

# EUROPEAN PARLIAMENT

2004



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*Committee on Legal Affairs*

PROVISIONAL  
2003/0168(COD)

8.11.2006

**\*\*\*II**

## **DRAFT RECOMMENDATION FOR SECOND READING**

on the Council common position for adopting a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("ROME II")  
(9751/7/2006 – C6-0317/2006 – 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.

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## DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the Council common position for adopting a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("ROME II") (9751/7/2006 – C6-0317/2006 – 2003/0168(COD))

(Codecision procedure: second reading)

*The European Parliament,*

- having regard to the Council common position (9751/7/2006 – C6-0317/2006),
  - having regard to its position at first reading<sup>1</sup> on the Commission proposal to Parliament and the Council (COM(2003)0427)<sup>2</sup>,
  - having regard to the amended Commission proposal (COM(2006)0083),
  - having regard to Article 251(2) of the EC Treaty,
  - having regard to Rule 62 of its Rules of Procedure,
  - having regard to the recommendation for second reading of the Committee on Legal Affairs (A6-0000/2006),
1. Approves the common position as amended;
  2. Instructs its President to forward its position to the Council and the Commission.

Council common position

Amendments by Parliament

Amendment 1  
Recital 7

(7) The *material* scope and the provisions of this Regulation should 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 ("Brussels I") **and** the Rome Convention on the law applicable to contractual obligations.

(7) The *substantive* scope and the provisions of this Regulation should 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 ("Brussels I"), the Rome Convention on the law applicable to contractual obligations **and the future Regulation on the law applicable to contractual obligations ("Rome I")**.

<sup>1</sup> OJ C 157 E, 6.7.2006, p. 370.

<sup>2</sup> 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 and the United Kingdom has opted out, at least for the time being, from Rome I - but also with the new regulation in the course of adoption. This amendment corresponds to an amendment adopted in first reading.*

#### Amendment 2 Recital 7 a (new)

***(7a) 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 basic legal 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, adopted in first reading, which is based on the wording of Recital 19 in the Commission's original proposal, should be read together with the amendment to Article 27. It is essential that the rules of this Regulation should not hamper the proper functioning of the internal market.*

#### Amendment 3 Recital 10 a (new)

***(10a) The conflict-of-laws rules set out in this Regulation also cover obligations based on strict liability and the harmonised rules on connecting factors also apply to the question of the capacity to incur liability in tort/delict.***

### *Justification*

*In view in particular (but not only) of the obligations arising from traffic accidents based on the strict liability of the vehicle owner, it is important to make it plain that the conflict rules*

also cover strict liability. It is also worth making it clear that the harmonised rules on connecting factors apply to the question of the capacity to incur liability in tort/delict. This amendment was adopted in first reading.

Amendment 4  
Recital 12 a (new)

***(12a) Nevertheless, the need to avoid distortions of competition and the requirement of legal certainty must be tempered by the need to do justice in individual cases, and consequently the courts must have a margin of discretion.***

*Justification*

*Some flexibility needs to be built into the rules so as to allow the courts to do justice in individual cases. Courts already use the categorisation of issues as "procedural" in order to allow them a measure of discretion. It is better and more consistent with the need for legal certainty overtly to confer certain limited discretionary powers on the courts. This amendment is based on an amendment adopted in first reading.*

Amendment 5  
Recital 19

***(19) The special rule in Article 6 is not an exception to the general rule in Article 4(1) but rather a clarification of it. In matters of unfair competition, the conflict rule should protect competitors, consumers and the general public and ensure that the market economy functions properly. The connection to the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected generally satisfies these objectives.*** ***deleted***

*Justification*

*It is considered that the general rule can cater perfectly well for cases involving unfair competition. Moreover, in Recitals 20 and 21, the Council makes it clear that what it means by "Unfair competition and acts restricting competition" is infringements of national and Community competition law, in particular breaches of Articles 81 and 82 of the Treaty. However, in its revised proposal (COM(2006)83 final), the Commission took quite a different approach by laying down a rule for "non-contractual obligations arising out of an unfair commercial practice". It preferred to leave anti-competitive practices within the meaning of Articles 81 and 82 of the Treaty subject to the general rule on the ground of the ongoing*

*debate on the Green Paper on Damages actions for breach of the EC antitrust rules, as a result of which "the Commission may wish to support a different solution in the course of the codecision procedure". The Council's approach in the common position would detract from the Commission's right of initiative and pre-empt Parliament's deliberations on any future Commission legislative proposal relating specifically to competition law. It is noted that a corresponding amendment was adopted in first reading.*

Amendment 6  
Recital 20

***(20) The non-contractual obligations arising out of restrictions of competition in Article 6(3) should cover infringements of both national and Community competition law. The law applicable to such non-contractual obligations should be the law of the country on whose market the restriction has, or is likely to have, effect, provided that the effect is direct and substantial. Where the damage is sustained in more than one country, the application of the law of any of those countries should be limited to the damage which occurred in that country.*** *deleted*

*Justification*

*See the justification to the amendment to Recital 19.*

Amendment 7  
Recital 21

***(21) Examples of cases covered by Article 6(3) include prohibitions on agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within a Member State or within the internal market, as well as prohibitions on the abuse of a dominant position within a Member State or within the internal market.*** *deleted*

*Justification*

*See the justification to the amendment to Recital 19.*

Amendment 8  
Recital 22

***(22) Regarding environmental damage, deleted  
Article 174 of the Treaty, which provides  
that there should be a high level of  
protection based on the precautionary  
principle and the principle that preventive  
action should 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. The question of  
when the person seeking compensation  
can make the choice of the law applicable  
should be determined in accordance with  
the law of the Member State in which the  
court is seised.***

*Justification*

*It is considered that the general rule can cater perfectly well for environmental damage. Moreover, it is uncertain what is meant by "environmental damage" 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. This amendment corresponds to an amendment adopted in first reading.*

Amendment 9  
Recital 25 a (new)

***(25a) As regards violations of privacy or  
rights relating to the personality, this  
Regulation does not prevent Member  
States from applying their constitutional  
rules relating to freedom of the press and  
freedom of expression in the media. The  
country in which the most significant***

*element or elements of the damage occur or are likely to occur should be deemed to be the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised, and that country's law should be applicable. The country to which a publication or broadcast is directed should be determined in particular by the language of the publication or broadcast or by sales or audience size in a given country as a proportion of total sales or audience size or by a combination of those factors. Similar considerations should apply in respect of publication via the Internet or other electronic networks.*

#### *Justification*

*Whereas in the Commission, in its amended proposal, and the Council, in the common position, have abandoned the attempt to include rules on the law applicable to violations of privacy and rights relating to the personality, the rapporteur considers that this issue should not be shirked. She considers that Parliament's stance in first reading constitutes a sensible approach consistent with the judgment in Case C-68/93 Fiona Shevill and Others [1995] ECR I-415. The rule is 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.*

#### Amendment 10

##### Recital 28

(28) To respect the intentions of the parties and to enhance legal certainty, the parties should be allowed to make an express choice as to the law applicable to a non-contractual obligation. Protection should be given to weaker parties by imposing certain conditions on the choice.

(28) To respect the intentions of the parties and to enhance legal certainty, the parties should be allowed to make an express choice as to the law applicable to a non-contractual obligation. Protection should be given to weaker parties by imposing certain conditions on the choice.

***Furthermore, it is necessary to respect the intentions of the parties where a choice as to the law applicable to an issue in tort or delict may reasonably be inferred by the***

**court.**

*Justification*

*It is important to respect party autonomy also where a choice of law is inferred rather than express. This amendment corresponds to an amendment adopted in first reading.*

Amendment 11  
Recital 29 a (new)

***(29a) It is appropriate to make it clear that, in quantifying damages in personal injury cases, the court seised should apply the principle of restitutio in integrum having regard to the victim's actual circumstances in his country of habitual residence. This should include, in particular, the actual cost of after-care and medical attention.***

*Justification*

*Given that the Council has rejected Parliament's first-reading amendment seeking to have the victim's national law applied for the purposes of calculating the quantum of the claim in traffic accident cases, the rapporteur has drafted two new amendments (one to the preamble and one to the enacting terms) in which the same result is sought to be attained by different means. Given the criticism voiced about the original limitation to traffic accidents, the rapporteur has extended the provisions to cover personal injuries generally.*

*In the case of personal injuries, it is vital to take account of the circumstances in which the victim will find him or herself in his or her country of habitual residence: the actual cost of nursing and carers, medical aftercare and so on. This provision will assist in making free movement of persons within the internal market more attractive for citizens, while showing an awareness of citizens' concerns. It will also avoid placing an unfair burden on the social security and assistance schemes of the country of habitual residence of an accident victim.*

*This amendment is designed to facilitate reaching agreement with the Council.*

Amendment 12  
Recital 30 a (new)

***(30a) In the interests of ensuring that the issue of applicable law is properly***

*considered by the parties and the court, the parties should be under a duty to inform the court in the document originating proceedings and the defence of the law or laws which they maintain are applicable to all or any parts of the claim.*

*Justification*

*This simple requirement, introduced in a first-reading amendment, will ensure that the issue of applicable law is duly considered by both the parties and the court, thus helping to ensure legal certainty.*

Amendment 13  
Recital 31

(31) A situation where conflict-of-law rules are dispersed among several instruments and where there are differences between those rules should be avoided. This Regulation, however, does not exclude the possibility of inclusion of conflict-of-law rules relating to non-contractual obligations in provisions of Community law with regard to particular matters.

***This Regulation should not prejudice the application of other instruments laying down provisions designed to contribute to the proper functioning of the internal market insofar as they cannot be applied in conjunction with the law designated by the rules of this Regulation.***

(31) A situation where conflict-of-law rules are dispersed among several instruments and where there are differences between those rules should be avoided. This Regulation, however, does not exclude the possibility of inclusion of conflict-of-law rules relating to non-contractual obligations in provisions of Community law with regard to particular matters.

*Justification*

*See the new Recital 7a and the amendment to Article 27.*

Amendment 14  
Article 1, paragraph 2, point (g)

***(g) non-contractual obligations arising***

***deleted***

***out of violations of privacy and rights relating to personality, including defamation.***

*Justification*

*See the justification to the amendment introducing recital 25a.*

Amendment 15  
Article 1, paragraph 3

3. This Regulation shall not apply to evidence and procedure, without prejudice to Articles 21 and 22.

3. This Regulation shall not apply to evidence and procedure, without prejudice to Articles ***15a, 15b***, 21, ***21a*** and 22.

*Justification*

*To be read in connection with the amendments introducing Articles 15a, 15b and 21a and Recitals 29a and 30a.*

Amendment 16  
Article 4, paragraph 3 a (new)

***3a. In resolving the question of the applicable law, the court seised shall have regard to the need for certainty, predictability and uniformity of result, the protection of legitimate expectations and the policies underlying the foreign law to be applied and the consequences of applying that law.***

*Justification*

*This provision, introduced as part of a first-reading amendment, is designed to give courts a margin of 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.*

Amendment 17

*Article 6*

*deleted*

***Unfair competition and acts restricting  
free 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, affected.***

***2. Where an act of unfair competition affects exclusively the interests of a specific competitor, Article 4 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.***

***4. The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14.***

*Justification*

*See the justification to the amendment to Recital 19.*

Amendment 18

Article 7

*Article 7*

*deleted*

***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 pursuant to Article 4(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.***

*Justification*

*See the justification to the amendment to Recital 22.*

Amendment 19  
Article 7 a (new)

*Article 7a*

*Violations of privacy and rights relating to the personality*

*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.*

*Where the violation is caused by the publication of printed matter or by a broadcast, the country in which the most significant element or elements of the damage occur or are likely to occur shall be deemed to be the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised, and that country's law shall be applicable. The country to which the publication or broadcast is directed shall be determined in particular by the language of the publication or broadcast or by sales or audience size in a given country as a proportion of total sales or audience size or by a combination of those factors.*

*This provision shall apply mutatis mutandis to publications via the Internet and other electronic networks.*

*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.*

*3. Paragraph 2 shall also apply to a violation of privacy or of rights relating to the personality resulting from the handling of personal data.*

*Justification*

*See the justification to the amendment to Recital 25a.*

*In addition, the second paragraph relating to injunctive relief is based on the Commission's original proposal, but is more realistic, given that such relief has to be sought and granted swiftly and is interim in nature.*

*Paragraph 3 is intended to fill a perceived lacuna in the original proposal for a regulation.*

*The amendment corresponds to one adopted in first reading.*

Amendment 20  
Article 8, paragraph 3

***3. The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14.***                      ***deleted***

*Justification*

*Reflects Parliament's position at first reading.*

Amendment 21  
Article 15 a (new)

***Article 15a***

***Contentions as to the applicable law***  
***Any litigant making a claim or counterclaim before a national court or tribunal which falls within the scope of this Regulation shall notify the court or tribunal and any other parties by statement of claim or other equivalent***

***originating document of the law or laws which that litigant maintains are applicable to all or any parts of his claim.***

*Justification*

*This simple requirement, introduced in a first-reading amendment, will ensure that the issue of the applicable law is properly considered by both the parties and the court, thus helping to ensure legal certainty.*

Amendment 22  
Article 15 b (new)

***Article 15b***

***Determination of the content of foreign law***

- 1. The court seised shall establish the content of the foreign law of its own motion. To this end, the parties' collaboration may be required.***
- 2. If it is impossible to establish the content of the foreign law and the parties agree, the law of the court seised shall be applied.***

*Justification*

*This clarification, introduced in a first-reading amendment, should ensure a more uniform approach to the application of foreign law by courts throughout the EU.*

Amendment 23  
Article 21 a (new)

***Article 21a***

***Damages***

***In quantifying damages in personal injury cases, the court seised shall apply the principle of restitutio in integrum, having regard to the victim's actual circumstances in his country of habitual***

*residence.*

*Justification*

*See the justification to the amendment introducing Recital 29a.*

Amendment 24

Article 26

The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy ("ordre public") of the forum.

*1. 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.*

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

*As far as the third paragraph is concerned, the existence of exemplary or punitive damages may act as an incentive for forum shopping and therefore the review clause includes 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.*

*This amendment was adopted in first reading.*

Amendment 25  
Article 27

This Regulation shall not prejudice the application of ***provisions of Community law*** which, in relation to particular matters, lay down conflict-of-law rules relating to non-contractual obligations.

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 conflict-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 law designated by the rules of private international law.

*Justification*

*The Regulation must be able to 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, the e-commerce and the services directives.*

*This amendment was adopted in first reading.*

Amendment 26  
Article 30

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. If necessary,

***I.*** 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. If necessary,

the report shall be accompanied by proposals to adapt this Regulation. ***In particular, the report shall consider non-contractual obligations arising out of traffic accidents and out of violations of privacy and rights relating to personality, including defamation.***

the report shall be accompanied by proposals to adapt this Regulation.

***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.***

***The report shall also 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.***

***1a. Not later than ...\*\*, the Commission, after extensive consultation with the insurance industry, personal injury lawyers and other interested parties, shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the situation with regard to the law applicable to road traffic accidents. The report shall be accompanied by a substantiated study of the scale of the phenomenon, the problems and an extended impact assessment. If appropriate, the report shall propose amendments to this Regulation and/or the adoption of specific legislation. In drawing up its report, the Commission shall work closely with the Hague Conference on Private International Law, the insurance industry, personal injury lawyers and other interested parties, and shall consider the options of modernising the Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents or of acceding thereto as an alternative or in addition to proposing specific legislation.***

***\*\* Two years after the date of entry into***

*force of this Regulation.*

*Justification*

*The review clause proposed by the Council does not go far enough and is insufficiently specific. This amendment is closely based on a first-reading amendment, but is more detailed in order to endeavour to reach an agreement with the Council.*

## EXPLANATORY STATEMENT

The rapporteur has considered the Council's common position with considerable care. She appreciates the attention which the Council - and the Commission - has paid to Parliament's first-reading opinion and the fact that many of Parliament's amendments are reflected in the common position in one way or another.

However, in preparing the draft recommendation for second reading, the rapporteur has been very conscious of the overwhelming vote which the first-reading opinion received in Parliament. She would draw attention in particular to the importance which Members attached to the provisions on road traffic accidents and violations of privacy and rights relating to the personality. She has therefore decided to continue to press for the inclusion of appropriate provisions on these matters in the final regulation.

As far as privacy and rights of personality are concerned, the rapporteur is disappointed that the Commission decided to withdraw the relevant provisions from its amended proposal. Whilst conscious of and sympathetic to the political difficulties experienced by the Council, she considers that it is only right and proper that she should maintain Parliament's first-reading amendments in order to give Parliament the possibility to give further thought to this important question and possibly consider other options.

As to the question of road traffic accidents, the rapporteur appreciates the Council's willingness to get the Commission to take up the matter, but feels that a more focused approach is required in the review clause. She also takes the view that more and better consultation is needed with interested parties and that now that the Community is in the course of acceding to the Hague Conference, it is time that the Community coordinated its activities in the sphere of private international law more closely with that body. She also takes the view that the question of damages in personal-injury cases can be appropriately regulated in Rome II and has proposed a new solution, consistent with Parliament's intentions in first reading, which is designed to enable agreement to be reached with Council.

In addition, the rapporteur continues to consider that the special provisions on unfair competition and environmental damage should be deleted, on the grounds set out in the justifications to the relevant amendments.

As for the relationship between Rome II and other Community instruments, she can but quote what she stated in the explanatory statement in her first-reading report, namely "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."

For the rest, the amendments put forward in the draft report, together with their justifications, speak for themselves.