



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 10 April 2006**

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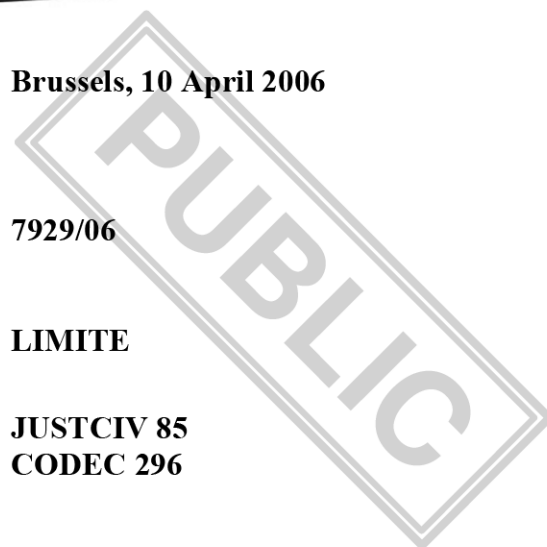
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**LIMITE**

**JUSTCIV 85  
CODEC 296**



**NOTE**

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from : the Presidency

to : Coreper

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No. prev. doc. : 7432/06 JUSTCIV 62 CODEC 247

No. Cion prop. : 6622/06 JUSTCIV 32 CODEC 171

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

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1. Delegations will find herewith the text on the Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("ROME II") with the overall compromise package as suggested by the Presidency

2. In case Coreper/Council reaches agreement on this package, the Committee on Civil Law Matters ("Rome II") will need to finalise the technical work on the recitals.

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,<sup>1</sup>

Having regard to the opinion of the European Economic and Social Committee,<sup>2</sup>

Acting in accordance with the procedure laid down in Article 251 of the Treaty,<sup>3</sup>

Whereas:

(...)

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<sup>1</sup> OJ C [... ], [... ], p. [... ] .

<sup>2</sup> OJ C [... ], [... ], p. [... ] .

<sup>3</sup> 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.<sup>1</sup> 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”).**<sup>2</sup>

(...)

2. The following are excluded from the scope of this Regulation:
  - a) non-contractual obligations **arising** out of family relationships<sup>3 4</sup> 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;

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<sup>1</sup> **A recital should indicate that this Regulation should apply irrespective of the nature of the court or tribunal.**

<sup>2</sup> **A recital will clarify that the liability of the State includes claims against officials who act on behalf of the State. Therefore, these matters are excluded from the scope of this Regulation.**

<sup>3</sup> **These concepts should be interpreted in accordance with the law of the Member State where the court is seized.**

<sup>4</sup> **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, the personal liability of officers and members as such for the obligations of the company or body and the 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. (...)**

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.

*Article A – Non-contractual obligations*

1. For the purposes of this Regulation damage shall cover any consequence arising out of tort or delict, unjust enrichment, negotiorum gestio or culpa in contrahendo.<sup>1</sup>
2. This Regulation shall apply also to non-contractual obligations that are likely to arise.
3. Any reference in this Regulation to:
  - a) an event giving rise to damage shall include events giving rise to damage that are likely to occur and;
  - b) damage shall include 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.

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<sup>1</sup> A recital shall recall that the concept of a non-contractual obligation should be understood as an autonomous concept.

## 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**.<sup>1</sup>
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.<sup>2</sup>

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<sup>1</sup> 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.

<sup>2</sup> 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.

*Article 4 – Product liability*

1. **Without prejudice to Article 3(2), 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 occurred, if the product was marketed in that country,**

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

2. **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 paragraph 1, 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.**

*Article 5 – Unfair competition and acts restricting free competition*<sup>1 2</sup>

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.**<sup>3 4</sup>
4. **The applicable law under this Article cannot be derogated from by an agreement in accordance with Article 3A.**

*Article 6*

**Deleted**

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

<sup>2</sup> **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.**

<sup>3</sup> **A recital could recall that the effect has to be direct and substantial.**

<sup>4</sup> **A recital shall indicate that this paragraph covers infringements of both national and EC competition law.**



### *Article 7 – (...) Environmental damage*

The law applicable to a non-contractual obligation **arising** out of **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** to base his **or her** claim on the law of the country in which the event giving rise to the damage occurred.<sup>1</sup>

### *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. **Articles 3, 3 A, 9 A, 9 B and 9 C shall not apply as regards non-contractual obligations arising from an infringement of an intellectual property right.**

### *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.**

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<sup>1</sup> **A recital shall explain that the question of when the person seeking compensation can make the choice of the applicable law is determined in accordance with the law of the court seized.**

## CHAPTER III

### Unjust enrichment, negotiorum gestio and culpa in contrahendo

*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 (...)**, 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 parties<sup>1</sup> 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.
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.

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<sup>1</sup> **Person claimed to be liable and the person seeking compensation**

*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 (...)**, 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 parties<sup>1</sup> 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.

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<sup>1</sup> **Person claimed to be liable and the person seeking compensation.**

*Article 9 C - Culpa in contrahendo*

1. **The law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract,<sup>1</sup> regardless of whether the contract was actually concluded or not, shall be the law that applies to the contract or that would have been applicable to the contract had it been entered into.<sup>2</sup>**
  
2. **Where the applicable law cannot be determined on the basis of paragraph 1, the applicable law shall be the law of the country:**
  - a) **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, or**
  
  - b) **where the parties<sup>3</sup> have their habitual residence in the same country at the time when the event giving rise to the damage occurs, the law of that country, or.**
  
  - c) **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 a) and b), the law of that other country.**

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<sup>1</sup> **A recital shall indicate that this concept includes the breakdown of contractual negotiations and the violation of the duty of disclosure.**

<sup>2</sup> **A recital will explain that this provision only covers non-contractual obligations presenting a direct link with the negotiations prior to the conclusion of a contract. This means that if during the negotiations of a contract a person suffers personal injury that is not related to the negotiations, Article 3 or other relevant provisions of the Regulation should apply.**

<sup>3</sup> **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.<sup>1</sup>

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.**

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<sup>1</sup> 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 remedy claimed;**
- d) **within the limits of powers conferred on the court by its procedural law, the measures which a court can take to prevent or terminate injury or damage or to ensure the provision of compensation;**
- e) (...)<sup>1</sup>;
- f) the question whether a right **to claim damages or remedy** may be **transferred, including by (...)** inheritance;
- g) persons entitled to compensation for damage sustained personally;
- h) liability for the acts of another person;
- i) the manner 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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<sup>1</sup> See c).

*Article 12 – Overriding mandatory provisions*

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.

(...)

*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 conduct<sup>1</sup> 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 damage 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 (...)*

**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.**

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

*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 (...) 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.

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<sup>1 2</sup>
3. (...)<sup>3</sup>

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<sup>1</sup> This place should correspond to the office of the natural person

<sup>2</sup> In French, this concept should be translated as "établissement principal" (see Article 4 of the 1980 Rome Convention).

<sup>3</sup> This paragraph is deleted as a consequence of the deletion of Article 6 (2).

*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 **Member** 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<sup>1</sup>*

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. (...)

*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.]

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<sup>1</sup> 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 **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:**
  - ...<sup>1</sup>

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<sup>1</sup> **The list of conventions to be included in this Article will be given by Member States.**

## 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 (...),<sup>1</sup> 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 -*

#### *Violations of privacy and rights relating to personality, including defamation (...)*

**Not later than 2 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 the issue of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation, (...) which is excluded from the scope of the Regulation. The Commission is requested to accompany this report with proposals to adapt the Regulation.**

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<sup>1</sup> **12 months after the adoption of the Regulation;**

*Article 26 B - Review clause*

**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.**

*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*

**This Regulation shall apply from (...)<sup>1</sup>, except for Article 26, which shall apply (...)<sup>2</sup>.**

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*

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<sup>1</sup> **18 months after its adoption;**  
<sup>2</sup> **12 months after its adoption.**