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THE EUROPEAN UNION**

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NOTE

from : the UK Presidency and the incoming Austrian Presidency
to : Committee on Civil Law Matters (Rome II)

No. prev. doc. : 16231/04 JUSTCIV 196 CODEC 1361
No. Cion prop. : 11812/03 JUSTCIV 121 CODEC 1052

Subject : Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("ROME II")

1. Delegations will find herewith the revised text on a Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("ROME II").
2. This text was prepared by the UK Presidency and the incoming Austrian Presidency in the light of the comments made by delegations during the meetings of the Committee on Civil Law Matters (Rome II) on 20 July, 29 September and 13 December 2005 and having regard to the opinion of the European Parliament (see doc. 10812/05 CODEC 590 JUSTCIV 132).
3. The Presidency suggests that, subject to finalising the text, delegations examine the following recitals from the opinion of the European Parliament as to whether and to what extent those could be included: recitals 7, 14, 15, 18, 18a.

Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND THE COUNCIL
ON THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS
("ROME II")**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in Articles 61(c) **and 67** thereof,

Having regard to the proposal from the Commission,¹

Having regard to the opinion of the European Economic and Social Committee,²

Acting in accordance with the procedure laid down in Article 251 of the Treaty,³

Whereas:

(...)

¹ OJ C [...], [...], p. [...] .

² OJ C [...], [...], p. [...] .

³ Opinion of the European Parliament of [...] (OJ C [...], [...], p. [...] .

HAVE ADOPTED THIS REGULATION:

Chapter I - Scope

Article 1 - (...) Scope

1. This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters.^{1 2 3} It shall not apply, **in particular**, to revenue, customs or administrative matters **or the liability of the state for acts and omissions in the exercise of State authority ("acta iure imperii")**.

1 a)

Option 1

This Regulation shall not apply if the only connection to the European Community results from the choice of court agreement designating a court in a Member State [and none of the parties to the dispute is domiciled in a Member State].

Option 2

This regulation shall not apply in cases where a court in a Member State has assumed jurisdiction solely on the basis of its national law, which for these purposes shall not include any jurisdiction created by a Community instrument.

¹ **A recital shall recall that the concept of a non-contractual obligation should be understood as an autonomous concept, including e.g. unjust enrichment or negotiorum gestio.**

² **A recital should indicate that this Regulation should apply irrespective of the nature of the court or tribunal.**

³ **At a later stage, the possibility of stipulating a rule in the Regulation saying that non-contractual obligations include also obligations that are "likely to arise" could be considered. Subsequently, all references to the individual articles on an obligation "likely to arise" could be deleted.**

Option 3

This Regulation shall apply in all cases where a court of a Member State has jurisdiction.

Option 4

(No provision on 1A)

2. The following are excluded from the scope of this Regulation:
- a) non-contractual obligations arising **or likely to arise** out of family relationships^{1 2} and relationships deemed **by the law applicable to such relationships as having comparable effects** including maintenance obligations;
 - b) non-contractual obligations arising **or likely to arise** out of matrimonial property regimes, **property regimes of relationships deemed by the law applicable to such relationships as having comparable effects to marriage** and successions;
 - c) **non-contractual** obligations arising **or likely to arise** under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;

¹ **These comments should be interpreted in accordance with the law of the Member State where the court is seised.**

² **A recital should indicate that family relationships cover parentage, marriage, affinity and collateral relatives.**

- d) **non-contractual obligations arising or likely to arise out of**¹ personal (...) liability of officers and members as such for the **obligations of the company or (...) body corporate or incorporate, [and the personal (...) liability of auditors to a company or its members in the statutory audits of accounting documents];**
- e) non-contractual obligations **arising or likely to arise out of the relations between the settlors**, trustees and beneficiaries of a trust **created voluntarily;**
- f) non-contractual obligations arising **or likely to arise** out of nuclear damage,
- g) (...)

2a. **The Regulation shall not apply to evidence and procedure without prejudice to Article[s] [16 and] 17.**

3. For the purposes of this Regulation, "Member State" means any Member State other than (...) Denmark.

Article 2 – Universal application

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

¹ **Several delegations suggested to amend d) in the sense of the 1980 Rome Convention. Therefore, it is proposed to read d) as follows:
"d) non-contractual obligations arising or likely to arise out of the law of companies and other bodies corporate or incorporate such as the creation, by registration or otherwise, legal capacity, internal organisation or winding up of companies and other bodies corporate or incorporate] and the personal liability of officers and members as such for the obligations of the company or body and personal (...) liability of auditors to a company or this members in the statutory audits of accounting documents);"**

Chapter II - (Torts or delicts)

Article 3 – General rule

1. **Unless otherwise provided for in this Regulation**, the law applicable to a **tort or delict** shall be the law of the country in which the damage **occurs** or is likely to **occur** irrespective of the country in which the event giving rise to the damage occurred **or may occur** and irrespective of the country or countries in which the indirect consequences of that event **occur** ¹.
2. However, where the person claimed to be liable and the person sustaining **or likely to sustain** damage both have their habitual residence in the same country **at the time** when the damage occurs **or is likely to occur**, the **tort or delict** shall be governed by the law of that country.
3. (...) Where it is clear from all the circumstances of the case that the tort or delict is manifestly more closely connected with another country **than that indicated in paragraphs 1 or 2**, the law of that other country shall apply. A manifestly closer connection with another country **might** be based in particular on a pre-existing **[or contemplated]**² relationship between the parties, such as a contract, that is closely connected with the tort or delict in question. ³

¹ A recital shall indicate that, in cases of personal injury and damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged.

² See the proposed Article 9C

³ A recital could explain that the general rule in this Regulation is the "lex loci damni" provided for in Article 3(1). Paragraph 2 of Article 3 is an exception to this general principle. Paragraph 3 must be understood as an "escape clause" to paragraphs 1 and 2.

Option 1

- 1. The law applicable to a non-contractual obligation arising out of damage or risk of damage caused by a product shall be any of the following laws on which the person seeking compensation for damage may chose to base his or her claim,**
 - a) the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred; or**
 - b) the law of the country in which the product was acquired; or**
 - c) the law of the country in which the damage was sustained.**

- 2. The application of any of the abovementioned laws is subject to products of the same type having been marketed in that country with the consent of the person claimed to be liable. If such is not the case, the law applicable shall be the law in which the person claimed to be liable has his or her habitual residence. It is for the person claimed to be liable to prove that he or she did not consent.**

- 3. It shall be presumed that a product marketed in one Member Sate is also marketed in all the other Member States**

Option 2

- 1. Without prejudice to Articles 3(2) and 3(3), the law applicable to a non-contractual obligation arising or likely to arise out of a damage caused by a (...) product shall be the law of the country where the person seeking compensation is habitually resident.**

However, the applicable law shall be the law of the country in which the person claimed to be liable is habitually resident if he [can show that he did not consent to] [he could reasonably not foresee to] the marketing of the product, or a product of the same type, in the country where the person seeking compensation is habitually resident or, where that country is a Member State in any of the Member States.

[2. It shall be presumed that a product marketed in one Member State is also marketed in all the other Member States.]

(Option 3)

- 1. Without prejudice to Article 3(3), the law applicable to a tort or delict arising or likely to arise out of damage caused by a defective product shall be:**
 - a) the law of the country where the person sustaining or likely to sustain damage and the person claimed to be liable both have their habitual residence in the same country at the time when the damage occurs or is likely to occur;**
 - b) failing that, the law of the country in which the person sustaining or likely to sustain the damage has his or her habitual residence when the damage occurred, if that country is the country where the product was acquired;**
 - [c) failing that, the law of the country in which the person sustaining or likely to sustain the damage has his or her habitual residence when the damage occurred, if that country is the country where the product was marketed;]**
 - d/c) failing that, the law of the country in which the damage was sustained.**

However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he could reasonably not foresee to the marketing of the product, or a product of the same type, in the country in which the law is applicable under a) to d/c).

2. It shall be presumed that a product marketed in one Member State is also marketed in all the other Member States.

Article 5 – Unfair competition [and acts restricting free competition]¹

1. The law applicable to a non-contractual obligation arising **or likely to arise** out of an act of unfair competition, [**including an act restricting free competition²**], shall be the law of the country where competitive relations or the collective interests of consumers are or are likely to be (...) affected.
2. Where an act of unfair competition affects exclusively the interests of a specific competitor, Article 3(...) shall apply.

Article 6 – Violation of privacy and rights relating to the personality, including defamation³

¹ An alternative solution would be to draft Article 5 as follows: "The law applicable to a tort or delict arising or likely to arise out of an act contrary to Articles 82(1) and 82 of the EC Treaty, shall be the law of the forum."

² It is recalled that this Regulation covers only extra-contractual obligations falling within the field of private law.

³ See also the proposals made by Spain in doc 14193/04 JUSTCIV 166, by France in doc. 14193/04 JUSTCIV 166 ADD 3 and by Germany in doc.12841/05 JUSTCIV 171. The Swedish delegation has suggested deleting this Article.

Option 1

- 1. The law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to honour and personal image shall be the law designated by Article 3. For the purpose of applying Article 3(1), if the damage arises or is likely to arise in more than one State, the applicable law shall be that of the country in which the person sustaining damage has his [or her] habitual residence.**

- 2. The law designated in accordance with the preceding paragraphs shall also apply to the right of reply or equivalent measures.**

Option 2

- 1. The law applicable to a non-contractual obligation arising or likely to arise out of a violation or a risk of a violation of privacy or rights relating to the personality, including an act of defamation, shall be as follows:**
 - where the claim is brought before a court in the Member State in which the defendant is domiciled, the law of that Member State; or**

 - where the claim is brought before a court in a Member State, other than that in which the defendant is domiciled, the law of the former State, but on the basis that that court may only determine the claim to the extent that it is confined to damage to reputation suffered in that State.**

- 2. [The United Kingdom reserves its position as to whether the rule on the right to reply in the Commission's proposal should be retained.]**

Option 3¹

1. **The law applicable to a non-contractual obligation arising or likely to arise out of a violation or a risk of violation of privacy or rights relating to the personality, including an act of defamation, shall be the law of the forum (...). [The same law shall apply to a right of reply or to equivalent measures.]** ²
2. [...]

Article 7 – Violation of the environment

Option 1

(Article 7 is deleted)

Option 2

The law applicable to a non-contractual obligation arising **or likely to arise** out of a violation of the environment³, **including damage caused to persons or property**, shall be the law determined by the application of Article 3(1), unless the person **seeking compensation for damage chooses, [at the latest at the time the court is seised,]** to base his **or her** claim on the law of the country in which the event giving rise to the damage occurred.

¹ **A recital will recall declaration 20 annexed to the treaty of the European Union and to the European Community relating to freedom of the press and freedom of expression in other media.**

² **A recital could recall that this provision was drawn up having in mind the need of coherence between the rules on jurisdiction and on applicable law, as laid down by the case law of the court (see Shevill case, judgment of the court of 7 March 1995 - Case C-68/93)**

³ **If this option should be retained, a recital could give certain indications relating to the interpretation of damages resulting of a violation of the environment.**

Article 8 – Infringement of intellectual property rights

1. The law applicable to a non-contractual obligation arising **or likely to arise** from an infringement of an intellectual property right shall be the law of the country for which protection is **claimed**.
2. In the case of a non-contractual obligation arising **or likely to arise** from an infringement of a *unitary Community intellectual property right*, **the applicable law shall be [the law of the Member State in which the act of infringement was committed] [the law of the forum] for any question that is not governed by the relevant Community instrument (...).**¹

[Article 8 a² - Industrial action]

[The law applicable to a non-contractual obligation arising or likely to arise out of a noticed or executed industrial action shall be the law of the country where the action has been taken.]

CHAPTER III

(Unjust enrichment and Negotorium gestion [and...])

Article 9 –

Deleted

Article 9 A– Unjust Enrichment

1. If a non-contractual obligation arising **or likely to arise** out of **unjust enrichment, including undue payment**, concerns a relationship (...) existing between the parties, such as a contract **or a tort or delict under Chapter II**, closely connected with **that unjust enrichment**, it shall be governed by the law that governs that relationship.

¹ **Delegations are asked to express their preferences for one of these options.**

² **This Article is proposed by the Swedish delegation and the Committee agreed to consider it at a next meeting.**

2. **Where the applicable law cannot be determined on the basis of paragraph 1 and the parties¹ have their habitual residence in the same country when the event giving rise or likely to give rise to the unjust enrichment occurs, the applicable law (...) shall be the law of that country.**
3. **Where the applicable law cannot be determined on the basis of paragraphs (1) or (2), the applicable law (...) shall be (...) the law of the country in which the enrichment takes place.**
4. **Where it is clear from all the circumstances of the case that the non-contractual obligation arising or likely to arise out of unjust enrichment is manifestly more closely connected with another country than that indicated in paragraphs 1 to 3, the law of that other country shall apply.**

Article 9B – Negotiorum gestio

1. If a non-contractual obligation arising **or likely to arise** out of **actions performed without due authority in connection with the affairs of another person**, concerns a relationship (...) existing between the parties, such as a contract **or a tort or delict under Chapter II**, closely connected with **that** non-contractual obligation, it shall be governed by the law that governs that relationship.
2. **Where the applicable law cannot be determined on the basis of paragraph 1, and the parties² have their habitual residence in the same country when the event giving rise or likely to give rise to the damage occurs, the applicable law (...) shall be the law of that country.**

¹ **Person claimed to be liable and the person seeking compensation**

² **Person claimed to be liable and the person seeking compensation.**

3. **Where the applicable law cannot be determined on the basis of paragraphs (1) or (2), the applicable law shall be the law of the country in which the action took place.**
4. **Where it is clear from all the circumstances of the case that the non-contractual obligation arising or likely to arise out of actions performed without due authority in connection with the affairs of another person is manifestly more closely connected with another country than that indicated in paragraphs 1 to 3, the law of that other country shall apply.**

[Article 9C¹

The law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded, shall be the law that would have been applicable to the contract had it been entered into.]

CHAPTER IV (Freedom of Choice)

Article 3A - Freedom of Choice

1. **Without prejudice to Articles [5] and [8]², the parties may agree to submit non-contractual obligations to the law of their choice:**
 - a) **by an agreement entered into after the [dispute arose] [the event occurred]; or**
 - b) **where all the parties are pursuing a commercial activity, by an agreement freely negotiated before the dispute arose.**

The choice must be expressed or demonstrated with reasonable certainty by the circumstances of the case. **The choice shall not prejudice** the rights of third parties.

¹ **This text is suggested by the Spanish and Swedish delegations.**

² **At the request of certain delegations, the Committee should consider whether the choice of law should also be allowed for Articles 5 or 8.**

2. **Where all the (...) elements relevant to the situation at the time when the [event and the] damage occurs** are located in a country other than the country whose law has been chosen, the choice of the parties shall be without prejudice to the application of **provisions** of the law of that country which cannot be derogated from by contract.

3. Where **all the (...) elements relevant to the situation at the time when the damage occurs** are located in one **or more** of the Member States of the European Community (...) the parties' choice of the applicable law **other than that of a Member State** shall not debar the application of provisions of Community law, **where appropriate as implemented in the Member State of the forum, which cannot be derogated from by contract.**

Chapter V

(Common rules)

Article 11 – Scope of the applicable law(...)

The law applicable to non-contractual obligations under (...) this Regulation shall govern in particular:

- a) the **basis** and extent of liability, including the determination of persons who **can be held** liable for acts performed by them;
- b) the grounds for exemption from liability, any limitation of liability and any division of liability;
- c) the existence, **the nature and the assessment of damages or the redress sought**;
- d) (...) ¹ ;

¹ **Several delegations suggested to delete d). If required by the Committee, d) could be worded as follows: "within the limits of the powers conferred on the court by its procedural law, the measures to prevent or terminate injury or damage or to ensure the provision of compensation;"**

- e) (...)¹;
- f) the question whether a right **to claim damages or redress** may be **transferred, including by assignment** or inheritance;
- g) persons entitled to compensation for damage sustained personally;
- h) liability for the acts of another person;
- i) the manners in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation and the interruption and suspension of the period.

2

Article 12 – Overriding mandatory provisions

1. Nothing in this Regulation shall restrict the application of the **provisions** of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.

2. **[Where the law of a country is applicable by virtue of this Regulation, effect may be given to the mandatory provisions of another country with which the situation is closely connected [, if and in so far as,] under the law of the latter country, those provisions must be applied whatever the law applicable to the non-contractual obligation. In considering whether to give effect to these mandatory provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.]**

¹ See c).

² The Spanish delegation suggested to add the following subparagraph j): "The assignability of rights arising from non-contractual damage, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtors' obligations have been discharged."

Article 13 – Rules of safety and conduct

In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct¹ which were in force at the place and time of the event giving rise or likely to give rise to the liability.

Article 14 – Direct action against the insurer of the person liable

The person having suffered damages may bring his or her claim directly against the insurer of the person liable to provide compensation if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides.

Article 15 – Subrogation (...)²

When a third person [, such as an insurer,] has the obligation to satisfy a person having a non-contractual claim, the right of recourse of the third person against the person liable shall be governed by the law applicable to the third person's obligation, [such as the law applicable to the insurance agreement].

¹ A recital shall give precisions on the sense to give to "rules of safety and conduct".
² Some few delegations would prefer to read Article 15 as follows: "Where a person ("the creditor") has a non-contractual claim upon another ("the debtor"), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether and to which extend the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship."

Article 15 A - [Subrogation on] Multiple liability

If a creditor has a claim against several debtors who are [jointly and severably] liable, and one of the debtors has already satisfied the claim, the question of that debtors' right to demand compensation from the other debtors shall be governed by the law applicable to that debtors' non-contractual obligation towards the creditor.

Article 16 – Formal validity

A unilateral act intended to have legal effect and relating to a non-contractual obligation is formally valid if it satisfies the formal requirements of the law which governs the non-contractual obligation in question or the law of the country in which this act is done.¹

Article 17 – Burden of proof

1. The law governing a non-contractual obligation under this Regulation applies to the extent that, in matters of non-contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.
2. Acts intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 16 under which that act is formally valid, provided that such mode of proof can be administered by the forum.

¹ **The Spanish delegation proposes to add the following second paragraph: "2. Where an act is done by an agent, the country in which the agent acts is the relevant country for the purposes of the previous paragraph."**

Chapter VI – Other provisions

Article 18 – Assimilation to the territory of a State

(deleted)

Article 19 – Assimilation to habitual residence

1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporate shall be the place of central administration. (...)

Where the event giving rise to the damage or harm occurs or the damage or harm arises in the course of operation of (...) a branch, agency or any other establishment, the place of establishment shall take the place of the habitual residence.

2. For the purposes of this Regulation, the habitual residence of a natural person acting in the course of his or her business activity shall be [his or her] principal place of business^{1 2}.
3. (...) ³.

Article 20 – Exclusion of renvoi

The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law.

¹ This place should correspond to the office of the natural person
² In French, this concept should be translated as "établissement principal" (see Article 4 of the 1980 Rome Convention).
³ This paragraph is deleted as a consequence of the deletion of Article 6 (2).

Article 21 – States with more than one legal system

1. Where a State comprises several territorial units, each of which has its own rules of law in respect of non-contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.
2. A State within which different territorial units have their own rules of law in respect of non-contractual obligations shall not be bound to apply this Regulation to conflicts solely between the laws of such units.

Article 22 – Public policy of the forum^{1 2}

The application of a **provision** of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy ("*ordre public*") of the forum. **Such incompatibility may exist, for instance, if the application of the designated law would have the effect of causing excessive non-compensatory damages to be awarded.**

Article 23 – Relationship with other provisions of Community law

1. This Regulation shall not prejudice the application of (...) acts of the institutions of the European Communities which, in relation to particular matters, lay down choice-of-law rules relating to non-contractual obligations.
- (...)
2. [P.M.]

¹ The Belgian delegation suggested to insert this Article immediately after Article 12.
² A recital could make a reference to the European Convention on human rights.

Article 24 – Non-compensatory damages

(See Article 22)

Article 25 – Relationship with existing international conventions

1. This Regulation shall not prejudice the application of international conventions to which **one or more** Member States are parties when this Regulation is adopted and which (...) lay down conflict-of-law rules relating to non-contractual obligations.

2. **However, this Regulation shall take precedence over the following conventions concluded between the Member States in so far as they concern matters governed by this Regulation:**¹

- ...

Chapter VII – Final provisions

Article 26 – List of conventions referred to in Article 25

1. The Member States shall notify the Commission, no later than [...], of the list of conventions referred to in Article 25, paragraph 1. After that date, the Member States shall notify the Commission of all denunciations of such conventions.

¹ **The Committee agreed to reconsider the following amendment proposed by the European Parliament (amendment 53): The rules of this Regulation shall prevail over the rules of international conventions concluded between two or more Member States unless those conventions are listed in Annex I.**

2. The Commission shall publish in the *Official Journal of the European Union* within six months of receiving

- the list of Conventions referred to in paragraph 1;
- **the denunciations of the Conventions referred to in paragraph 1.**

Article 27 –Application in time

This Regulation shall apply to **damage or harm**¹ occurring after **the** entry into force of **this Regulation**.

Article 27A –Entry into force

This Regulation shall enter into force on [...].

This Regulation shall be binding in its entirety and directly applicable in all Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, [...].

For the European Parliament
The President

For the Council
The President

¹ It was proposed to replace "damage or harm" by "acts".