of law exercise when it comes to marketing that may fall within the scope of the e-Commerce Act. In order to determine the applicable law in a marketing case, the PMC will now have to assess several criteria being interdependent.

Some questions necessary to consider will be:

- In what media has the marketing act taken place?
- If the marketing has taken place online, does the marketing fall within the scope of the e-Commerce Act?
- If the e-Commerce Act is applicable, does the marketing concern an area exempt from the Act, e.g. gambling?

- If the marketing activities are not exempted from the Act, is the legal person a "service provider"?
- Is the service provider established within the EEA and does the marketing constitute an "information society service"?

If the marketing is covered by the e-Commerce Act, the PMC shall henceforth be obliged to examine if Section 3 (designating the law of the country of origin) or Section 5 (designating Swedish law) would be applicable to the marketing. It must also examine whether any of the exceptions to those provisions, found in Section 6, are applicable; one of which states that the provisions do not apply to marketing consisting of unsolicited commercial communication by email.

If the marketing is not covered by the e-Commerce Act, then the country-of-effect choice of law principle shall apply.

From the perspective of a commercial party, the judgment is likely to cause rather complex assessments and considerations to be made before bringing a foreign company to court in a marketing case.

For example, if a company established in another EEA Member State, would address Swedish consumers with online commercial communication through its .com website, the marketing activity will be governed by the laws of the country in which the company is established. However, if the company would also address Swedish consumers by unsolicited online commercial communication by e-mail, or by analogue commercial advertising in Swedish magazines, such marketing activities will according to the country-of-effect principle be governed by Swedish law. Consequently, the same marketing distributed through different media will be governed by the marketing legislation of two different countries. This will also require parties to produce evidence on the marketing legislation of other jurisdictions, making proceedings more time-consuming and increasing litigation costs.

However, if a company established outside the EEA directs identical commercial communication to Swedish consumers, said marketing falls outside the scope of the e-Commerce Act. Then the case in its entirety, regardless of communication media, will be governed by Swedish law according to the country-of-effect principle.

The present judgment thereby causes identical marketing activities directed to Swedish consumers via the internet to be treated differently. Commercial practices provided by a Swedish company deemed unfair under the Marketing Act might be accepted under the legislation of other EEA Member States. Consequently, companies could potentially come to consider establishing their business in countries with less strict marketing legislation.

Additionally, the judgment is likely to impact the use of joint actions covering both claims of unfair marketing and infringement of intellectual property rights, an option introduced with the specialized IP courts in 2016. Proceedings initiated against a defendant established in another EEA Member State, could result in the PMC needing to apply the legislation of the

country where the company is incorporated as pertains to the claims of unfair marketing, while applying Swedish intellectual property legislation to alleged IP infringements. This could potentially make such joint actions much less attractive for Swedish claimants.

The PMCA has granted leave to appeal to the Supreme Court. At the time of writing, the judgment has not been appealed.

We look forward to continuously monitor and assess the case and its impact. As illustrated by this article, the judgment has opened up for many interesting topics for future discussions.

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