

# EUROPEAN PARLIAMENT

2004



2009

---

*Committee on Legal Affairs*

PROVISIONAL  
**2003/0168(COD)**

11.11.2004

**\*\*\*I**

## **DRAFT REPORT**

on the proposal for a regulation of the European Parliament and of the Council  
on the law applicable to non-contractual obligations ("Rome II")  
(COM(2003)0427 – C5-0338/2003 – 2003/0168(COD))

Committee on Legal Affairs

Rapporteur: Diana Wallis

### ***Symbols for procedures***

- \* Consultation procedure  
*majority of the votes cast*
- \*\*I Cooperation procedure (first reading)  
*majority of the votes cast*
- \*\*II Cooperation procedure (second reading)  
*majority of the votes cast, to approve the common position  
majority of Parliament's component Members, to reject or amend  
the common position*
- \*\*\* Assent procedure  
*majority of Parliament's component Members except in cases  
covered by Articles 105, 107, 161 and 300 of the EC Treaty and  
Article 7 of the EU Treaty*
- \*\*\*I Codecision procedure (first reading)  
*majority of the votes cast*
- \*\*\*II Codecision procedure (second reading)  
*majority of the votes cast, to approve the common position  
majority of Parliament's component Members, to reject or amend  
the common position*
- \*\*\*III Codecision procedure (third reading)  
*majority of the votes cast, to approve the joint text*

(The type of procedure depends on the legal basis proposed by the Commission)

### ***Amendments to a legislative text***

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

## CONTENTS

	<b>Page</b>
DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION.....	5
EXPLANATORY STATEMENT.....	29
OPINION OF THE COMMITTEE ON CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS.....	
OPINION OF THE COMMITTEE ON .....	



## DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II")  
(COM(2003)0427 – C5-0338/2003 – 2003/0168(COD))

(Codecision procedure: first reading)

*The European Parliament,*

- having regard to the Commission proposal to the European Parliament and the Council (COM(2003)0427)<sup>1</sup>,
  - having regard to Articles 251(2) and 61(c) of the EC Treaty, pursuant to which the Commission submitted the proposal to Parliament (C5-0338/2003),
  - having regard to Rule 51 of its Rules of Procedure,
  - having regard to the report of the Committee on Legal Affairs and the opinions of the Committee on Civil Liberties, Justice and Home Affairs and the Committee on ... (A6-0000/2004),
1. Approves the Commission proposal as amended;
  2. Calls on the Commission to refer the matter to Parliament again if it intends to amend the proposal substantially or replace it with another text;
  3. Instructs its President to forward its position to the Council and Commission.

Text proposed by the Commission

Amendments by Parliament

### Amendment 1 Recital 5

(5) The scope of *the* Regulation must be determined in such a way as to be consistent with Regulation (EC) No 44/2001 and the *Rome Convention of 1980*.

(5) The scope *and provisions of this* Regulation must be determined in such a way as to be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and *Regulation (EC) No ... on the law applicable to contractual obligations ("Rome I")*.

<sup>1</sup> OJ C ... / Not yet published in OJ.

### *Justification*

*It is self-evident that the Regulation should be consistent not only with the 1980 Rome Convention, which will continue in being owing to the fact that Denmark is not participating in the adoption of the Regulation, but also with the new regulation which will emerge from the Rome I project.*

#### Amendment 2 Recital 5 a (new)

***(5a) The concern for consistency in Community law requires that this Regulation be without prejudice to provisions relating to or having an effect on the applicable law, contained in instruments of secondary legislation other than this Regulation, such as conflict rules in specific matters, overriding mandatory rules of Community origin, and the specific principles of the internal market. As a result, this Regulation should promote the proper functioning of the internal market, in particular the free movement of goods and services.***

### *Justification*

*This amendment, which is based on the wording of the Commission's recital 19, should be read together with the amendment to Article 1 (Material scope, which should read "substantive scope"). It is essential that the rules of this Regulation should not hamper the proper functioning of the Internal Market.*

#### Amendment 3 Recital 7

***(7) The principle of the lex loci delicti commissi is the basic solution for non-contractual obligations in virtually all the Member States, but the practical application of the principle where the component factors of the case are spread over several countries is handled differently. This situation engenders***

***(7) It is necessary to have conflict rules which are as uniform as possible throughout the Member States in order to minimise uncertainty in the law. But the need for legal certainty must always be subordinate to the overriding need to do justice in individual cases and consequently the courts must be able to***

*uncertainty in the law.*

*exercise discretion.*

*Justification*

*Whereas to select the lex loci delicti commissi as the basic solution is superficially attractive, more flexibility needs to be built into the rules so as to allow the courts to do justice in individual cases.*

Amendment 4

Recital 8

**(8) *The uniform rule must*** serve to improve the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage. ***A connection with the country where the direct damage occurred (lex loci delicti commissi) strikes a fair balance between the interests of the person causing the damage and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability.***

**(8) *This Regulation should*** serve to improve the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage.

*Justification*

*See the justification to the amendment to recital 7. Moreover, it is uncertain what the "modern approach to civil liability" is. Also it is not felt that the reference to systems of strict liability is necessary.*

Amendment 5

Recital 9

**(9) *Specific rules should be laid down for special torts/delicts where the general rule does not allow a reasonable balance to be struck between the interests at stake.***

*deleted*

*Justification*

*This recital is unnecessary in view of the new approach adopted herein.*

Amendment 6  
Recital 9 a (new)

***(9a) In considering the question of the applicable law, it is also necessary to have regard to the need to ensure a high level of consumer protection.***

Amendment 7  
Recital 10

***(10) Regarding product liability, the conflict rule must meet the objectives of fairly spreading the risks inherent in a modern high-technology society, protecting consumers' health, stimulating innovation, securing undistorted competition and facilitating trade. Connection to the law of the place where the person sustaining the damage has his habitual residence, together with a foreseeability clause, is a balanced solution in regard to these objectives.*** ***deleted***

*Justification*

*It is considered that the general rules can cater perfectly well for product liability cases.*

Amendment 8  
Recital 11

***(11) In matters of unfair competition, the conflict rule must protect competitors, consumers and the general public and ensure that the market economy functions properly. The connection to the law of the relevant market generally satisfies these objectives, though in specific*** ***deleted***



***circumstances other rules might be appropriate.***

*Justification*

*It is considered that the general rules can cater perfectly well for cases involving unfair competition. Moreover, it is uncertain what exactly is intended to be covered by "matters of unfair competition". In the event that it should be regarded as imperative to have a special rule for "matters of unfair competition", a definition clause should be included.*

Amendment 9  
Recital 12

***(12) In view of the Charter of Fundamental Rights of the European Union and the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, the conflict must strike a reasonable balance as regards violations of privacy and rights in the personality. Respect for the fundamental principles that apply in the Member States as regards freedom of the press must be secured by a specific safeguard clause.***

***(12) A specific rule is needed for violations of privacy and rights relating to the personality owing in particular to the role played by the media in society and in order to take account of the case-law of the Court of Justice of the European Communities<sup>1</sup>. In particular, a manifestly closer connection with a particular country may be deemed to exist, having regard to factors such as the country to which a publication or broadcast is principally directed or the language of the publication or broadcast or sales or audience size in a given country as a proportion of total sales or audience size. Similar considerations should apply in respect of Internet publication.***

***<sup>1</sup> Case C-68/93 Fiona Shevill and Others [1995] ECR I-415.***

*Justification*

*See the justification to the amendment to Article 6.*

Amendment 10  
Recital 13

***(13) Regarding violations of the environment, Article 174 of the Treaty,***

***deleted***

***which provides that there must a high level of protection based on the precautionary principle and the principle that preventive action must be taken, the principle of priority for corrective action at source and the principle that the polluter pays, fully justifies the use of the principle of discriminating in favour of the person sustaining the damage.***

#### *Justification*

*It is considered that the general rules can cater perfectly well for violations of the environment. Moreover, it is uncertain what is meant by "violations of the environment" and this Regulation should be concerned solely with what the applicable law should be, not with the substantive law on environmental liability. In the event that it should be regarded as imperative to have a special rule for "violations of the environment", a definition clause should be included.*

#### Amendment 11 Recital 14

(14) Regarding ***violations*** of intellectual property rights, the universally acknowledged principle of the *lex loci protectionis* should be preserved. For the purposes of the present Regulation, the term intellectual property rights ***means*** copyright, related rights, sui generis right for the protection of databases and industrial property rights.

(14) Regarding ***infringements*** of intellectual property rights, the universally acknowledged principle of the *lex loci protectionis* should be preserved. ***In the case of infringements committed over the Internet or as a result of satellite broadcasts, the applicable law should be that of the country of reception.*** For the purposes of the present Regulation, the ***expression*** intellectual property rights ***should be understood as meaning*** copyright ***and*** related rights, ***the*** sui generis right for the protection of databases and industrial property rights.

#### *Justification*

*Seeks to clarify the purport of the expression *lex loci protectionis* in the case of infringements committed over the Internet or by satellite broadcasters and to improve the terminology of the English version.*

Amendment 12

Recital 15

(15) **Similar** rules should be provided for **where damage is caused by an act other than a tort or delict, such as** unjust enrichment **and** agency without authority.

(15) **Special** rules should be provided for **liability arising out of** unjust enrichment **or** agency without authority.

*Justification*

*Special rules should be laid down for non-contractual liability arising out of unjust enrichment or agency without authority.*

Amendment 13

Recital 19

**(19) The concern for consistency in Community law requires that this Regulation be without prejudice to provisions relating to or having an effect on the applicable law, contained in the treaties or instruments of secondary legislation other than this Regulation, such as the conflict rules in specific matters, overriding mandatory rules of Community origin, the Community public policy exception and the specific principles of the internal market. Furthermore, this regulation is not intended to create, nor shall its application lead to obstacles to the proper functioning of the internal market, in particular free movement of goods and services.**

**deleted**

*Justification*

*This recital has been amended and renumbered recital 5a.*

Amendment 14

Article 1, paragraph 2, points (d) and (e)

(d) the personal legal liability of officers

(d) the personal legal liability of officers

and members as such for the debts of a company or firm or other body corporate or incorporate, and the personal legal liability of persons responsible for carrying out the statutory audits of accounting documents;

(e) non-contractual obligations among the *settlers*, trustees and beneficiaries of a trust;

and members as such for the debts of a company or firm or other body corporate or incorporate, and the personal legal liability of persons responsible for carrying out the statutory audits of accounting documents ***vis-à-vis the company audited and its members***;

(e) non-contractual obligations among the *settlers*, trustees and beneficiaries of a trust ***created voluntarily***;

#### *Justification*

*The first limb of this amendment reflects the concern that two different conflicts regimes might apply, say, where a potential purchaser of a company brings claims against the vendor's financial advisers and the company's auditors.*

*The second limb relating to trusts is designed to ensure greater consistency with the 1985 Hague Convention on recognition of trusts and to avoid difficulty or confusion arising from the employment of the trust in common-law jurisdictions as a device for dealing with situations such as unjust enrichment.*

#### Amendment 15

##### Article 1, paragraph 2 a (new)

***2a. This Regulation shall not prejudice the application or adoption of acts of the institutions of the European Communities which:***

***(a) in relation to particular matters, lay down choice-of-law rules relating to non-contractual obligations; or***

***(b) lay down rules which apply irrespective of the national law governing the non-contractual obligation in question by virtue of this Regulation; or***

***(c) prevent application of a provision or provisions of the law of the forum or of the law designated by this Regulation; or***

***(d) lay down provisions designed to contribute to the proper functioning of the internal market in so far as they cannot be applied in conjunction with the rules of private international law.***

*Justification*

*It is better to deal with the substantive scope of the Regulation in a single article, clearly delimiting where Community law displaces the rules of private international law. The new indent (d) is intended to cover existing Internal Market instruments such as the television without frontiers and the e-commerce directives.*

Amendment 16  
Section 1, Title

RULES APPLICABLE TO NON-  
CONTRACTUAL OBLIGATIONS  
ARISING OUT OF A TORT OR DELICT

**GENERAL** RULES APPLICABLE TO  
NON-CONTRACTUAL OBLIGATIONS  
ARISING OUT OF A TORT OR DELICT

Amendment 17  
Chapter II, Section I, Article 2 a (new)

**Article 2a**

***Freedom of choice***

***1. The parties may agree, by an agreement entered into after their dispute arose or, where there is a pre-existing arms-length commercial relationship, by an agreement entered into before the dispute arose, to submit non-contractual obligations to the law of their choice. The choice must be expressed or demonstrated with reasonable certainty by the circumstances of the case. It may not affect the rights of third parties and shall be without prejudice to the application of mandatory rules within the meaning of Article 12.***

***2. If all the other elements of the situation at the time when the loss or damage is sustained are located in one or more of the Member States of the European Community, the parties' choice of the applicable law shall not debar the application of provisions of Community law.***

## *Justification*

*It seems more logical to move the former Article 10 to the beginning of the Regulation, since it is clear that if the parties have reached an agreement between them as to the applicable law, account should be taken of the parties' intention before applying exogenous rules in order to determine the applicable law.*

*In addition, there seems to be no reason why parties in an arms-length commercial relationship should not be able to agree on the law applicable to any claim in tort before any such claim arises. There also seems to be no reason why such agreements cannot be concluded in relation to intellectual property.*

## Amendment 18

### Article 3

1. ***The law applicable to a non-contractual obligation shall be the law of the country in which **the damage arises or is likely to arise, 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 arise.*****

2. ***However***, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country when the damage occurs, the non-contractual obligation shall be governed by the law of that country.

1. ***Unless otherwise provided for in this Regulation***, the law applicable to a non-contractual obligation ***arising out of a tort or a delict*** shall be the law of the country with which the ***non-contractual obligation is most closely connected.***

2. ***In order to determine the applicable law in a particular case, the following presumptions shall be applied, individually or severally:***

***(a)*** where the person claimed to be liable and the person sustaining ***loss or*** damage both have their habitual residence in the same country when the damage occurs, the non-contractual obligation shall be governed by the law of that country;

***(b)*** ***subject to Article 13, where the harmful event results in a claim for damages for personal injuries, the non-contractual obligation shall be governed by the law of the victim's country of residence;***

***(c)*** ***where appropriate, the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur shall be applicable, irrespective of the country in***

*which the event giving rise to the damage occurred;*

*(d) a manifestly closer connection with another country may be based in particular on a pre-existing relationship between the parties, such as a contract that is closely connected with the non-contractual obligation in question.*

3. Notwithstanding *paragraphs 1 and 2*, where it is clear from all the circumstances of the case that the non-contractual obligation is manifestly more closely connected with another country, the law of that other country shall apply. *A manifestly closer connection with another country may be based in particular on a pre-existing relationship between the parties, such as a contract that is closely connected with the non-contractual obligation in question.*

3. Notwithstanding *paragraph 2*, where it is clear from all the circumstances of the case that the non-contractual obligation is manifestly more closely connected with another country, the law of that other country shall apply. *In particular, in the case of a claim based on a non-contractual obligation arising out of damage caused by a defective product, regard may be had in determining the applicable law to the country or countries in which a product in respect of which a claim for non-contractual liability arises was intended to be marketed or to which it was specifically directed.*

#### *Justification*

*For the sake of clarity, the rapporteur has opted for a single principle and a set of presumptions designed to assist the courts in determining the applicable law. This approach is designed to allow the courts to use their discretion in choosing the solution which best accords with the need to do justice to the victim and with the reasonable expectations of the parties, whilst minimising the risk of forum shopping. It is also intended to allow for dépeçage.*

*The reasoning behind presumption (a) is clear: where the victim and the tortfeasor are resident in the same country, justice will most probably be best served by applying the law of that country. Presumption (b) is calculated to cater for traffic accidents; for instance, where a victim is injured so badly that he or she will require intensive care for the rest of his or her life, it would plainly be equitable to award damages on the scale of his or her country of residence and not on the scale of the country in which the accident occurred. This would also avoid injustice being done in the event, say, of an accident occurring on board a vessel flying a flag of convenience where crew members may not have any connection with the flag State. Presumption (c) provides for the *lex loci delicti commissi*, which was the Commission's preferred option. Presumption (d) may be useful where the victim and the tortfeasor have a pre-existing relationship and might reasonably presume that the law applicable to that relationship should apply to any tortious act or omission arising in the course of that relationship. Paragraph 3 covers residual cases and also seeks to deal with cases involving defective products where the product in question was not intended to be marketed in the country in which the harmful event occurred.*

Amendment 19  
Article 4

*Article 4*

*deleted*

*Product liability*

*Without prejudice to Article 3(2) and (3), the law applicable to a non-contractual obligation arising out of damage or a risk of damage caused by a defective product shall be that of the country in which the person sustaining the damage is habitually resident, unless the person claimed to be liable can show that the product was marketed in that country without his consent, in which case the applicable law shall be that of the country in which the person claimed to be liable is habitually resident.*

*Justification*

*It is considered that liability for defective products can be dealt with under Article 3, as amended.*

Amendment 20  
Section 1A, Title (new)

**SECTION 1A**

**SPECIAL RULES APPLICABLE TO  
SPECIFIC TORTS/DELICTS AND  
NON-CONTRACTUAL OBLIGATIONS**

Amendment 21  
Article 5

*Article 5*

*deleted*

*Unfair competition*



**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 directly and substantially affected.**

**2. Where an act of unfair competition affects exclusively the interests of a specific competitor, Article 3(2) and (3) shall apply.**

#### *Justification*

*It is considered that unfair competition can be dealt with under Article 3, as amended. Moreover, in the absence of clarity as to what is covered by "acts of unfair competition", the rapporteur considers that this provision is best omitted. If, ultimately, it is decided that "acts of unfair competition" should be expressly catered for in this Regulation, the rapporteur considers that such acts should be defined in a definition clause.*

#### Amendment 22 Article 6

1. The law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality **shall be the law of the forum where the application of the law designated by Article 3 would be contrary to the fundamental principles of the forum as regards freedom of expression and information.**

2. 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.

**1. As regards** the law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality, **the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur shall be applicable, but a manifestly closer connection with a particular country may be deemed to exist having regard to factors such as the country to which a publication or broadcast is principally directed or the language of the publication or broadcast or sales or audience size in a given country as a proportion of total sales or audience size or a combination of these factors. This provision shall apply mutatis mutandis to Internet publication.**

2. The law applicable to the right of reply or equivalent measures **and to any preventive measures or prohibitory injunctions against a publisher or broadcaster regarding the content of a publication or broadcast** shall be the law

of the country in which the ***publisher or*** broadcaster has its habitual residence.

*Justification*

*The amended version of Article 6 is consistent with the judgment in Case C-68/93 Fiona Shevill and Others [1995] ECR I-415. This rule has been formulated to cover situations in which a manifestly closer connection may be considered to exist with the country of the principal place of publication or broadcasting. This will make for more legal certainty for publishers and broadcasters and result in a straightforward rule applying to all publications, even those carried out on the Internet.*

*The amendment to the second paragraph relating to injunctive relief is more realistic, given that such relief has to be sought and granted swiftly and is interim in nature.*

Amendment 23  
Article 6a (new)

***Article 6a***

***Industrial action***

***The law applicable to a non-contractual obligation arising out of industrial action, pending or carried out, shall be the law of the country in which the action is to be taken or has been taken.***

Amendment 24  
Article 7

***Article 7***

***deleted***

***Violation of the environment***

***The law applicable to a non-contractual obligation arising out of a violation of the environment shall be the law determined by the application of Article 3(1), unless the person sustaining damage prefers to base his claim on the law of the country in which the event giving rise to the damage occurred.***

*Justification*

*It is considered that violations of the environment can be dealt with under Article 3, as amended. Moreover, in the absence of any definition of what is meant by "violations of the environment", the rapporteur prefers to make no express mention of such.*

Amendment 25  
Section 2, Title,

**SECTION 2** *deleted*

**RULES APPLICABLE TO NON-  
CONTRACTUAL OBLIGATIONS  
ARISING OUT OF AN ACT OTHER  
THAN A TORT OR A DELICT**

*Justification*

*This title is now redundant.*

Amendment 26  
Article 9

**Article 9** *deleted*

***Determination of the applicable law***

- 1. If a non-contractual obligation arising out of an act other than a tort or delict concerns a relationship previously existing between the parties, such as a contract closely connected with the non-contractual obligation, it shall be governed by the law that governs that relationship.***
- 2. Without prejudice to paragraph 1, where the parties have their habitual residence in the same country when the event giving rise to the damage occurs, the law applicable to the non-contractual obligation shall be the law of that country.***
- 3. Without prejudice to paragraphs 1 and 2, a non-contractual obligation arising out of unjust enrichment shall be governed by the law of the country in which the enrichment takes place.***
- 4. Without prejudice to paragraphs 1 and 2, the law applicable to a non-contractual obligation arising out of actions performed without due authority in connection with the affairs of another***

*person shall be the law of the country in which the beneficiary has his habitual residence at the time of the unauthorised action. However, where a non-contractual obligation arising out of actions performed without due authority in connection with the affairs of another person relates to the physical protection of a person or of specific tangible property, the law applicable shall be the law of the country in which the beneficiary or property was situated at the time of the unauthorised action.*

*5. Notwithstanding paragraphs 1, 2, 3 and 4, where it is clear from all the circumstances of the case that the non-contractual obligation is manifestly more closely connected with another country, the law of that other country shall apply.*

*6. Notwithstanding the present Article, all non-contractual obligations in the field of intellectual property shall be governed by Article 8.*

*Justification*

*Replaced by Articles 9a and 9b.*

Amendment 27  
Article 9 a (new)

#### *Article 9a*

##### *Unjust enrichment*

*1. If a non-contractual obligation arising out of unjust enrichment concerns a relationship previously existing between the parties, such as a contract 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 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 and 2, the applicable law shall be the law of the country in which the events giving rise to unjust enrichment substantially occurred, irrespective of the country in which the enrichment occurred.***

***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 a country other than the one indicated by paragraphs 1, 2 or 3, the law of that other country shall apply.***

#### *Justification*

*These rules closely accord with the general rules for torts/delicts. In addition, the rapporteur disagrees with the Commission's original idea that the law applicable in cases of unjust enrichment should be the law of the country in which enrichment takes place. The place where enrichment takes place may be entirely fortuitous (e.g. dependent upon where a fraudster chooses to open the bank account to which monies are fraudulently paid over).*

Amendment 28  
Article 9 b (new)

#### ***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 previously existing between the parties, such as a contract 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 have their habitual residence in the same country when the event giving rise to the loss or 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 and 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 a country other than the one indicated by paragraphs 1, 2 or 3, the law of that other country shall apply.*

#### *Justification*

*These rules closely accord with the general rules for torts/delicts.*

#### Amendment 29 Article 10

##### *Article 10*

*deleted*

##### *Freedom of choice*

*1. The parties may agree, by an agreement entered into after their dispute arose, to submit non-contractual obligations other than the obligations to which Article 8 applies to the law of their choice. The choice must be expressed or demonstrated with reasonable certainty by the circumstances of the case. It may not affect the rights of third parties.*

*2. If all the other elements of the situation at the time when the loss is sustained 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 rules of the law of that country which cannot be derogated from by contract.*

*3. The parties' choice of the applicable law shall not debar the application of provisions of Community law where the*

***other elements of the situation were located in one of the Member States of the European Community at the time when the loss was sustained.***

*Justification*

*Covered by the new Article 2a.*

Amendment 30  
Article 11, point a)

a) the ***conditions*** and extent of liability, including the determination of persons ***who are liable for acts performed by them;***

a) the ***basis*** and extent of liability, including the determination of persons ***whose acts give rise to liability;***

*Justification*

*Corrects the English version to bring it into line with the other language versions and aligns the wording with existing private international law conventions.*

Amendment 31  
Article 12

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

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

***1. Nothing in this Regulation shall restrict the application of the rules 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 specific country is applicable by virtue of this Regulation, effect may be given to the mandatory rules of another country with which the situation is closely connected, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the non-contractual obligation. In considering whether to give***

***effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.***

*Justification*

*The new order of the paragraphs seems more logical. The English text has been corrected to align it with the other language versions.*

Amendment 32  
Article 14

The right of persons who have suffered damage to take direct action against the insurer of the person claimed to be liable shall be governed by the law applicable to the non-contractual obligation unless the person who has suffered damage prefers to base his claims on the law applicable to the insurance contract.

The right of persons who have suffered damage to take direct action against the insurer of the person claimed to be liable shall be governed by the law applicable to the non-contractual obligation unless the person who has suffered damage prefers to base his claims on the law applicable to the insurance contract ***in so far as this possibility exists under one of those laws.***

*Justification*

*Clarification requested by the insurance industry.*

Amendment 33  
Article 17, paragraph 3 (new)

***3. Notwithstanding paragraphs 1 and 2, the rules of this Regulation shall not apply to evidence and procedure.***

*Justification*

*This amendment corresponds to Article 1(2)(h) of the Rome Convention on the law applicable to contractual obligations.*

Amendment 34  
Article 22

The application of a rule of the law of any country specified by this Regulation may

***1.*** The application of a rule of the law of any country specified by this Regulation



be refused only if such application is manifestly incompatible with the public policy ("*ordre public*") of the forum.

may be refused only if such application is manifestly incompatible with the public policy ("*ordre public*") of the forum.

***1a. In particular, the application of a rule of law of any country specified by this Regulation may be refused and/or the law of the forum applied if such application would be in breach of fundamental rights and freedoms as enshrined in the European Convention on Human Rights, national constitutional provisions and international humanitarian law.***

***1b. Furthermore, the application of a provision of the law designated by this Regulation which has the effect of causing non-compensatory damages, such as exemplary or punitive damages, to be awarded may be regarded as being contrary to the public policy ("*ordre public*") of the forum.***

#### *Justification*

*The new second paragraph is intended as a clarification of the meaning of public policy at Community level.*

*The new third paragraph has been added as it is thought beyond the scope of this Regulation to introduce a new concept of "Community public policy" and remove the possibility of awarding exemplary or punitive damages as the Commission proposed in Article 24. The rapporteur is conscious that the existence of such damages may act as an incentive for forum shopping and therefore has included in the new review clause a commitment on the part of the Commission to examine the whole question of damages in this context when it reviews the implementation of the Regulation.*

#### Amendment 35 Article 23

##### ***Article 23***

***deleted***

##### ***Relationship with other provisions of Community law***

***1. This Regulation shall not prejudice the application of provisions contained in the Treaties establishing the European Communities or in 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; or*

*– lay down rules which apply irrespective of the national law governing the non-contractual obligation in question by virtue of this Regulation; or*

*– prevent application of a provision or provisions of the law of the forum or of the law designated by this Regulation.*

*2. This regulation shall not prejudice the application of Community instruments which, in relation to particular matters and in areas coordinated by such instruments, subject the supply of services or goods to the laws of the Member State where the service-provider is established and, in the area coordinated, allow restrictions on freedom to provide services or goods originating in another Member State only in limited circumstances.*

*Justification*

*Corresponding provisions have been inserted into Article 1, paragraph 2a.*

Amendment 36  
Article 24

*Article 24*

*deleted*

*Non-compensatory damages*

*The application of a provision of the law designated by this Regulation which has the effect of causing non-compensatory damages, such as exemplary or punitive damages, to be awarded shall be contrary to Community public policy.*

*Justification*

*Whilst the rapporteur has sympathy with this provision, she has preferred to add an amended version to Article 22.*

Amendment 37  
Article 25

This regulation shall not prejudice the application of internal conventions to which the Member States are parties when this Regulation is adopted and which, in relation to particular matters, lay down conflict of law rules relating to non-contractual obligations.

*1. This regulation shall not prejudice the application of internal conventions to which the Member States are parties when this Regulation is adopted and which, in relation to particular matters, lay down conflict of law rules relating to non-contractual obligations.*

*1a. However, where all the elements relevant to the situation at the time when the damage occurs are located in one or more Member States of the European Community, the rules of this Regulation shall prevail over the rules of the Hague Convention of 4 May 1971 on the law applicable to traffic accidents and the Hague Convention of 2 October 1973 on the law applicable to products liability.*

*1b. The rules of this Regulation shall also prevail over the rules of international conventions concluded between two or more Member States unless those conventions are listed in Annex 1.*

*Justification*

*The Hague Conventions in question have not been ratified by all Member States and, furthermore, the Regulation caters for traffic accidents and for product liability cases. In view of criticism of the Hague Convention on traffic accidents, your rapporteur considers that the Commission should consider proposing Community legislation (see the proposed new Article 26a)*

Amendment 38  
Article 26 a (new)

**Article 26a**

**Review**

***Not later than ...\* , the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation and, if necessary, make further proposals to***

*adapt it.*

*In making its report, the Commission shall pay particular attention to the effects of the way in which foreign law is treated in the different jurisdictions and the question of damages, including the possibility of awarding exemplary or punitive damages in certain jurisdictions.*

*It shall also consider whether Community legislation specifically dealing with the law applicable to traffic accidents ought to be proposed.*

*The report shall include an analytical study of the extent to which courts in the Member States apply foreign law in practice, including recommendations as to the desirability of a common approach to the application of foreign law*

*\* Three years after the date of adoption of this Regulation.*

#### *Justification*

*The rapporteur considers that such a review is clause is both desirable and necessary.*

## EXPLANATORY STATEMENT

The amendments presented to the proposal for a regulation are intended to simplify the original proposal by introducing the concept of general rules for determining the law applicable to torts/delicts. The rapporteur suggests that the best approach is first to consider whether the parties have agreed on what the applicable law should be (Article 2a). Indeed, she can see no reason why parties should not be able to agree to submit non-contractual obligations to the law of their choice before, and not only after, the dispute arises, where the parties are in a pre-existing arms-length commercial relationship. She has also made it possible for such agreements to be made in respect of disputes relating to intellectual property rights.

Otherwise the courts should apply the principle set out in Article 3(1). In order to assist them in making their determination, Article 3(2) sets out a series of presumptions which may be applied individually or severally (in order to allow for *dépeçage*). The reasoning behind the presumptions is that (a) where the victim and the tortfeasor are resident in the same country, justice will most probably be best served by applying the law of that country and (b) in the case of personal injury cases (traffic accidents, for instance), it would plainly be equitable to award damages on the scale of the victim's country of residence and not on the scale of the country in which the accident occurred. Presumption (c) then provides for the *lex loci delicti commissi*, which was the Commission's preferred option. Presumption (d) may be useful where the victim and the tortfeasor have a pre-existing relationship and might reasonably presume that the law applicable to that relationship should apply to any tortious act or omission arising in the course of that relationship. Article 3(3) covers residual cases and also seeks to deal with cases involving defective products where the product in question was not intended to be marketed in the country in which the harmful event occurred.

The complexity of many cases is such that a flexible regime is more appropriate than rigid rules for each class of non-contractual obligation. Small factual differences in cases can substantially alter the parties' expectations and the policy considerations at stake. Your rapporteur has nonetheless provided for special rules for defamation and torts arising out of industrial disputes, while deleting the special provisions on defective products, unfair competition and violations of the environment.

As far as violations of privacy and rights relating to the personality are concerned, the rapporteur takes the view that the *lex loci delicti commissi* should in principle apply, but that the court should be able to consider that a manifestly closer connection exists with the country of publication or broadcasting having regard to sales per Member State, audience figures and so on. In line with the Brussels I Regulation on the recognition and enforcement of judgments, the court may also take account of the audience to which the publication or broadcast is principally directed. Given that Internet publications are also covered, it will be possible to avoid a situation in which different rules apply to the same publication, depending on whether it is made off- or on-line. Your rapporteur considers that this should conduce to greater legal certainty.

As far as other non-contractual obligations are concerned, your rapporteur has chosen to deal with unjust enrichment and agency without authority in two separate articles for the sake of

simplicity.

The rapporteur is conscious that her approach diverges from that of traditional international conventions in the field of private international law, but would point out that the instrument in preparation is a piece of Community legislation and hence has to satisfy different requirements. In contrast to previous instruments where the Community has taken over an existing international convention on private law, in this instance there was no previous convention, which provides a unique opportunity to legislate in a specifically Community context. In particular, your rapporteur has taken pains to ensure that the regulation can co-exist with Internal Market legislation and promote, rather than hamper, the proper functioning of the Internal Market. Particular consideration has been given to the Regulation's relationship with the television without frontiers and the e-commerce directives. Your rapporteur has been anxious to suggest a principled holistic approach which should avoid the necessity for confusing carve-outs and special regimes, present or future, as these merely serve to make our legislation more complex to navigate and less transparent.

Attention has also been paid to public policy. Your rapporteur considers that it is important to make it clear that embryonic Community public policy exists, as reflected in the ECHR, the Charter of Fundamental Rights, national constitutional provisions and international humanitarian law. The reference to international humanitarian law has been added to avoid courts having to apply rules of law of a non-Community country which would be repugnant to European systems of values.

Your rapporteur has also made it clear that rules of evidence and procedure are outside the scope of this Regulation in accordance with the traditional rules of private international law.

Lastly, the *ordre public* provision has been expanded to cover exemplary and punitive damages, since your rapporteur considers that it is not legally possible in an instrument such as this to legislate to prohibit the award of such damages. She has, however, added a review clause mandating the Commission to examine, three years after the adoption of the Regulation, the question of damages and its impact in terms of forum shopping.

Given the dissatisfaction which has been voiced about the Hague Convention on traffic accidents, your rapporteur proposes to ask the Commission to consider proposing a Community instrument for this area. Pending this, traffic accidents should be able to be dealt satisfactorily under this Regulation.

Another key part of this review should be the issue of how national courts deal in practice with the application and use of foreign law; more evidence of this needs to be accumulated to ensure that there is equality of treatment with national law so as to encourage confidence in the use of foreign law in national courts and again discourage the perceived need for forum shopping.

Your rapporteur wishes to underline that this Regulation should be seen as both underpinning Member States' differing legal traditions in private law, which arise out of their individually unique historic cultural and social circumstances, but at the same time providing clear guidance at a Community level as to how those differing traditions should be recognised when conflicts arise by giving proper weight to the priorities of the overall Community legal order. The rapporteur would conclude by stating that this Regulation should assist in ensuring

that the Community principles of mutual recognition and trust between the courts of the Member States are upheld.