

**COMMON POSITION (EC) No 22/2006****adopted by the Council on 25 September 2006****with a view to adopting Regulation (EC) No .../... of the European Parliament and of the Council  
of ... on the law applicable to non-contractual obligations (ROME II)**

(2006/C 289 E/04)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 61(c) and 67 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee <sup>(1)</sup>,

Acting in accordance with the procedure laid down in Article 251 of the Treaty <sup>(2)</sup>,

Whereas:

- (1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice. For the progressive establishment of such an area, the Community is to 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.
- (2) According to Article 65(b) of the Treaty, these measures are to include those promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.
- (3) The European Council meeting in Tampere on 15 and 16 October 1999 endorsed the principle of mutual recognition of judgments and other decisions of judicial authorities as the cornerstone of judicial cooperation in civil matters and invited the Council and the Commission to adopt a programme of measures to implement the principle of mutual recognition.
- (4) On 30 November 2000, the Council adopted a joint Commission and Council programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters <sup>(3)</sup>. The programme identifies measures relating to the harmonisation of conflict-of-law rules as those facilitating the mutual recognition of judgments.

- (5) The Hague Programme <sup>(4)</sup>, adopted by the European Council on 5 November 2004, called on work to be pursued actively on the rules of conflict of laws regarding non-contractual obligations ('Rome II').
- (6) The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.
- (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 <sup>(5)</sup> ('Brussels I') and the Rome Convention on the law applicable to contractual obligations <sup>(6)</sup>.
- (8) This Regulation should apply irrespective of the nature of the court or tribunal seized.
- (9) Claims arising out of '*acta iure imperii*' should include claims against officials who act on behalf of the State and liability for acts of public authorities, including liability of publicly appointed office-holders. Therefore, these matters should be excluded from the scope of this Regulation.
- (10) Family relationships should cover parentage, marriage, affinity and collateral relatives. The reference in Article 1(2) to relationships having comparable effects to marriage and other family relationships should be interpreted in accordance with the law of the Member State in which the court is seized.
- (11) The concept of a non-contractual obligation varies from one Member State to another. Therefore for the purposes of this Regulation non-contractual obligation should be understood as an autonomous concept.

<sup>(1)</sup> OJ C 241, 28.9.2004, p. 1.

<sup>(2)</sup> Opinion of the European Parliament of 6 July 2005 (OJ C 157 E, 6.7.2006, p. 371), Council Common Position of 25 September 2006 and Position of the European Parliament of ... (not yet published in the Official Journal).

<sup>(3)</sup> OJ C 12, 15.1.2001, p. 1.

<sup>(4)</sup> OJ C 53, 3.3.2005, p. 1.

<sup>(5)</sup> OJ L 12, 16.1.2001, p. 1. Regulation as last amended by Commission Regulation (EC) No 2245/2004 (OJ L 381, 28.12.2004, p. 10).

<sup>(6)</sup> OJ C 27, 26.1.1998, p. 34.

- (12) Uniform rules applied irrespective of the law they designate may avert the risk of distortions of competition between Community litigants.
- (13) 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 varies. This situation engenders uncertainty as to the law applicable.
- (14) Uniform rules should enhance 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 damni*) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability.
- (15) The law applicable should be determined on the basis of where the damage occurs, regardless of the country or countries in which the indirect consequences could occur. Accordingly, in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively.
- (16) The general rule in this Regulation should be the '*lex loci damni*' provided for in Article 4(1). Article 4(2) should be seen as an exception to this general principle, creating a special connection where the parties have their habitual residence in the same country. Article 4(3) should be understood as an 'escape clause' from Article 4(1) and (2), where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country.
- (17) 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.
- (18) The conflict rule in matters of product liability should 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. Creation of a cascade system of connecting factors, together with a foreseeability clause, is a balanced solution in regard to these objectives. The first element to be taken into account is the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country. The other elements of the cascade are triggered if the product was not marketed in that country, without prejudice to Article 4(2) and to the possibility of a manifestly closer connection to another country.
- (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.
- (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.
- (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.
- (22) Regarding environmental damage, 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.
- (23) Regarding infringements 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' should be interpreted as meaning, for instance, copyright, related rights, the *sui generis* right for the protection of databases and industrial property rights.
- (24) The exact concept of industrial action, such as strike action or lock-out, varies from one Member State to another and is governed by each Member State's internal rules. Therefore, this Regulation assumes as a general

principle that the law of the country where the industrial action was taken should apply, with the aim of protecting the rights and obligations of workers and employers.

- (25) The special rule on industrial action in Article 9 is without prejudice to the conditions relating to the exercise of such action in accordance with national law and without prejudice to the legal status of trade unions or of the representative organisations of workers as provided for in the law of the Member States.
- (26) Provision should be made for special rules where damage is caused by an act other than a tort/delict, such as unjust enrichment, *negotiorum gestio* and *culpa in contrahendo*.
- (27) *Culpa in contrahendo* for the purposes of this Regulation is an autonomous concept and should not necessarily be interpreted within the meaning of national law. It should include the violation of the duty of disclosure and the breakdown of contractual negotiations. Article 12 covers only non-contractual obligations presenting a direct link with the dealings prior to the conclusion of a contract. This means that if, while a contract is being negotiated, a person suffers personal injury, Article 4 or other relevant provisions of this Regulation should apply.
- (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.
- (29) Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions.
- (30) In order to strike a reasonable balance between the parties, account must be taken, in so far as appropriate, 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 the law of another country. The term 'rules of safety and conduct' should be interpreted as referring to all regulations having any relation to safety and conduct, including, for example, road safety rules in the case of an accident.
- (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.

- (32) Respect for international commitments entered into by the Member States means that this Regulation should not affect international conventions to which one or more Member States are parties at the time this Regulation is adopted. To make the rules more accessible, the Commission should 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.
- (33) The Commission will make a proposal to the European Parliament and the Council concerning the procedures and conditions according to which Member States would be entitled to negotiate and conclude on their own behalf agreements with third countries in individual and exceptional cases, concerning sectoral matters, containing provisions on the law applicable to non-contractual obligations.
- (34) Since the objective of this Regulation cannot be sufficiently achieved by the Member States, and can therefore, by reason of the scale and effects of the Regulation, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity set out in Article 5 of the Treaty. In accordance with the principle of proportionality set out in that Article, this Regulation does not go beyond what is necessary to attain that objective.
- (35) The United Kingdom and Ireland, 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, have given notice of their wish to take part in the adoption and application of this Regulation.
- (36) 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, Denmark does not take part in the adoption of this Regulation, and is not bound by it or subject to its application,

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, in particular, to revenue, customs or administrative matters or the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*).

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

- (a) non-contractual obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects including maintenance obligations;
- (b) non-contractual obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession;
- (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 negotiable instruments arise out of their negotiable character;
- (d) non-contractual obligations arising out of the law of companies and other bodies corporate or unincorporated regarding matters such as the creation, by registration or otherwise, legal capacity, internal organisation or winding up of companies and other bodies corporate or unincorporated, the personal liability of officers and members as such for the obligations of the company or body and the personal liability of auditors to a company or to its members in the statutory audits of accounting documents;
- (e) non-contractual obligations arising out of the relations between the settlors, trustees and beneficiaries of a trust created voluntarily;
- (f) non-contractual obligations arising out of nuclear damage;
- (g) non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

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

4. For the purposes of this Regulation, 'Member State' shall mean any Member State other than Denmark.

#### Article 2

##### Non-contractual obligations

1. For the purposes of this Regulation, damage shall cover any consequence arising out of tort/delict, unjust enrichment, *negotiorum gestio* or *culpa in contrahendo*.

2. This Regulation shall apply also to non-contractual obligations that are likely to arise.

3. Any reference in this Regulation to:

- (a) an event giving rise to damage shall include events giving rise to damage that are likely to occur; and
- (b) damage shall include damage that is likely to occur.

#### Article 3

##### Universal application

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

#### CHAPTER II

##### TORTS/DELICTS

#### Article 4

##### General rule

1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs 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 occur.

2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

#### Article 5

##### Product liability

1. Without prejudice to Article 4(2), the law applicable to a non-contractual obligation arising out of damage caused by a product shall be:

- (a) the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country; or, failing that,
- (b) the law of the country in which the product was acquired, if the product was marketed in that country; or, failing that,
- (c) the law of the country in which the damage occurred, if the product was marketed in that country.



However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably foresee the marketing of the product, or a product of the same type, in the country the law of which is applicable under (a), (b) or (c).

2. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraph 1, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

#### Article 6

### 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.

#### Article 7

### 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.

#### Article 8

### Infringement of intellectual property rights

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

2. In the case of a non-contractual obligation arising from an infringement of a unitary Community intellectual property right, the law applicable shall, for any question that is not

governed by the relevant Community instrument, be the law of the country in which the act of infringement was committed.

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

#### Article 9

### Industrial action

Without prejudice to Article 4(2), the law applicable to a non-contractual obligation in respect of the liability of a person in the capacity of a worker or an employer or the organisations representing their professional interests for damages caused by an industrial action, pending or carried out, shall be the law of the country where the action is to be, or has been, taken.

#### CHAPTER III

### UNJUST ENRICHMENT, NEGOTIORUM GESTIO AND CULPA IN CONTRAHENDO

#### Article 10

### Unjust enrichment

1. If a non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that unjust enrichment, it shall be governed by the law that governs that relationship.

2. Where the law applicable cannot be determined on the basis of paragraph 1 and the parties have their habitual residence in the same country when the event giving rise to unjust enrichment occurs, the law of that country shall apply.

3. Where the law applicable cannot be determined on the basis of paragraphs 1 or 2, it shall be the law of the country in which the unjust enrichment took place.

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 that indicated in paragraphs 1, 2 and 3, the law of that other country shall apply.

#### Article 11

### Negotiorum gestio

1. If a non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another person, concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that non-contractual obligation, it shall be governed by the law that governs that relationship.

2. Where the law applicable 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, the law of that country shall apply.

3. Where the law applicable cannot be determined on the basis of paragraphs 1 or 2, it shall be the law of the country in which the act was performed.

4. Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another person is manifestly more closely connected with a country other than that indicated in paragraphs 1, 2 and 3, the law of that other country shall apply.

#### Article 12

##### **Culpa in contrahendo**

1. The law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, shall be the law that applies to the contract or that would have been applicable to it had it been entered into.

2. Where the law applicable cannot be determined on the basis of paragraph 1, it shall be:

- (a) the law of the country in which the damage occurs, 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 occurred; or
- (b) where the parties have their habitual residence in the same country at the time when the event giving rise to the damage occurs, the law of that country; or
- (c) where it is clear from all the circumstances of the case that the non-contractual obligation arising out of dealings prior to the conclusion of a contract is manifestly more closely connected with a country other than that indicated in points (a) and (b), the law of that other country.

#### Article 13

##### **Applicability of Article 8**

For the purposes of this Chapter, Article 8 shall apply to non-contractual obligations arising from an infringement of an intellectual property right.

#### CHAPTER IV

##### **FREEDOM OF CHOICE**

#### Article 14

##### **Freedom of choice**

1. The parties may agree to submit non-contractual obligations to the law of their choice:

- (a) by an agreement entered into after the event giving rise to the damage occurred;
- or

- (b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred.

The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties.

2. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs, are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that country which cannot be derogated from by agreement.

3. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs, are located in one or more of the Member States, the parties' choice of the law applicable other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

#### CHAPTER V

##### **COMMON RULES**

#### Article 15

##### **Scope of the law applicable**

The law applicable to non-contractual obligations under this Regulation shall govern in particular:

- (a) the basis and extent of liability, including the determination of persons who may be held 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, the nature and the assessment of damage or the remedy claimed;
- (d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation;
- (e) the question whether a right to claim damages or a remedy may be transferred, including by inheritance;
- (f) persons entitled to compensation for damage sustained personally;
- (g) liability for the acts of another person;
- (h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation.

#### Article 16

##### **Overriding mandatory provisions**

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

*Article 17***Rules of safety and conduct**

In assessing the conduct of the person claimed to be liable, 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 liability.

*Article 18***Direct action against the insurer of the person liable**

The person having suffered damage may bring his or her claim directly against the insurer of the person liable to provide compensation if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides.

*Article 19***Subrogation**

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, and the extent to which, 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.

*Article 20***Multiple liability**

If a creditor has a claim against several debtors who are liable for the same claim, and one of the debtors has already satisfied the claim in whole or in part, the question of that debtor's right to demand compensation from the other debtors shall be governed by the law applicable to that debtor's non-contractual obligation towards the creditor.

*Article 21***Formal validity**

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

*Article 22***Burden of proof**

1. The law governing a non-contractual obligation under this Regulation shall apply 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 21 under which that act is formally valid, provided that such mode of proof can be administered by the forum.

## CHAPTER VI

**OTHER PROVISIONS***Article 23***Habitual residence**

1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.

Where the event giving rise to the damage occurs, or the damage arises, in the course of operation of a branch, agency or any other establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.

2. For the purposes of this Regulation, the habitual residence of a natural person acting in the course of his or her business activity shall be his or her principal place of business.

*Article 24***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 25***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 Member State within which different territorial units have their own rules of law in respect of non-contractual obligations shall not be required to apply this Regulation to conflicts solely between the laws of such units.

*Article 26***Public policy of the forum**

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.

*Article 27***Relationship with other provisions of Community law**

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.

*Article 28***Relationship with existing international conventions**

1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations.

2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them insofar as such conventions concern matters governed by this Regulation.

## CHAPTER VII

## FINAL PROVISIONS

*Article 29***List of conventions**

1. By ... (\*), Member States shall notify the Commission of the conventions referred to in Article 28(1). After that date, Member States shall notify the Commission of all denunciations of such conventions.

This Regulation shall be binding in its entirety and directly applicable in the 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*

...

2. The Commission shall publish in the *Official Journal of the European Union* within six months of receipt:

- (i) a list of the conventions referred to in paragraph 1;
- (ii) the denunciations referred to in paragraph 1.

*Article 30***Review clause**

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.

*Article 31***Application in time**

This Regulation shall apply to events giving rise to damage which occur after its entry into force.

*Article 32***Date of application**

This Regulation shall apply from ... (\*\*\*), except for Article 29, which shall apply from ... (\*).

(\*) 12 months after the date of the adoption of this Regulation.

(\*\*) Four years after the date of entry into force of this Regulation.

(\*\*\*) 18 months after the date of adoption of this Regulation.



## STATEMENT OF THE COUNCIL'S REASONS

### I. INTRODUCTION

The Council reached general agreement on the text of the draft Regulation on the law applicable to non-contractual obligations on 1-2 June 2006. This led to the adoption of a common position on 25 September 2006 under the co-decision procedure.

The Council took its decision by qualified majority. The delegations of Estonia and Latvia voted against due to their reservations on Article 9 on industrial action and its implications for the freedom to provide services. <sup>(1)</sup>

When adopting its position, the Council took into account the opinion of the European Parliament delivered at first reading on 6 July 2005. <sup>(2)</sup>

The purpose of this proposal is to lay down a uniform set of rules of law applicable to non-contractual obligations, irrespective of the country of the court in which an action is brought. This should increase certainty as to the applicable law and improve the predictability of legal disputes and the free movement of judgements.

### II. ANALYSIS OF THE COMMON POSITION

#### 1. General

The Council's common position follows largely the same line as the Commission's original proposal as modified by the amended proposal submitted to the Council on 22 February 2006 <sup>(3)</sup>.

The principal changes made to the text are as follows:

1. In comparison with the original Commission proposal the scope of the instrument has been clarified and further elaborated. Civil and commercial matters do not cover liability of the State for acts and omissions in the exercise of state authority ('acta iure imperii'). An additional exclusion has been added to Article 1(2) (g) to reflect the discussions and the final compromise on violations of privacy and rights relating to personality.
2. The Regulation follows the same logic as the original Commission proposal in the sense that the Regulation sets out a general rule for the law applicable to a tort/delict. The general rule consists of applying the law of the country where damage occurred. This has not changed as compared to the original Commission proposal. Article 4(2) sets out an exception from the general principle, creating a special connection where the parties have their habitual residence in the same country. Article 4(3) should be understood as an 'escape clause' from Articles 4(1) and 4(2), where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country.

As a matter of principle, the general rule should be applicable to all non-contractual obligations covered by the Regulation. Only in certain limited, duly justified circumstances should the general rule be derogated from and special rules applied. In accordance with the conditions specified in Article 14 the parties may agree to submit non-contractual obligations to the law of their choice.

3. In comparison with the original Commission proposal, the scope of the special rules has been further clarified in order to facilitate their practical application. The Regulation currently contains special rules in matters of product liability, unfair competition, environmental damage, infringements of intellectual property and industrial action.
4. Negotiations over violations of privacy and rights relating to personality caused difficulties to many delegations. The Council examined this issue on numerous occasions and carefully considered all options on the negotiating table, including the proposal by the European Parliament.

<sup>(1)</sup> See ref to I/A-item note 12219/2006 CODEC 838 JUSTCIV 181;

<sup>(2)</sup> See 10812/05 CODEC 590 JUSTCIV 132;

<sup>(3)</sup> See 6622/06 JUSTCIV 32 CODEC 171;

Nevertheless, as a final compromise and in an attempt to reconcile the conflicting interests, the Council decided to delete the special rule on violations of privacy and rights relating to personality at this stage. As indicated above, such matters are currently excluded from the scope of the Regulation by Article 1(2) g.

However, this has to be read together with Article 30. The review clause, proposed by the European Parliament and currently contained in Article 30, makes provision for a report to be submitted by the Commission at the latest four years after the date of entry into force of the Regulation. The report should consider in particular non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

5. Differently from the original Commission proposal, the Regulation now also contains a rule on industrial action in line with the proposal of the European Parliament. With the aim of balancing the interests of workers and employers, this rule consists of applying the law of the country where the industrial action was taken. However, this provision caused such difficulties to two delegations that they voted against the common position.
6. The original proposal of the Commission contained one provision for non-contractual obligations arising out of acts other than torts/delicts. The Regulation now includes a specific chapter with separate provisions on unjust enrichment, *negotiorum gestio* and *culpa in contrahendo*.
7. The Articles on mandatory provisions, relationship with other Community law provisions and relationship with existing international conventions have further been simplified.
8. The Regulation now contains, as requested by the European Parliament, a review clause, which obliges the Commission to submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of the 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.

Other amendments are of a more formal nature and have been made to render the text easier to read.

After revision by Legal/Linguistic Experts, the text and the recitals have been re-numbered. A table in the Annex sets out the respective numbers as set out in the common position and as they were indicated in the original proposal.

## 2. Parliament's amendments

The Council has accepted many of European Parliament's amendments. In some cases, however, the discussions in the Council and the revision of the text by Legal/Linguistic Experts showed the need for certain technical clarifications. In order to ensure correspondence to the provisions of the Regulation, the recitals have been adapted and updated.

The changes made to Articles 1, 2, 4, 9, 10, 11, 12, 28 and 30 require the inclusion of additional recitals.

Recitals 1-5 have been updated in order to take account of the latest developments at political level. Accordingly, the reference to the 1998 Action Plan has been replaced by guidelines contained in the Hague Programme adopted by the European Council in 2004.

### a) Amendments accepted in their entirety

Amendments 12, 17, 21, 22, 35, 37, 39, 40, 45, 51, 52 and the oral amendments can be accepted as presented by the European Parliament since they contribute either to the clarity and consistency of the instrument or to questions of detail.

### b) Amendments accepted in substance

Amendments 2, 15, 18, 19, 20, 23, 24, 28, 31, 34, 38, 45, 54 can be accepted in substance subject to re-drafting.

Amendment 2 is covered by current recitals (29) and (31).

The substance of amendment 15 is taken over by recital (24).

The changes proposed by amendment 18 are reflected in substance in Articles 2 and 1(1).

Amendments 19 and 20 are included in the text of Articles 1(2) b and 1(2) d. However, the drafting has been simplified, in particular due to the inclusion of Article 2.

Amendment 23 is accepted in substance. However, the Council considers that in view of the changes made to recital (9) and Article 1(1) this amendment is redundant.

The Council consider that the changes proposed by amendment 24 are covered in substance by the changes made to Articles 16, 26 and 27, as well as recital (31).

The Council can accept the principle of amendments 28 and 34, which would change the structure and the title of the sections. The Council considers that this is reflected in the current structure of the Regulation, which is divided into, Chapter I — Scope, Chapter II — Torts/delicts, Chapter III — Unjust enrichment, negotiorum gestio and culpa in contrahendo, Chapter IV — Freedom of choice and Chapter V — Common provisions, and would serve the same purpose.

Amendment 31 introduces a new provision on industrial action. This is in line with the negotiations in the Council. However, the substance of the rule has been further elaborated in Article 9 and by recitals (24) and (25).

The substance of amendment 38 is taken over by Article 14. However, the Council has tried to simplify the wording and render it more flexible.

The substance of amendment 46 is taken over by Article 18.

*c) Amendments accepted in part*

Amendment 3, 14, 25, 26, 36, 44, 53 and 54 can be accepted in part.

Amendment 3 is only partly acceptable since the recital relates to Article 4 and amendment 26 on Article 4 is not fully accepted. The first sentence of the amendment is reflected in substance in the current text of recitals (13) and (14). The last part of the amendment is reflected in the current text of recital (28).

Amendment 14 proposes, firstly, to add the words 'in so far as appropriate' so as to add emphasis to the discretion of the court and, secondly, to exclude this possibility in matters of violations of privacy and unfair competition. While the Council can accept the first part of the amendment, matters of violations of privacy have been excluded from the scope, and the Council sees no justification for making an exception for cases of unfair competition.

Amendment 25 is acceptable in principle. However, the conditions for expressing ex ante choice should in view of the Council be laid down in clear and unequivocal terms.

Amendment 26 relates to the general rule contained in Article 4.

With regard to Article 4(1) the Council can accept the changes proposed.

On the other hand, the Council cannot accept the changes to paragraph 2. Paragraph 2 brings in a specific rule on traffic accidents which would subject the non-contractual obligation and the amount of damages to two different laws. As the Commission has stated in its revised proposal <sup>(1)</sup> this solution diverges from the law in force in the Member States and cannot therefore be adopted without prior in-depth analysis. It is accordingly proposed that the question be considered in detail in the report foreseen by Article 30.

<sup>(1)</sup> See 6622/06 JUSTCIV 32 CODEC 171;

As to Article 4(3), it should be seen as an escape clause from Articles 4(1) and (2), where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country. In the light of this, the Council sees no need for listing specific factors.

Amendment 36 relates to the new Article 10. While in principle the changes proposed are acceptable, the Council considers that the law of the country in which enrichment took place is a more appropriate connecting factor in case the applicable law cannot be determined on the basis of Article 10(1) or (2).

The first part of amendment 44 is acceptable to the Council. However, in the course of the negotiations it was agreed to delete paragraph (2) that would create fundamental problems to certain Member States and therefore the Council cannot accept this part of the amendment.

Amendment 53 is accepted in part. The Council considers that it would be more appropriate to have the Regulation take automatically precedence over conventions concluded exclusively between two or more of the Member States insofar as such conventions concern matters governed by the Regulation. The amendment proposed to Article 28(3) is not accepted since the Hague Convention provides for a specific regime on traffic accidents and many of the Member States that are contracting parties to the Convention expressed their wish to preserve this regime. In this context, regard should be had to the review clause in Article 30, which makes a specific reference to traffic accidents.

The Council welcomes the review clause as proposed by amendment 54. However, the Council suggests that a more generic review clause is more appropriate to ensure effective evaluation in the framework of the existing competencies (see Article 30).

#### d) *Amendments rejected*

Amendments 1, 4, 5, 6, 8, 10, 11, 13, 16, 27, 29, 32, 33, 41, 42, 43, 47, 49, 50, 56 and 57 are rejected.

Amendment 1 refers to the Rome I Regulation. However, until the Regulation is adopted, it is more appropriate to refer to the existing 1980 Rome I Convention on the law applicable to contractual obligations.

Amendment 4 relates to the changes proposed to the general rule (amendment 26). Since amendment 26 was rejected in part, the corresponding changes to the recital would have to be rejected.

In view of the changes made to the scope of the Regulation, the Council sees no need for amendment 5.

Amendment 6, 8, 11 and 13 would adapt the recitals to reflect the deletion of several special rules from the Regulation as proposed by amendments 27 (product liability), 29 (unfair competition and acts restricting free competition) and 33 (violations of the environment). The Council cannot accept the deletion of these special rules, therefore the corresponding amendments to the recitals would have to be rejected as well. However, the Council has made an effort to clearly define the scope of these special rules in order to facilitate their practical application.

Amendments 10 and 56 would have to be rejected since non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation, have been excluded from the scope of the Regulation

Amendment 16 is not acceptable to the Council, since the Council rejects amendment 42 to which this amendment corresponds.

Amendment 27 would abolish the special rule on product liability. The Council considers that the application of the general rules in cases of product liability would not allow foreseeing the applicable law with reasonable certainty. Creation of a cascade system of connecting factors, together with a foreseeability clause, appears to be a balanced solution in view of this objective.

Amendment 29 proposes to delete the specific rule on unfair competition. The Council cannot accept that. The rule in Article 6 is not an exception to the general rule contained in Article 4(1) but rather clarifies it in order to determine where the damage arises. In matters of unfair competition, the rule should protect competitors, consumers and the general public and ensure that the market economy functions properly. The connection to the place where the competitive relations or the collective interests of consumers are affected, or in case of restrictions of competition, the country where the restriction has or is likely to have effect, generally satisfy these objectives. The non-contractual obligations arising out of restrictions of competition in Article 6(3) should cover infringements of both Community and national competition law.

Amendment 32 is related to amendment 26 which is rejected by the Council to the extent it relates to traffic accidents. For the same reasons as indicated above, this amendment is rejected.

The Council cannot accept the deletion of the special rule for environmental damage as proposed by amendment 33. The proposed rule reflects the 'polluter pays' principle promoted by the Community and already applied in several Member States.

The Council cannot accept amendment 41 since it would appear to be in contradiction with the changes proposed by amendment 40 which the Council accepts.

Amendments 42 and 43 address the question of the application of foreign law by the court. The Council rejects these amendments since this question should be tackled in a different context.

Since amendment 22 was accepted, amendment 47 is redundant in the view of the Council.

The Council considers that the clarification contained in Article 23(2) is sufficient for the purposes of natural persons acting in the course of their business activities. Thus, amendment 49 is rejected.

Amendment 50 aims at clarifying the concept of public policy. It would be difficult for the time-being to lay down common criteria and reference instruments for the purposes of defining public policy. For these reasons amendment 50 is rejected.

Amendment 57 relates to Article 6 of the original Commission proposal. The Council examined this issue on numerous occasions and carefully considered all options on the negotiating table, including the solution proposed by the European Parliament. However, as a final compromise and in an attempt to reconcile the conflicting interests, the Council proposes to delete the special rule on violations of privacy and rights relating to personality at this stage. Accordingly amendment 57 has to be rejected. Instead the Regulation provides in Article 1(2) (g) for an exclusion from the scope.

However, this should be read together with Article 30. The review clause contained in Article 30 makes provision for a report to be submitted by the Commission at the latest four years after the date of entry into force of the Regulation. The report shall consider in particular non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

### III. CONCLUSION

The Council considers that the text of the common position on Regulation on the law applicable to non-contractual obligations creates a balanced system of conflict-of-law rules in the field of non-contractual obligations and achieves the desired uniformity of rules of applicable law. Furthermore, the common position is in broad terms in line with the original proposal of the Commission and the opinion of the European Parliament.

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## ANNEX

## TABLE OF CORRESPONDENCE

| The original Commission proposal | The Council's common position |
|----------------------------------|-------------------------------|
| Recital (1)                      | Recital (1)                   |
| new                              | Recital (2)                   |
| Recital (2)                      | deleted                       |
| Recital (3)                      | Recital (3)                   |
| new                              | Recital (4)                   |
| new                              | Recital (5)                   |
| Recital (4)                      | Recital (6)                   |
| Recital (5)                      | Recital (7)                   |
| new                              | Recital (8)                   |
| new                              | Recital (9)                   |
| new                              | Recital (10)                  |
| new                              | Recital (11)                  |
| Recital (6)                      | Recital (12)                  |
| Recital (7)                      | Recital (13)                  |
| Recital (8)                      | Recital (14)                  |
| new                              | Recital (15)                  |
| new                              | Recital (16)                  |
| Recital (9)                      | Recital (17)                  |
| Recital (10)                     | Recital (18)                  |
| Recital (11)                     | Recital (19)                  |
| new                              | Recital (20)                  |
| new                              | Recital (21)                  |
| Recital (12)                     | deleted                       |
| Recital (13)                     | Recital (22)                  |
| Recital (14)                     | Recital (23)                  |
| new                              | Recital (24)                  |
| new                              | Recital (25)                  |
| Recital (15)                     | Recital (26)                  |
| new                              | Recital (27)                  |
| Recital (16)                     | Recital (28)                  |
| Recital (17)                     | Recital (29)                  |
| Recital (18)                     | Recital (30)                  |
| Recital (19)                     | Recital (31)                  |

| The original Commission proposal | The Council's common position |
|----------------------------------|-------------------------------|
| Recital (20)                     | Recital (32)                  |
| new                              | Recital (33)                  |
| Recital (21)                     | Recital (34)                  |
| Recital (22)                     | Recital (35)                  |
| Recital (23)                     | Recital (36)                  |
| Article 1                        | Article 1                     |
| new                              | Article 2                     |
| Article 2                        | Article 3                     |
| Article 3                        | Article 4                     |
| Article 4                        | Article 5                     |
| Article 5                        | Article 6                     |
| Article 6                        | deleted                       |
| Article 7                        | Article 7                     |
| Article 8                        | Article 8                     |
| new                              | Article 9                     |
| Article 9(1)                     | Article 12                    |
| Article 9(2)                     | Article 10(2), 11(2), 12(2)b  |
| Article 9(3)                     | Article 10                    |
| Article 9(4)                     | Article 11                    |
| Article 9(5)                     | Article 10(4), 11(4), 12(2)c  |
| Article 9(6)                     | Article 13                    |
| Article 10                       | Article 14                    |
| Article 11                       | Article 15                    |
| Article 12                       | Article 16                    |
| Article 13                       | Article 17                    |
| Article 14                       | Article 18                    |
| Article 15(1)                    | Article 19                    |
| Article 15(2)                    | Article 20                    |
| Article 16                       | Article 21                    |
| Article 17                       | Article 22                    |
| Article 18                       | deleted                       |
| Article 19                       | Article 23                    |
| Article 20                       | Article 24                    |

| The original Commission proposal    | The Council's common position |
|-------------------------------------|-------------------------------|
| Article 21                          | Article 25                    |
| Article 22                          | Article 26                    |
| Article 23                          | Article 27                    |
| Article 24                          | deleted                       |
| Article 25                          | Article 28                    |
| Article 26                          | Article 29                    |
| new                                 | Article 30                    |
| Article 27 second section           | Article 31                    |
| Article 27 first and third sections | Article 32                    |