



COMMISSION OF THE EUROPEAN COMMUNITIES

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2003/0168 (COD)

Amended proposal for a

EUROPEAN PARLIAMENT AND COUNCIL REGULATION

**ON THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS
("ROME II")**

(presented by the Commission pursuant to Article 250 (2) of the EC Treaty)

EXPLANATORY MEMORANDUM

1. BACKGROUND

The proposal¹ was adopted by the Commission on 22 July 2003 and transmitted to the European Parliament and the Council on the same date.

The European Economic and Social Committee adopted its Opinion on the Commission proposal on 30 June and 1 July 2004.²

The European Parliament adopted 54 amendments at first reading in plenary session on 6 July 2005.³

2. OBJECTIVE OF THE AMENDED PROPOSAL

The amended proposal adapts the original proposal for a Regulation on the law applicable to non-contractual obligations in the light of certain amendments passed by Parliament while reflecting proceedings in the Council.

3. COMMISSION OPINION ON THE AMENDMENTS ADOPTED BY PARLIAMENT

3.1 Amendments accepted in their entirety by the Commission

Amendments 2, 12, 17, 19, 22, 24, 35, 38, 39, 40, 44, 45, 48, 51, 52 and 53 can be accepted as presented by Parliament since they make improvements relating either to the clarity of the instrument or to questions of detail, or add material that will be potentially useful in implementing the initial proposal.

3.2 Amendments accepted by the Commission as to substance, subject to redrafting

Amendments 1, 5, 18, 20, 21, 23, 25, 28, 34, 36, 37, 46 and 49 can be accepted in principle, subject to redrafting.

Amendment 1 refers to the Rome I Regulation. But until the Regulation has been adopted, it would be preferable to refer to the future Community instrument that will replace the Rome Convention of 1980.

Amendment 5 brings non-contractual obligations based on strict liability and the capacity to incur liability in tort/delict within the scope of the Regulation. While the Commission can accept this analysis, it prefers to combine all the points concerning the scope of the Regulation in a single recital – recital 5 – without repeating all the questions already covered expressly by Article 12 (scope of the applicable law).

¹ COM (2003) 427 final – 2003/0168 (COD); not yet published in the OJ.

² OJ C 241, 28.9.2004, p. 1.

³ A6-0211/2005.

Amendment 18 specifies that unjust enrichment and administration of others' affairs without a mandate are to be considered as breaches of non-contractual obligations for the purposes of the Regulation. The Commission agrees with this. But to avoid making the text more cumbersome, it prefers to combine all the points concerning the scope of the Regulation in a single recital. Above all the Commission feels it is preferable to restate that there should be an autonomous and coherent interpretation of the legal concepts used in the Brussels I and Rome II instruments and the Rome Convention of 1980 – or the Community instrument that will replace it – by the Court of Justice rather than a long but inevitably incomplete list of details. This amendment also aims to exclude the liability of public administrations in respect of acts or omissions occurring in the performance of their duties from the scope of the Regulation. The Commission accepts the amendment as regards the substance but prefers the forms of words commonly used in international conventions.

Amendment 20 aims to exclude non-contractual obligations governed by specific provisions of company law or specific provisions applicable to other bodies corporate such as associations. The Commission accepts this amendment as regards the substance but proposes drafting it in simpler terms.

Amendment 21 would exclude non-contractual obligations arising from a trust. The Commission accepts the principle of the amendment but prefers to adopt the wording of the Hague Convention of 1 July 1985.

Amendment 23 would exclude liability for acts of public authority, including liability of publicly appointed office-holders. The Commission can accept the proposed solution as regards the substance but considers the amendment to be redundant in view of amendment 18.

Amendment 25 would allow certain parties who are already in a contractual relationship to choose the law applicable to their non-contractual obligation before the loss or damage is sustained. The Commission can accept the principle of an *ex ante* choice and agrees that the choice should be subject to strict conditions, in particular to protect the weaker party. But the conditions for the choice should be expressed in clear and simple terms. If the legal terms are not precise enough, parties might feel they were being given an incentive to litigate, which would make the procedure more cumbersome in terms of duration and cost and thus run counter to the objective pursued by the Regulation. The wording proposed by the Commission would both protect consumers and employees from ill-thought-out choices and exclude the possibility of such choices being imposed in standard contracts.

The Commission can accept the principle of **amendments 28 and 34**, which would change the structure and title of the sections to make a clearer distinction between the general rule and special rules for certain categories of liability. To reflect proceedings in the Council and the differences between the Member States' legal systems, the Commission proposal makes an additional distinction between the special rules applicable to certain categories of liability and the specific rules governing unjust enrichment and administration of others' affairs.

Amendments 36 and 37 replace the single rule of Article 9 of the initial Commission proposal, applicable to all quasi-contracts, by two specific rules, one applying to unjust enrichment and the other to administration of others' affairs. The Commission can accept this additional distinction. In its amended proposal, however, it wishes to reflect certain technical improvements in the text emerging from Council proceedings.

Amendment 46 seeks to clarify the rule on direct actions against the insurer of the person liable without modifying it as to the substance. The Commission can accept the principle of redrafting the rule to make it easier to understand. But it prefers the form of words that emerged from the Council, which pursues the same objective.

Amendment 49 seeks to clarify the place where a natural person working from home has his habitual residence. The Commission can accept the principle of this clarification, but it prefers a form of words that is closer to what emerged from the Council, whereby the court would prefer the actual place where an occupation is exercised rather than an official address which might turn out to be purely fictitious.

3.3 *Amendments accepted by the Commission in part*

Amendment 3 would adapt recital 7 **of the initial proposal** to the changes made by amendment 26 relating to the general rule in Article 3. Since the Commission can only accept part of amendment 26, it will have to reject the corresponding amendment to the recital. As regards the final sentence of the amendment, restating the need to respect the intentions of the parties, the idea is already covered by recital 8 in the Commission's amended proposal.

Amendment 14 relating to rules of safety and conduct in the country where the loss or damage is sustained serves two purposes: first, to add the words "*in so far as is appropriate*" so as to emphasise even further that the application of these rules is in the discretion of the court, and second, to exclude this possibility in matters of defamation and unfair competition. The Commission can accept the proposed clarification for the first sentence of the recital. But Parliament's report offers no justification for excluding the rule in matters of defamation and unfair competition. The Commission accordingly sees no reason for depriving the perpetrators of these two categories of liability of the protection which this rule gives them.

Amendment 26 relating to the general rule in Article 3 of the initial Commission proposal can be accepted as regards the drafting improvements to paragraph 1, which confirms the rule proposed by the Commission. On the other hand, the Commission cannot accept the changes to paragraphs 2 and 3. Paragraph 2 brings in a specific rule concerning traffic accidents which would subject to two different laws the non-contractual obligation and the amount of damages. The Commission appreciates Parliament's efforts to find a fair solution for so many people who are the victims of traffic accidents but this solution, which would diverge sharply from the law in force in the Member States, cannot be adopted without prior in-depth analysis. It is accordingly proposed that the question be considered in detail in the report on the application of the Regulation, provided for by amendment 54. As regards paragraph 3, the amendment would substantially alter the spirit of the instrument. While it is specified that the exception clause available to the court really would be applied "*by way of exception*", the current wording runs the risk of sending a message that is contrary to the foreseeability objective pursued by the Regulation. The mere fact that the paragraph lists no less than five factors that can be taken into consideration to justify activating the exception clause means that the parties and the courts will routinely check the justification for the solution that the general rule would have generated even where it is at first sight satisfactory. The Commission therefore cannot accept this part of amendment 26 and maintains its initial approach, which the Council also appears to have endorsed. But the Commission does acknowledge the significance of some of the factors listed in paragraph 3, in particular as regards the parties' shared habitual residence, a pre-existing *de facto* or *de jure* relationship or the legitimate expectations of the parties. As the first two of these are already mentioned expressly in paragraphs 2 and 3 of the initial proposal, Article 5(3) of the amended proposal now contains an express reference to the legitimate expectations of the parties.

Amendment 50, which concerns the mechanism for the public policy (*ordre public*) exception, first inserts a new paragraph 1a) to spell out the concept of public policy of the forum by listing reference instruments. Even though the public policy of the Member States

will inevitably contain common elements, there are variations from one to another. Consequently the Commission cannot accept such a list. The proposed new paragraph 1b) addresses the issue of damages in amounts regarded as excessive, such as certain types of exemplary or punitive damages, already covered by a specific rule in Article 24 of the initial Commission proposal. Subject to drafting changes to make clear that punitive damages are not *ipso facto* excessive, the Commission can accept this rule being incorporated in the Article concerning the public policy of the forum. Under the proposed new paragraph 1c), only the parties would be able to rely on the exception clause. But it is for the court to ensure compliance with the fundamental values of the forum, and that task cannot be delegated to the parties, especially as they are not always legally represented. The Brussels I Regulation provides for the possibility for the court to withhold the *exequatur* from a judgment given in another Member State if it would be contrary to the public policy of the forum. The Commission accordingly cannot accept the proposed paragraph 1c).

Amendment 54 provides for an obligation for the Commission to report on the application of the Regulation after it is in force. While the Commission acknowledges the value of such a report, it cannot accept all the conditions provided for by the amendment. For one thing, the period of three years after adoption of the Regulation would not allow an adequate number of judgments to be given as the basis for an effective evaluation. As in the Brussels I Regulation, the Commission proposes a period of five years after the Regulation enters into force. As for the content of the report, the question of the amount of damages awarded by the courts and the elaboration of a code of ethics for the European media are way out of place in a conflict-of-laws regulation. The Commission accordingly cannot accept that these questions should be dealt with in a report on the application of this Regulation. On the other hand the Commission agrees with Parliament on the need to consider how to achieve a more uniform approach to applying foreign law in the courts of the Member States. It does not believe that the time is ripe for a legislative initiative in this respect (see amendment 43), but it can accept the idea of looking into the question in depth in the application report.

3.4 *Amendments rejected*

Amendments 4, 9, 10, 15 and 16 are not acceptable to the Commission as it rejects amendments 26, 30, 54 (paragraph 3), 31 and 42 to which they correspond.

Amendments 6, 7, 8, 11 and 13 would adapt the recitals to reflect the removal of several special rules for specific forms of liability as proposed in amendments 27, 29 and 33. Since the Commission cannot accept the deletion of these special rules (see above), it must logically reject the corresponding changes to the recitals. In its report, however, Parliament does not exclude the possibility of keeping the special rules, as long as their scope is clearly defined, particular as regards unfair trading practices and damage to the environment. Recitals 12, 13 and 14 of the amended proposal now accordingly refer to the relevant Community secondary legislation. The legal terminology of these Articles has also been changed to align it on that used in the secondary legislation. But while the concepts are thus better defined in Community law, it must still be borne in mind that they may be defined in broader terms than in Community law when they are used for the determination of a tort/delict for the purposes of private international law.

Amendment 27 would abolish the special rule for product liability. As in the case of the other torts/delicts such as unfair competition and environmental damage, the Commission considers that the general rule would not make it possible to foresee the applicable law with reasonable certainty. The place where the damage arises may be the result of pure chance in view of the

great mobility of consumer goods (imagine a Dutch-made hairdryer, owned by a German tourist travelling in Thailand). Since in this area there are very often amicable settlements between insurers, it is particularly important to come up with a clear, foreseeable rule to facilitate such agreements. The Commission accordingly cannot accept the proposed deletion.

Amendment 29 would abolish the special rule for anti-competitive practices. The Commission cannot accept this amendment: Article 5 of the initial proposal did not seek to introduce a rule differing from the general rule on the substance but simply to determine more accurately the place where the damage arises, which is not always an easy matter. Article 7 has been slightly reworded in the amended proposal to make clear that the aim is solely to determine more accurately where the damage arises. To meet the European Parliament's requests regarding definitions, the Commission has also opted to use terminology in Article 7 of the amended proposal that is directly inspired by Directive 2005/29 of 11 May 2005. The result, *a contrario*, is that non-contractual obligations arising from anti-competitive practices outlawed under Articles 81 and 82 of the Treaty or equivalent rules in the Member States are not covered by Article 7; they are consequently subject to the general rule in Article 5. But in its Green Paper "*Damages actions for breach of the EC antitrust rules*", scheduled for publication in December 2005, the Commission is planning to provoke debate on the question of the law applicable to civil actions for compensation for damage arising from an anti-competitive practice. Depending on the replies, the Commission may wish to support a different solution in the course of the codecision procedure.

Amendment 57 would change the substance of the rule applicable to violations of privacy, particularly by the press. The Commission cannot accept this amendment, which is too generous to press editors rather than the victim of alleged defamation in the press and does not reflect the solution taken by a large majority of Member States. Since it is not possible to reconcile the Council's text and the text adopted by Parliament at first reading, the Commission considers that the best solution to this controversial question is to exclude all press offences and the like from the proposal and delete Article 6 of the original proposal. Other privacy violations would be covered by Article 5.

Amendment 31 would bring in a new special rule concerning damage arising from the exercise of the right to strike by employed people. The Commission is sensitive to the underlying political arguments but it cannot accept this amendment as the proposed rule is too rigid.

Amendment 32 restates that, until such time as the Community adopts detailed legislation on the law applicable to traffic accidents, Member States will either apply the 1971 Hague Convention or the general rules of the Rome II Convention. Since it is quite possible that the implementation report provided for by Article 26 of the amended proposal will confirm that the general rules of the Regulation provide a satisfactory solution, the Commission cannot commit itself now to a future legislative proposal and accordingly rejects this amendment. Paragraph 2 of this amendment reiterates the proposal made in amendment 26 as regards the introduction of a new special rule on the evaluation of the damage arising from a traffic accident, which the Commission cannot accept (see above under amendment 26).

Amendment 33 would delete the special rule for damage to the environment. The Commission cannot accept this amendment as the proposed rule reflects the "polluter pays" principle promoted by the Community and already applied in several Member States. The Greens, incidentally, abstained from voting on this amendment in plenary.

Amendment 41 again raises the question of the evaluation of the damages, which would generally (except as regards traffic accidents) be governed by the *lex fori*. The Commission

cannot accept this amendment. This is a vital question for victims not only of traffic accidents but of any other situations, in particular personal injury, and the rules laid down by the Regulation offer a fair solution reflecting the legitimate expectations both of the victim and of the person causing the damage.

Amendments 42 and 43 address the question of the application of foreign law by the court. The former would require the parties to indicate the law applicable in their statement of claim. The Commission is in favour of making things easier for courts dealing with international litigation, but this rule would be too difficult to implement as parties are not all capable of stating what law is applicable to their situation, in particular when they are not legally represented. The purpose of the latter is to formalise the rule already in operation in some Member States that the court must itself determine the content of the foreign law, though it can seek help from the parties. The Commission is of the opinion that, as matters stand, most Member States would not be able to apply the rule as they do not have proper structures in place to enable the courts to apply the foreign law in this way, and it rejects this amendment. But it agrees that this is an avenue well worth exploring and that special attention should be paid to it in the implementation report.

Amendment 47 is redundant with amendment 22, which the Commission prefers on drafting grounds. Amendment 47 is accordingly rejected.

4. CONCLUSION

Acting under Article 250(2) of the EC Treaty, the Commission amends its proposal as follows.

Amended proposal for a

EUROPEAN PARLIAMENT AND COUNCIL REGULATION
ON THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS
(“ROME II”)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) thereof,

Having regard to the proposal from the Commission,⁴

Having regard to the opinion of the European Economic and Social Committee,⁵

Acting in accordance with the procedure laid down in Article 251 of the Treaty,⁶

Whereas:

- (1) The Union has set itself the objective of establishing an area of freedom, security and justice. To that end the Community must adopt measures relating to judicial cooperation in civil matters with a cross-border impact to the extent necessary for the proper functioning of the internal market, including measures promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.
- (2) For the purposes of effectively implementing the relevant provisions of the Amsterdam Treaty, the Council (Justice and Home Affairs) on 3 December 1998 adopted a plan of action specifying that the preparation of a legal instrument on the law applicable to non-contractual obligations is among the measures to be taken within two years following the entry into force of the Amsterdam Treaty.⁷
- (3) The Tampere European Council on 15 and 16 October 1999⁸ approved the principle of mutual recognition of judgments as a priority matter in the establishment of a European law-enforcement area. The mutual recognition programme⁹ states that measures relating to harmonisation of conflict-of-law rules are measures that actually do help facilitate the implementation of the principle.

⁴ OJ C [...], [...], p. [...]. **Not yet published in the OJ.**

⁵ OJ C **241, 28.9.2004**, p.1.

⁶ Opinion of the European Parliament of [...] (JO C [...] du [...], [...]) **6 July 2005.**

⁷ Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice: OJ C 19, 23.1.1999, p. 1.

⁸ Presidency conclusions of 16 October 1999, points 28 to 39.

⁹ OJ C 12, 15.1.2001, p. 1.

- (4) The proper functioning of the internal market creates a need, in order to improve the foreseeability of the outcome of litigation, certainty as to the law and the free movement of judgments, for the rules of conflict of laws in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.
- (5) The scope **and provisions** of ~~the~~ **this Regulation, which are subject to autonomous interpretation by the Court of Justice,** must be determined in such a way as to be consistent with Regulation (EC) No 44/2001¹⁰ **of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I),**¹¹ ~~the Rome Convention of 1980¹², —~~ **and the Community instrument which will replace it. This Regulation will accordingly apply not only to actions for compensation for damage that has already arisen but also to actions to prevent likely future damage. It also covers obligations based on rules imposing strict liability.**
- (6) Only uniform rules applied irrespective of the law they designate can avert the risk of distortions of competition between Community litigants.
- ~~(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 uncertainty in the law.~~
- (7) **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 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.**
- (8) **To respect the intentions of the parties, they must be able to make an express choice as to the law applicable to a non-contractual obligation. However, their choice should be subject to certain conditions, and consumers and employees should have no possibility of choosing the applicable law before the event from which the damage occurs.**
- (9) **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 uncertainty in the law.**

¹⁰ OJ L 12, 16.1.2001, p. 1.

¹¹ OJ L 12, 16.1.2001, p. 1

¹² The consolidated text of the Convention as amended by the various Conventions of Accession, and the declarations and protocols annexed to it, is published in OJ C 27, 26.1.1998, p. 34.

¹³ The consolidated text of the Convention, as amended by the various Conventions of Accession, and the declarations and protocols annexed to it, is published in OJ C 27, 26.1.1998, p. 34.

- (§ 10) 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.
- (9 11) 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.
- (10 12) Regarding product liability, **as penalised under Directive 374/1985/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products,**¹⁴ 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.
- (11 13) In matters of unfair competition **commercial practices, as penalised under Directive 29/2005/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market,**¹⁵ the **general** conflict rule ~~must~~ **makes it possible to** 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 circumstances other rules might be appropriate~~ **The provision in a specific Article that the place where the damage occurs is the place where the market is affected helps to increase certainty as to the law.**
- (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.~~
- (13 14) Regarding violations of the environment, **environmental damage to which Directive 35/2004/EC of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage**¹⁶ **applies, the solution of allowing the person sustaining the loss to choose the applicable law is fully compliant with** Article 174 of the Treaty, 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.~~

¹⁴ OJ L 210, 7.8.1985, p. 29, as amended by Directive 34/1999/EC of 10 May 1999, JO L 141, 4.6.1999, p. 20.

¹⁵ OJ L 149, 11.6.2005, p. 22.

¹⁶ OJ L 143, 30.4.2004, p. 56.

- (1415) Regarding violations of intellectual property rights, the universally acknowledged principle of the *lex loci protectionis* should be preserved. For the purposes of this Regulation, the term intellectual property rights means copyright, related rights, *sui generis* right for the protection of databases and industrial property rights.
- (1516) Similar **Special** rules should be **laid down for non-contractual obligations arising from** ~~provided for where damage is caused by an act other than a tort or delict, such as unjust enrichment and agency without authority.~~
- ~~(16) To preserve their freedom of will, the parties should be allowed to determine the law applicable to a non-contractual obligation. Protection should be given to weaker parties by imposing certain conditions on the choice.~~
- (17) Considerations of the public interest warrant giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory rules
- (18) The concern to strike a reasonable balance between the parties means that account must be taken of the rules of safety and conduct in operation in the country in which the harmful act was committed, even where the non-contractual obligation is governed by another law, **in so far as is appropriate**.
- ~~(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.~~
- (2019) Respect for international commitments entered into by the Member States means that this Regulation should not affect conventions relating to specific matters to which the Member States are parties. To make the rules easier to read, the Commission will publish the list of the relevant conventions in the *Official Journal of the European Union* on the basis of information supplied by the Member States.
- (2120) Since the objective of the proposed action, namely better foreseeability of court judgments requiring genuinely uniform rules determined by a mandatory and directly applicable Community legal instrument, cannot be adequately attained by the Member States, who cannot lay down uniform Community rules, and can therefore, by reason of its effects throughout the Community, be better achieved at Community level, the Community can take measures, in accordance with the subsidiarity principle set out in Article 5 of the Treaty. In accordance with the proportionality principle set out in that Article, a regulation, which increases certainty in the law without requiring harmonisation of the substantive rules of domestic law, does not go beyond what is necessary to attain that objective.
- (2221) [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, these Member States have stated their intention of participating

~~in the adoption and application of this Regulation./In accordance with Articles 1 and 2 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, these Member States are not participating in the adoption of this Regulation, which will accordingly not be binding on those Member States.]~~

(2322) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and the Treaty establishing the European Community, that Member State is not participating in the adoption of this Regulation, which will accordingly not be binding on that Member State,

HAVE ADOPTED THIS REGULATION:

Chapter I - Scope

Article 1 - Material scope

1. This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters.

It shall not apply to revenue, customs or administrative matters.

2. The following are excluded from the scope of this Regulation:

- a) non-contractual obligations arising out of family relationships and relationships ~~deemed to be equivalent, including~~ **having comparable effects under the law applicable to such relationships, including** maintenance obligations;
- b) non-contractual obligations arising out of matrimonial property regimes and successions **or regimes having comparable effects under the law applicable to such relationships;**
- c) **non-contractual** obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other instruments arise out of their negotiable character;
- 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~~ **non-contractual obligations, in particular the liability of partners, management bodies and persons responsible for carrying out the statutory audits of accounting documents of an association, a company or firm or other body corporate or incorporate, provided they are subject to specific rules of company law or other specific provisions applicable to such persons or bodies;**
- e) non-contractual obligations ~~among~~ **arising from relationships between** the settlers, trustees and beneficiaries of a trust **created voluntarily and evidenced in writing;**
- f) non-contractual obligations arising out of nuclear damage;

g) non-contractual obligations arising in connection with the liability of the State for acts done in the exercise of public authority (“acta iure imperii”);

h) violations of privacy and of personal rights by the media;

i) evidence and procedure, without prejudice to Article 19.

3. For the purposes of this Regulation, “Member State” means any Member State other than ~~[the United Kingdom, Ireland or]~~ Denmark.

*Article 2 – ~~Universal application~~ **Application of the law of a third country***

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

Article 3 – ~~Relationship with other provisions of Community law~~

1. 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 relevant non-contractual obligation by virtue of this Regulation; or

c) preclude the application of one or more provisions of the law of the forum or the law designated by this Regulation;

d) lay down rules to promote the smooth operation of the internal market, where such rules cannot apply at the same time as the law designated by the rules of private international law.

Chapter II - Uniform rules

SECTION 1

~~RULES APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS ARISING OUT OF A TORT OR DELICT~~ **FREEDOM OF CHOICE**

*Article 3 – ~~General rule~~ **Article 4 – Freedom of choice***

1. The **parties may agree, by an agreement entered into after their 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 and obligations of third parties.**

2. Where all the parties exercise a commercial activity, such choice may also be made by an agreement freely negotiated before the event from which the damage arises occurs.

3. 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 (“mandatory provisions”).

4. 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.

SECTION 2

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

Article 5 – General rule

1. Where no choice has been made under Article 4, 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.

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. For the purpose of assessing the existence of a manifestly closer connection with another country, account shall be taken *inter alia* of the expectations of the parties regarding the applicable law.

SECTION 3

RULES APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS ARISING FROM SPECIFIC TORTS/DELICTS

Article 4~~5~~6 - Product liability

Without prejudice to Article ~~35~~(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 **at the time when the damage occurs**, 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.

Article 5 – Unfair competition **Article 7 – Unfair commercial practices**

1. The law applicable to a non-contractual obligation arising out of an act of ~~unfair competition~~ **unfair commercial practice** shall be **designated by Article 5(1). The country where the damage occurs or threatens to occur shall be** 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~~ **5**(2) and (3) shall **also** apply.

Article 6 – Violations of privacy and rights relating to the personality

~~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.~~

Article 7 – Violation of the environment **Article 8 – Environmental damage**

The law applicable to a non-contractual obligation arising out of a ~~violation of the environment~~ **environmental damage or damage sustained by persons or property as a result of such damage** shall be the law determined by the application of Article ~~3~~ **5**(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.

*Article ~~8~~ **9** - Infringement of intellectual property rights*

1. The law applicable to a non-contractual obligation arising from an infringement of a **an** intellectual property right shall be the law of the country for which protection is sought.

2. In the case of a non-contractual obligation arising from an infringement of a unitary Community industrial property right, the relevant Community instrument shall apply. For any question that is not governed by that instrument, the applicable law shall be the law of the Member State in which the act of infringement is committed.

3. Notwithstanding Sections 1, 2 and 4, this Article shall apply to all non-contractual obligations arising from an infringement of an intellectual property right.

SECTION 2
~~RULES APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS ARISING OUT OF AN~~
~~ACT OTHER THAN A TORT OR DELICT~~

~~Article 9 – Determination of the applicable law~~

SECTION 4
SPECIAL RULES APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS ARISING
OUT OF UNJUST ENRICHMENT AND NEGOTIORUM GESTIO

Article 10 – Unjust enrichment

1. If a non-contractual obligation arising out of ~~an act other than a tort or delict~~ **unjust enrichment, including payment of amounts wrongly received,** concerns a relationship previously existing between the parties, such as a contract **or a tort or delict to which section 2 or 3 applies, which is** closely connected with the non-contractual obligation, it shall be governed by the law that governs that relationship.
2. Without prejudice to ~~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 damage occurs~~ **when the event giving rise to unjust enrichment occurs,** the law applicable to the non-contractual obligation shall be the law of that country.
3. Without prejudice to ~~Where the applicable law cannot be determined on the basis of~~ 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~~ **the event giving rise to unjust enrichment substantially occurs.**
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.~~
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.**

Article 11– Negotiorum gestio

1. If a non-contractual obligation arising out of an action or 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 or a tort or delict to which section 2 or 3 applies, which is 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 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.

SECTION 3

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

Article 10 – 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.~~

SECTION 5

COMMON RULES

Article ~~H~~12 – Scope of the law applicable to non-contractual obligations

The law applicable to non-contractual obligations under Articles ~~3~~4 to ~~10~~11 of this Regulation shall govern in particular:

- a) the conditions and extent of liability, including the determination of persons who are liable for acts performed by them;
- b) the grounds for exemption from liability, any limitation of liability and any division of liability;
- c) the existence and kinds of injury or damage for which compensation may be due;
- d) within the limits of its powers, the measures which a court has power to take under its procedural law to prevent or terminate injury or damage or to ensure the provision of compensation;
- e) the assessment of the damage in so far as prescribed by law;
- f) the question whether a right to compensation may be assigned or inherited;
- g) persons entitled to compensation for damage sustained personally;
- h) liability for the acts of another person;
- i) the manners in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation and the interruption and suspension of the period.

Article ~~12~~13 – Overriding mandatory rules

21. 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.

~~1.2.~~ 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.

Article ~~13~~14 – Rules of safety and conduct

Whatever may be the applicable law, in determining liability account shall be taken, **as a matter of fact, and in so far as is appropriate,** of the rules of safety and conduct which were in force at the place and time of the event giving rise to the damage.

Article ~~14~~15 – Direct action against the insurer of the person liable

~~The right of~~ Persons who have suffered damage to **may** take direct action against the insurer of the person claimed to be liable ~~shall be governed by~~ **where such actions are provided for either by** the law applicable to the non-contractual obligation ~~unless the person who has~~

suffered damage prefers to base his claims on or by the law applicable to the insurance contract.

*Article ~~15~~**16** – Statutory subrogation and multiple liability*

~~1. Where a person (“the creditor”) has a non-contractual claim upon another (“the debtor”), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship in whole or in part.~~

~~2. The same rule shall apply where several persons are subject to the same claim and one of them has satisfied the creditor.~~

Where a third person, for example an insurer, has a duty to satisfy a creditor in respect of a non-contractual obligation, the right of that third person to take action against the person owing the non-contractual obligation shall be governed by the law applicable to the duty to satisfy the third person’s claim, for example under an insurance contract.

*Article ~~16~~**17** - Multiple liability*

Where a person has a claim upon several debtors who are jointly liable and one of those debtors has already satisfied the creditor, the right of that debtor to take action against the other debtors shall be governed by the law applicable to that debtor's duty to satisfy the creditor.

Article 18 – Formal validity

A unilateral act intended to have legal effect and relating to a non-contractual obligation is formally valid if it satisfies the formal requirements of the law which governs the non-contractual obligation in question or the law of the country in which this act is done.

*Article ~~17~~**19** – Evidence*

1. The law governing a non-contractual obligation under this Regulation applies to the extent that, in matters of non-contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.

2. Acts intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article ~~16~~**18** under which that act is formally valid, provided that such mode of proof can be administered by the forum.

Chapter III - Other provisions

Article 18 – Assimilation to the territory of a State

For the purposes of this Regulation, the following shall be treated as being the territory of a State:

- a) installations and other facilities for the exploration and exploitation of natural resources in, on or below the part of the seabed situated outside the State's territorial waters if the State, under international law, enjoys sovereign rights to explore and exploit natural resources there;
- b) a ship on the high seas which is registered in the State or bears lettres de mer or a comparable document issued by it or on its behalf, or which, not being registered or bearing lettres de mer or a comparable document, is owned by a national of the State;
- c) an aircraft in the airspace, which is registered in or on behalf of the State or entered in its register of nationality, or which, not being registered or entered in the register of nationality, is owned by a national of the State.

Article 19 – Assimilation to habitual residence

1. For companies or firms and other bodies or incorporate or unincorporate, the principal place of business shall be considered to be the habitual residence. However, where the event giving rise to the damage occurs or the damage arises in the course of operation of a subsidiary, a branch or any other establishment, the place of business shall take the place of the habitual residence.

2. Where the event giving rise to the damage occurs or the damage arises in the course of the business activity of a natural person, that natural person's **principal** place of business shall take the place of the habitual residence.

3. For the purpose of Article 6(2), the place where the broadcaster is established within the meaning of the directive 89/552/EEC, as amended by the directive 97/36/EC, shall take the place of the habitual residence.

Article 20 – Exclusion of renvoi

The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law.

Article 21 – States with more than one legal system

1. Where a State comprises several territorial units, each of which has its own rules of law in respect of non-contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.

2. A State within which different territorial units have their own rules of law in respect of non-contractual obligations shall not be bound to apply this Regulation to conflicts solely between the laws of such units.

*Article ~~22~~**23** – Public policy of the forum*

The application of a rule 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. **In particular, the application under this Regulation of a law that would have the effect of causing non-compensatory damages to be awarded that would be excessive may be considered incompatible with the public policy of the forum.**

*Article ~~23~~**24** – Relationship with ~~other provisions of Community law~~ **international conventions***

~~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:~~ **This Regulation shall not prejudice the application of multilateral international 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 and of which the Commission has been notified in accordance with Article 26.**

~~— 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.~~

Article ~~24~~ – 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.~~

Article 25 – Relationship with existing international conventions

~~This Regulation shall not prejudice the application of international 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.~~

2. However, where, at the time of conclusion of the contract, all the material aspects of the situation are located in one or more Member States, this Regulation shall take precedence over the following Conventions:

- the Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents;

- the Hague Convention of 2 October 1973 on the Law Applicable to Products Liability.

Chapter IV - Final provisions

Article ~~26~~25 - List of conventions referred to in Article ~~25~~24

1. The Member States shall notify the Commission, no later than ~~30 June 2004~~ ..., of the list of conventions referred to in Article ~~25~~24. After that date, the Member States shall notify the Commission of all denunciations of such conventions.

2. The Commission shall publish the list of conventions referred to in paragraph 1 in the *Official Journal of the European Union* within six months of receiving ~~the full~~ that list.

*Article ~~27~~26 – **Implementation report***

Not later than five years after this Regulation enters into force, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on its application. If necessary, this report shall be accompanied by proposals to adapt the Regulation.

In making its report, the Commission shall pay particular attention to the effects of the way in which foreign law is treated in the courts of the Member States. If necessary, the report shall include recommendations as to the desirability of a common approach to the application of foreign law.

The report shall consider whether Community legislation specifically dealing with the law applicable to traffic accidents ought to be proposed.

Article ~~27~~27 - Entry into force and application in time

This Regulation shall enter into force on ~~1 January 2005~~

It shall apply to non-contractual obligations arising out of acts occurring after its entry into force.

This Regulation shall be binding in its entirety and directly applicable in all Member States in accordance with the Treaty establishing the European Community.

Done at Brussels,

For the European Parliament
The President

For the Council
The President