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DRAFT REPORT

with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II)
(2009/2170(INI))

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(Initiative – Rule 42 of the Rules of Procedure)

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MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) (2009/2170(INI))

The European Parliament,

- having regard to Article 225 of the Treaty on the Functioning of the European Union,
- having regard to Article 81 of the Treaty on the Functioning of the European Union, in particular point (c) of paragraph 2 thereof,
- having regard to Articles 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") and Articles 7 and 11 of the Charter of Fundamental Rights of the European Union,
- having regard to the forthcoming accession of the Union to that Convention pursuant to Article 6(2) of the Treaty on European Union,
- having regard to Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters¹, in particular Articles 2 and 5(3) thereof, and to the proposal for a recast of that regulation²,
- having regard to the judgment of the Court of Justice of 7 March 1995 in Case C-68/93 *Shevill* [1995] ECR I-415,
- having regard to the judgment of the Court of Justice of 25 October 2011 in Joined Cases C-509/09 and C-161/10 *eDate Advertising GmbH*³,
- having regard to the opinion of Advocate General Mancini in Case 352/85 *Bond van Adverteerders and Others v Netherlands* [1988] ECR 2085, the judgment in Case C-260/89 *Elliniki Radiofonia Tileorasi (ERT-AE)* [1991] ECR I-2925, the judgment and the opinion of Advocate General Van Gerven in Case C-159/90 *Society for the Protection of Unborn Children Ireland Ltd* [1991] ECR I-4685 and the opinion of Advocate General Jacobs in Case C-168/91 *Christos Konstantinidis* [1993] ECR I-1191,
- having regard to the Commission's original proposal for a regulation of the European Parliament and the Council on the law applicable to non-contractual obligations⁴,
- having regard to its position of 6 July 2005 on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual

¹ OJ L 12, 16.1.2001, p.1.

² COM(2010)0748.

³ Not yet reported in the European Court Reports.

⁴ COM(2003)0427.

obligations ("Rome II")¹,

- having regard to Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)² ("the Rome II Regulation"), in particular Article 30(2) thereof³,
- having regard to the comparative study commissioned by the Commission on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality⁴,
- having regard to the alleged phenomenon of "libel tourism"⁵,
- having regard to the UK Defamation Bill⁶,
- having regard to the public hearing held on 28 January 2010⁷,
- having regard to the working documents drawn up by the rapporteur of the Committee on Legal Affairs and the large body of scholarly writings on this matter⁸,

¹ OJ C 157 E, 6.7.2006, p. 370.

² OJ L 199, 31.7.2007, p. 40.

³ *Not later than 31 December 2008, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media, and conflict-of-law issues related to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.*

⁴ JLS/2007/C4/028, Final Report.

⁵ See the Fifth Dame Ann Ebsworth Memorial Public Lecture given by the Rt Hon. The Lord Hoffmann on 2 February 2010 and Trevor C. Hartley, 'Libel Tourism' and Conflict of Laws, ICLQ vol 59, p. 25, January 2010.

⁶ Published as a consultative document on <http://www.justice.gov.uk/consultations/docs/draft-defamation-bill-consultation.pdf>; see also the first report of the joint committee of the UK Parliament at <http://www.publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/20302.htm>.

⁷ Hearing on rights relating to personality, in particular in relation to defamation, in the context of private international law, particularly the Rome II Regulation. For the speakers' contributions, see <http://www.europarl.europa.eu/activities/committees/events/Com.do?page=2&product=CHE&language=EN&body=JURI>

⁸ DT\820547EN.doc and DT\836983EN.doc.; see in particular the publications made in July 2010 in the online symposium *Rome II and Defamation*: <http://conflictoflaws.net/2010/rome-ii-and-defamation-online-symposium> by Jan von Hein, Professor of civil law, private international law and comparative law at the University of Trier, Germany (to whom the rapporteur is particularly indebted for the proposal set out in this document), Trevor Hartley, Emeritus Professor at the London School of Economics, Andrew Dickinson, Visiting Fellow in Private International Law at the British Institute of International and Comparative Law and Visiting Professor at the University of Sydney, Olivera Boskovic, Professor of Law at the University of Orléans, Bettina Heiderhoff, Professor of Law at the University of Hamburg, Nerea Magallón, former Professor of Law at the University of the Basque Country, at present teaching Private International Law in Santiago de Compostela, Louis Perreau-Saussine, Professor of Law at the University of Nancy, and Angela Mills Wade, Executive Director of the European Publishers Council. See also Jan-Jaap Kuipers, *Towards a European Approach in the Cross-Border Infringement of Personality Rights*, 12 German Law Journal 1681-1706 (2011), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=1379>. For the EU and fundamental rights, see Darcy S. Binder, *The European Court of Justice and the Protection of Fundamental Rights in the European Community: New Developments and Future Possibilities in Expanding Fundamental Rights Review to Member State Action*, Jean Monnet Working Paper No 4/95, at <http://centers.law.nyu.edu/jeanmonnet/papers/95/9504ind.html>.

- having regard to Rules 42 and 48 of its Rules of Procedure,
 - having regard to the report of the Committee on Legal Affairs,
- A. whereas, following its ruling in *Shevill*, the Court of Justice has held in *eDate Advertising* that Article 5(3) of Regulation (EC) No 44/2001 must be interpreted as meaning that, in the event of an alleged infringement of personality rights by means of content placed online on an internet website, the person who considers that his rights have been infringed has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the centre of his interests is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised;
- B. whereas the Rome II Regulation lacks a provision for the determination of the law applicable to violations of privacy and rights relating to personality;
- C. whereas consideration of an appropriate rule has been coloured by controversy about "libel tourism", a type of forum shopping in which a claimant elects to bring an action for defamation in the jurisdiction which is considered most likely to produce a favourable result – generally that of England and Wales, which is "regarded as the most claimant-friendly in the world";
- D. whereas the high costs of litigating in that jurisdiction and the potentially high level of damages that may be awarded there allegedly have a chilling effect on freedom of expression; whereas where legal costs are high, publishers may be forced to settle even where they consider that they have a good defence;
- E. whereas the Defamation Bill presently before the UK Parliament promises to go a long way towards removing the alleged chilling effect on publishers, although it seems unlikely to resolve the difficult issue of high legal costs;
- F. whereas the internet has added the further complication of virtual universal accessibility, coupled with the permanence of postings and the emergence of blogs and anonymous postings;
- G. whereas press and media freedom are hallmarks of a democratic society;
- H. whereas legal remedies must be available when that freedom is abused, particularly to the detriment of peoples' private lives and reputation¹; whereas, where powerful media organisations are guilty of such abuse, the victims, who are not always affluent business tycoons or media celebrities and may be simply ordinary citizens, may have in practice no access to justice on account of the expense of legal proceedings; whereas the cost of legal proceedings can also be ruinous for publishers;

¹ Reputation is nowadays considered to be protected by the ECHR as part of private life (see *N. v. Sweden*, No. 11366/85).

- I. whereas it is for each State to determine the proper balance between the right to respect for private life guaranteed by Article 8 of the ECHR and the right to freedom of expression guaranteed by Article 10 of the ECHR as it thinks fit;
- J. whereas, notwithstanding this, with the Union's accession to the ECHR, the Union may over time have to find a common yardstick in cross-border cases relating to the freedoms to supply goods and services as a result of the "dialectical development" looked forward to by Advocate General Mancini in the *Bond van Adverteerders* case, having regard also to the judgments in *Elliniki Radiofonia Tileorasi* and *Society for the Protection of Unborn Children Ireland Ltd* and Advocate General Jacob's opinion in *Christos Konstantinidis*; indeed, in the case *Society for the Protection of Unborn Children Ireland Ltd*¹, Advocate General Van Gerven put forward the proposition that "a national rule which in order to show that it is compatible with [Union] law has to rely on legal concepts, such as imperative requirements of public interest or public policy ... falls 'within the scope' of [Union] law" on the ground that, although the Member States have some discretion in defining the public interest or public policy concepts, the scope of those concepts in the case of measures falling within the scope of Union law is nevertheless subject to Union control and they have to be "justified and delimited in a uniform manner for the whole [Union] under [Union] law and therefore taking into account the general principles in regard to fundamental rights and freedoms";
- K. whereas, nevertheless, it would not be appropriate to adopt rules of private international law for the determination of the applicable law which are skewed in one way or another to protect one right above another or designed to restrict the reach of the law of a particular Member State, particularly given the existence of the public policy/*ordre public* clause in Article 26 of the Rome II Regulation; whereas it is therefore especially important to retain the public policy control in the Brussels I Regulation;
- L. whereas it is considered that a provision of the type set out in the annex coupling the basic principle that the law of the place where the damage occurs is paramount with a foreseeability clause to take the legitimate interests of publishers into account ought to be put forward by the Commission in order to fill the gap in the Rome II Regulation; whereas the criterion of the closest connection should be used for the right of reply, since such relief should be granted swiftly and is interim in nature; whereas the provision should also cater for party autonomy and the option of electing to apply the *lex fori* where the claimant elects to sue in the publisher's courts for damage sustained in more than one Member State;
- M. whereas it is further considered that, in order to promote the public goods of reducing litigation, promoting access to justice, ensuring the proper functioning of the internal market and securing an appropriate balance between freedom of expression and the right to a private life, the Commission should carry out extensive consultations with interested parties, including journalists, the media and specialist lawyers and judges, with a view to proposing the creation of a centre for the voluntary settlement of cross-border disputes arising out of violations of privacy and rights relating to personality, including defamation, by way of alternative dispute resolution (ADR); whereas this would be a much more progressive and 21st-century approach to the resolution of such disputes and

¹ Paragraph 31.

facilitate a move towards a more modern mediation-friendly justice culture;

- N. whereas Member States could encourage and promote the use of a future ADR centre, also by allowing non-use of the centre to be taken into account in orders for costs;
- O. whereas the centre could ultimately be self-financing;
1. Requests the Commission to submit, on the basis of point (c) of Article 81(2) of the Treaty on the Functioning of the European Union, a proposal designed to add to the Rome II Regulation a provision to govern the law applicable to a non-contractual obligation arising out of violations of privacy and rights relating to personality, including defamation, following the detailed recommendations set out in the annex hereto;
 2. Further requests the Commission to submit, on the basis of point (d) of Article 81(2) of the Treaty on the Functioning of the European Union, a proposal for the creation of a centre for the voluntary settlement of cross-border disputes arising out of violations of privacy and rights relating to personality, including defamation, by way of alternative dispute resolution;
 3. Confirms that the recommendations respect fundamental rights and the principle of subsidiarity;
 4. Considers that the requested proposal does not have financial implications;
 5. Instructs its President to forward this resolution and the accompanying detailed recommendations to the Commission and the Council.

ANNEX TO THE MOTION FOR A RESOLUTION: DETAILED RECOMMENDATIONS AS TO THE CONTENT OF THE PROPOSAL REQUESTED

The European Parliament considers that the following Article 5a ought to be added to Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II):

Article 5a – Privacy and rights relating to personality

(1) Without prejudice to Article 4(2) and (3), the law applicable to a non-contractual obligation arising out of violations of privacy and rights relating to personality, including defamation, shall be the law of the country in which the rights of the person seeking compensation for damage are, or are likely to be, directly and substantially affected. However, the law applicable 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 have foreseen substantial consequences of his or her act occurring in the country designated by the first sentence.

(2) When the rights of the person seeking compensation for damage are, or are likely to be, affected in more than one country, and that person sues in the court of the domicile of the defendant, the claimant may instead choose to base his or her claim on the law of the court seised.

(3) The law applicable to the right of reply or equivalent measures shall be the law of the country in which the broadcaster or publisher has its habitual residence.

(4) The law applicable under this Article may be derogated from by an agreement pursuant to Article 14.