



**COUNCIL OF  
THE EUROPEAN UNION**

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**NOTE**

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from:	Presidency
to:	Coreper II
No. prev.doc.:	16027/05 JUSTCIV 245 CODEC 1218
No. Cion prop.:	11812/03 JUSTCIV 121 CODEC 1052
Subject:	Proposal for a Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II)

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**I. INTRODUCTION**

1. On 22 July 2003 the Commission submitted a proposal for a Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II).<sup>1 2</sup> The proposal is subject to the codecision procedure. The European Parliament delivered its opinion on 6 July 2005.<sup>3</sup>

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<sup>1</sup> In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, the United Kingdom and Ireland have given notice of their wish to take part in the adoption and application of this Regulation.

<sup>2</sup> In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the adoption of this Regulation, and is not bound by it or subject to its application.

<sup>3</sup> See doc. 10812/05 CODEC 590 JUSTCIV 132;

2. The purpose of this proposal is to set out a coherent set of rules of conflict of laws regarding non-contractual obligations.
3. The proposal has been under examination within the Committee on Civil Law Matters (Rome II) for three years. Several readings of the text have been carried out and the technicalities have been examined in great detail. The Committee has also conducted a thorough examination of the opinion of the European Parliament, which has provided valuable input for the discussions in the Committee.
4. The Presidency considers that on certain Articles the discussions have come to a point where political guidance by Coreper/Council is necessary. In particular, the Presidency considers that this is the case as regards Articles 3, 4, 5, 6, 3A, 22 and 23.<sup>1</sup>
5. The following Articles need to be further examined at the level of the Committee on Civil Law Matters (Rome II): 1, 2, 7, 8, 8a, 9A, 9B, 9C, 11-21, 26, 27, 27A<sup>2</sup>. On certain of those Articles this examination is of merely technical nature, whereas in other cases more fundamental issues need to be addressed.

## II. ISSUES TO BE EXAMINED BY COREPER

6. As regards the Articles referred to in paragraph 4, there is broad agreement within the Committee on Civil Law Matters (Rome II) subject to certain issues being resolved. Therefore the Presidency considers that agreement is possible by means of the compromise set out in Annex I.

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<sup>1</sup> The Presidency does not exclude that the compromise on Article 25 will be presented to the Coreper of 16 February 2006;

<sup>2</sup> This is not a closed list and delegations are not prevented from submitting other issues to the Committee on Civil Law Matters (Rome II).

7. The guidelines set out in Annex I would steer discussions in the Committee on Civil Law Matters (Rome II), enabling further progress to be made with a view to reaching political agreement later this year. Those guidelines would be subject to exact drafting in the Committee. If Coreper/Council approves the guidelines, the Presidency would propose a new draft text to the Committee on Civil Law Matters (Rome II) on that basis.

### III. CONCLUSION

8. Taking these considerations into account, the Presidency suggests that Coreper could:
  - (a) hold a preliminary discussion on the compromise as set out in Annex I;
  - (b) take note that in light of the discussions the Presidency will submit a final compromise to the Council and
  - (c) agree that this compromise will be submitted to the JHA Council on 20-21 February 2006.

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**a) General questions**

1. The Presidency suggests that the general architecture of the text as set out in document 16027/05 should be retained. This means that the Regulation would set out a general rule of the law applicable to a tort or delict, complemented by specific rules in certain cases. In addition a section would be devoted to certain quasi-delicts.
2. There is general agreement that the instrument is also applicable to situations where the damage is likely to occur.<sup>1</sup> For the purposes of good drafting, it is suggested that all separate references to the damage possibly occurring (arising or likely to arise) should be replaced by a general provision to that effect.

**b) Article 3**

3. The Presidency suggests agreeing on the text of this provision as set out in document 16027/05 with the exception of one remaining question. This relates to the relationship of Article 3(3) to the proposed Article 9C. The Presidency suggests that this issue be examined at a later stage in the Committee on Civil Law Matters (Rome II).

**c) Article 4**

4. The Presidency suggests that there should be a specific rule for product liability. This specific rule should aim to strike an appropriate balance between the interests of the person sustaining damage and the person claimed to be liable.

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<sup>1</sup> It is recalled that as regards torts, delicts or quasi-delicts Article 5(3) of the Brussels I Regulation refers to the courts of the place where the harmful event occurred or *may* occur;

5. Having regard to the discussions that have taken place so far, the Presidency proposes a solution according to which the law applicable to a non-contractual obligation arising out of damage caused by a product would be:
  - a) the law of the country in which the person sustaining damage had his habitual residence, if the product was marketed in that country;
  - b) failing that, the law of the country in which the product was acquired, if the product was marketed in that country;
  - c) failing that, the law of the country where damage was sustained, if the product was marketed in that country.
6. The different elements of this hierarchical solution would only apply without prejudice to Articles 3(2) and 3(3).
7. In addition, if the product was not marketed in any of the countries listed above, then the law applicable would be the law of the country in which the person claimed to be liable had his habitual residence.
8. The Presidency suggests deleting the presumption contained in Article 4(3) that a product marketed in one Member State is also marketed in all the other Member States.

#### **d) Article 5**

9. The Presidency suggests that there should be a specific rule on unfair competition and acts restricting free competition. However, this rule should not be an exception to the general rule in Article 3 but rather clarify it. This should be reflected in a recital.

10. This rule should encompass both unfair competition and acts restricting free competition.
11. Furthermore, a recital should also give some examples of cases covered by Article 5.
12. The Presidency suggests keeping the text of Article 5 as set out in doc. 16027/05 without the text in square brackets and supplementing the provision with a further paragraph stating that 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.
13. If Coreper/Council agrees to this line of direction, then the question of infringements of Articles 81 and 82 of the EC Treaty should be examined at a forthcoming meeting of the Committee on Civil Law Matters.

**e) Article 6**

14. The Presidency suggests that there should be a specific Article on violation of privacy and rights relating to the personality. However, the Presidency suggests that this specific provision should be restricted to mass media (press and broadcasting).
15. The Presidency acknowledges that it is a sensitive task trying to tailor a balanced solution, one that fits into the general logic of the Regulation, while striking a balance between the interests of the victim as well as of the media.
16. There are specific provisions on respect for privacy and freedom of expression and information in the Charter of Fundamental Rights of the European Union and in the Council of Europe Convention on the Protection of Human Rights and Fundamental Freedoms. In the event of defamation proceedings the question is how to reconcile these two important principles.

### **a) Interests of the victim**

17. The victim's interest is to enforce his claim for compensation as easily as possible and at as low costs as possible. The person who has suffered damage should not be put under additional burden by having to apply foreign law and by not knowing in advance what the consequences could be.
18. In that sense, giving the victim a choice or establishing a rule referring to the law of the state of the victim's habitual residence would serve the purpose of securing transparency and legal certainty to the person who has sustained damage.

### **b) Interests of the media**

19. As to media, then it is recalled that declaration 20 attached to the Treaty of Amsterdam accords special priority to the freedom of press and freedom of expression in other media. The proper exercise of these freedoms is fundamental to the democratic society and of benefit to the citizens.
20. Foreseeability is an important criterion for the media in order to meet the conditions set by applicable law and to minimise the risk of legal complications in advance.
21. In this context, the future rule should aim to ensure transparency and legal certainty, while avoiding a situation whereby the laws of many countries could be applicable.

### **c) Suggestions by the Presidency**

22. On the basis of the discussions held until now and taking into account the opinion of the European Parliament, the Presidency considers that to take work forward it would be useful to formulate certain guidelines and to refrain for the time being from laying down the rule itself.

23. The Presidency accordingly suggests that any rule in this area should combine the following two elements:

a) the law of the country where the person sustaining damage has his habitual residence if the publication was distributed in that Member State and

b) the law of the country where the publisher is established.

24. The appropriate way to balance these two elements would need to be examined further.

These guidelines would have the effect of eliminating the multiplicity of options on the table and would serve as a basis for further work

25. The Presidency considers that the right of reply is an important issue that needs careful consideration. However, the Presidency suggests examining it once the rule itself has been established.

#### **f) Article 3A**

26. The Presidency suggests that the parties should be able to agree to submit non-contractual obligations to the law of their choice by an agreement entered into after the event occurred. In cases where Articles 5 or 8 are applicable such agreements should not be possible.

27. As to agreements entered into beforehand, then these should be admitted only in a business-to-business context where all the parties act for a purpose which can be regarded as being within their trade or profession. This would exclude contracts concluded by consumers and employees.<sup>1</sup>

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<sup>1</sup> It is recalled that recital 13 of Brussels I Regulation calls for the protection of the weaker party (in particular consumers, employees).

**g) Article 22**

28. The Presidency suggests that the provision should stand as set out in doc. 16027/05. The second sentence of this provision should be set out in a recital that should read as follows:  
"Such incompatibility may exist, for instance, if the application of the designated law would have the effect of causing non-compensatory damages to be awarded."

**h) Article 23**

29. The Presidency proposes to agree on the text of Article 23 as set out in doc. 16027/05.

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