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THE EUROPEAN UNION**

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NOTE

from : the Presidency
to : Committee on Civil Law Matters (Rome II)

No. prev. doc. : 16027/05 JUSTCIV 245 CODEC 1218
No. Cion prop. : 6622/06 JUSTCIV 32 CODEC 171

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 text on a Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("ROME II") revised in the light of the discussions during the Austrian Presidency.
2. The Presidency recalls that, subject to finalising the text, delegations should still 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 - Scope¹

Article 1 - (...) Scope

1. This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters.^{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”)**.

(...)

2. The following are excluded from the scope of this Regulation:
 - a) non-contractual obligations **arising** out of family relationships^{4 5} and relationships deemed by **the law applicable to such relationships as having comparable effects** including maintenance obligations;
 - b) non-contractual obligations **arising** 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;

¹ The Spanish delegations made a proposal for Article X suggesting that the law applicable to the liability of the Member State shall be the law of the forum for cases of *acta iure gestionis* (see doc. 7212/06 ADD 2 JUSTCIV 56 CODEC 234).

² 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.

³ A recital should indicate that this Regulation should apply irrespective of the nature of the court or tribunal.

⁴ These concepts should be interpreted in accordance with the law of the Member State where the court is seized.

⁵ A recital should indicate that family relationships cover parentage, marriage, affinity and collateral relatives.

- c) **non-contractual obligations arising** 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;
- d) **non-contractual obligations arising out of the law of companies and other bodies corporate or unincorporate such as the creation, by registration or otherwise, legal capacity, internal organisation or winding up of companies and other bodies corporate or unincorporate 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 its members in the statutory audits of accounting documents;**
- e) non-contractual obligations **arising out of the relations between the settlors, trustees and beneficiaries of a trust created voluntarily;**
- f) non-contractual obligations **arising** out of nuclear damage,
- g) (...)
- h) **non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation, by the media.**¹

2a. **The Regulation shall not apply to evidence and procedure without prejudice to Articles 16 and 17.**

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

¹ **A recital will explain that the concept of media shall include television and radio broadcasting and print media, including distribution on the internet;**

Article A – Damage

For the purposes of this Regulation, all references to:

- a) an event giving rise to damage shall include events giving rise to damage that are likely to occur;**
- b) a non-contractual obligation shall include non-contractual obligations that are likely to arise;**
- c) damage includes damage that is likely to occur.**

Article 2 – Universal application

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

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** irrespective of the country in which the event giving rise to the damage **occurred** and irrespective of the country or countries in which the indirect consequences of that event **occur**.¹

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. However, where the person claimed to be liable and the person sustaining (...) damage both have their habitual residence in the same country **at the time** when the damage **occurs**, 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 (...) relationship between the parties, such as a contract, that is closely connected with the tort or delict in question. ¹

Article 4 – Product liability

Without prejudice to Articles 3(2) and 3(3), the law applicable to a non-contractual obligation arising out of damage caused by a product shall be:

- a) **the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country;**
- b) **failing that, the law of the country in which the product was acquired, if the product was marketed in that country;**
- c) **failing that, the law of the country in which the damage was sustained, if the product was marketed in that country.**

¹ 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" from paragraphs 1 and 2.

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

Article 5 – Unfair competition and acts restricting free competition^{1 2}

1. The law applicable to a non-contractual obligation arising out of an act of unfair competition 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.
3. The law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country on whose market the restriction has or is likely to have effect.³
4. ^{4 5}
5. The applicable law under this Article cannot be derogated from by an agreement in accordance with Article 3A.

¹ A recital will indicate that this Article is not an exception to the general rule in Article 3 but rather a clarification thereof.

² In accordance with the results of the JHA Council on 21 February 2006 a recital should give clarifications by way of examples of cases covered by Article 5.

³ A recital could recall that the effect has to be direct and substantial.

⁴ In accordance with the results of the JHA Council on 21 February 2006 the Committee is invited to examine the question of infringements of Articles 81 and 82 of the EC Treaty. A possible solution would be to draft paragraph 4 as follows: "Notwithstanding paragraph 3, the law applicable to a non-contractual obligation arising out of an act contrary to Article 81 or 82 of the EC Treaty shall be the law of the forum."

⁵ See the proposal of the UK delegation in 5460/06 JUSTCIV 11 CODEC 52;

Article 6

Deleted

Article 7 – (...) Environmental damage

Option 1

(Article 7 is deleted)

Option 2

The law applicable to a non-contractual obligation **arising** out of [a violation of the environment¹, **including damage caused to persons or property**] [environmental damage or damage **sustained by persons or property as a result of such damage**], 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.

Article 8 – Infringement of intellectual property rights

1. The law applicable to a non-contractual obligation **arising** 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** from an infringement of a *unitary Community intellectual property right*, **the applicable law shall be the law of the (...) State in which the act of infringement was committed for any question that is not governed by the relevant Community instrument (...)**.
3. **Notwithstanding Articles 3, 3 A, 9 A, 9 B and 9 C, this Article shall apply to all non-contractual obligations arising from an infringement of an intellectual property right.**

¹ **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 a - Industrial action]

[Without prejudice to Article 3(2), the law applicable to a non-contractual obligation arising out of industrial action, pending or carried out, shall be the law of the country where the action is to be or 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** out of **unjust enrichment, including payment of amounts wrongly received**, 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.
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** to **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.

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

4. Where it is clear from all the circumstances of the case that the non-contractual obligation **arising 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** 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 parties¹ have their habitual residence in the same country when the event **giving rise** to the damage 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 **action took** place.
4. Where it is clear from all the circumstances of the case that the non-contractual obligation **arising 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.

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

Article 9 C - Culpa in contrahendo

1. Option 1

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 or not, shall be the law that would have been applicable to the contract had it been entered into.

1. Option 2

The law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract shall be the law of the country in which the damage occurs, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occurred.

2. However, where the parties¹ have their habitual residence in the same country at the time when the event giving rise to the damage occurs, the applicable law (...) shall be the law of that country.

3. Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of dealings prior to the conclusion of a contract, is manifestly more closely connected with another country than that indicated in paragraphs 1 and 2, the law of that other country shall apply.

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

CHAPTER IV (Freedom of Choice)

Article 3A - Freedom of Choice

1. **The parties may agree to submit non-contractual obligations to the law of their choice:**
 - a) **by an agreement entered into after the event giving rise to the damage occurred;**
 - or**
 - b) **where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred.**

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

2. **Where all the (...) elements relevant to the situation at the time when the event giving rise to 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 event giving rise to 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.**

¹ See Article 4(1) of the revised Commission proposal;

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 claimed**;
- d) **the measures which can be taken to prevent or to 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.

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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 of whether the debtors' obligations have been discharged."

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.]**

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 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.

¹ A recital shall give precisions on the meaning to be given to the term "rules of safety and conduct".

Article 15 – Subrogation (...)

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 extent 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 liable for the same claim (...), and one of the debtors has already satisfied the claim in whole or in part, 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.

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.

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 (...)¹ occurs or the damage (...) arises in the course of operation of (...) a branch, agency or any other establishment, the place where the branch, agency or any other establishment is located shall take the place of habitual residence.

¹ **A recital will explain that the definition of damage would cover any consequence of a non-contractual obligation, including harm.**

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.

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^{4 5}

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. (...)

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).**
⁴ **The Belgian delegation suggested to insert this Article immediately after Article 12.**
⁵ **A recital could make a reference to the European Convention on human rights.**

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.]

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 **at the time** when this Regulation is adopted and which (...) lay down conflict-of-law rules relating to non-contractual obligations.
2. **However, this Regulation shall, as between Member States, take precedence over the following conventions concluded between two or more of them in so far as they concern matters governed by this Regulation:**¹

- ...

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.**

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 **[9 months after the adoption of the Regulation]**, 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.
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 26 A - Review clause

- 1. Not later than five years after this Regulation enters into force, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on its application. If necessary, this report shall be accompanied by proposals to adapt the Regulation. In particular, the report shall consider non-contractual obligations arising out of traffic accidents.**
- 2. The Commission shall, not later than [2 years after the date of entry into force of the Regulation] submit a proposal to the European Parliament and the Council on the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation, by the media.**

Article 27 –Application in time

This Regulation shall apply to events giving rise to damage (...) occurring after the entry into force of this Regulation.

Article 27A –Entry into force

1. This Regulation shall enter into force [**9 months after its adoption**].

2. This Regulation shall apply from [15 months after its adoption,] except for Article 26, which shall apply 9 months after the adoption of the Regulation.

3. 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