



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 27.9.2006
COM(2006) 566 final

2003/0168 (COD)

**COMMUNICATION FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT**

pursuant to the second subparagraph of Article 251 (2) of the EC Treaty

concerning the

**common position of the Council on the adoption of a Regulation of the European
Parliament and of the Council on the law applicable to non-contractual obligations
("Rome II")**

**COMMUNICATION FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT**

pursuant to the second subparagraph of Article 251 (2) of the EC Treaty

concerning the

**common position of the Council on the adoption of a Regulation of the European
Parliament and of the Council on the law applicable to non-contractual obligations
("Rome II")**

1. BACKGROUND

Date of transmission of the proposal to the EP and the Council 22.7.2003
(document COM(2003) 427 final – 2003/0168 (COD))

Date of the opinion of the European Economic and Social Committee: 2.6.2004

Date of the opinion of the European Parliament, first reading: 6.7.2005

Date of transmission of the amended proposal: 21.2.2006

Date of adoption of the common position (qualified majority vote): 25.9.2006

2. OBJECTIVES OF THE COMMISSION PROPOSAL

International jurisdiction, recognition and enforcement in a Member State of judgments given in another Member State are dealt by the Regulation No. 44/2001, which applies in civil and commercial matters both to contractual and non-contractual obligations. As regards applicable law, the rules on contracts were harmonised between the Member States by the *1980 Rome Convention on the law applicable to contractual obligations*. However, there are no general harmonised rules within the Community for determining the law applicable to non-contractual obligations. The Commission proposal is intended to fill this gap.

Thus, the Commission proposal aims at harmonising the applicable law rules on non-contractual obligations of civil and commercial nature (traffic accidents, product liability, unfair competition etc.) and adopt common rule across the EU for the determination of the law applicable to such obligations.

The aims of the harmonisation of these rules is to offer higher level of legal certainty to individuals and economic operators as heretofore and avoid "forum shopping" which leads to potentially different substantive results for the parties depending on which court was seized of the matter.

3. COMMENTS ON THE COMMON POSITION

3.1. General comment

The Council's common position retains the essence of the Commission's initial proposal as modified by the amended proposal which reflected a number of amendments adopted by the European Parliament in its first reading.

The substantive differences in the common position in comparison with the amended proposal of the Commission and the Parliament's amendment are commented on in further detail below.

3.2. Substantive departures from the Commission's amended proposal

Article 1(2)(g) reflects the Commission's amended proposal (Article 1(2)(h)) where the Commission suggested the exclusion from scope of violations of privacy and of rights relating to personality when perpetrated *by the media*. The common position goes, however, further. It does not limit this exclusion only to non-contractual obligations entered into by the media, but extends it to all and any such non-contractual obligation. The main reason for this approach was the ultimate inability to agree on the scope (definition) of *media* in this context.

This exclusion is mitigated by the wording of the review clause (Article 30) which focuses the attention to this specific area of non-contractual obligation as a specific subject of the report on the application of the future Regulation.

Article 5 on product liability departs in its drafting approach considerably from the Commission's proposal (Article 6 of the amended proposal), albeit not in its intention. The common position reflects the need for a specific rule on products liability which strikes an appropriate balance between the interests of the victim and the person liable.

The Commission continues to regret the approach in the common position which provides for a rather complex system of cascade application of connecting factors. It remains persuaded that its original solution offered an equally balanced solution for the interests at stake, while expressed in much simpler drafting.

Article 6 extends the application of the rule on unfair competition also to acts restricting free competition, while Article 7 of the Commission's amended proposal applies only to unfair commercial practices. It follows from the Explanatory Memorandum to the amended proposal (point 3.4., Amendment 29) that the absence of an explicit rule for competition cases in the amended proposal was due to the then pending public consultation on the Commission Green Paper on "Damages actions for breach of EC antitrust rules". Indeed, the Commission did not want to pre-empt that consultation by including already in its amended proposal an applicable law rule for non-contractual obligations arising out of a breach of the competition rules. The Commission did, however, stipulate in the Explanatory Memorandum that in the course of the co-decision procedure, it may support a different solution for competition cases. The Commission reserves the right to do so particularly in order to preserve the effectiveness of the right of natural and legal persons to seek compensation for loss caused by an infringement of the competition rules. Having regard to the Council common position, the Commission maintains its position that it may support a different solution for competition cases in the course of the co-decision procedure.

Article 9 introduces a specific rule on the law applicable to non-contractual obligations arising out of industrial action. The provision on these lines was part of the Parliament's amendments which the Commission did not accept and consequently was not included in its amended proposal.

The text of the provision in the common position is a redraft which attempts to give effect to the main objections of the Commission during the discussions in the Council. Its scope is now defined more precisely and is, in particular, limited to the issue of liability of employers, workers and/or trade unions in the context of an industrial action. The text is, however, still unclear that it should not extend to relationships vis-à-vis third parties and the Commission regrets this lack of clarity.

Article 16 departs from Article 13 of the Commission's amended proposal which contained an additional paragraph dealing with the possibility for the court to give effect to overriding mandatory rules of another country than the country whose law is applicable under the rules of the instrument. This provision in the Commission's proposal did not reflect any particular Community interest; it was aiming at consistency as it was inspired by a similar provision in the *1980 Rome Convention on the Law Applicable to Contractual Obligations*. The Commission has accepted this deletion.

Article 26 on public policy does not reflect the wording of Article 23 of the Commission's amended proposal, which in turn was the result of the earlier discussions in the Council where the original Commission's proposal for a specific article dealing with non-compensatory damages was rejected. Subsequent to the discussions on the amended proposal, the idea reflected in the amendment was moved into a recital and ultimately dropped completely when no agreement could be achieved over its content, while there is no disagreement that the public policy clause does offer sufficient guarantee and protection against potential negative effects of awards of extreme non-compensatory damages.

Article 27 departs from Article 23 in the Commission's initial proposal (Article 3 of the amended proposal) which contained a much more detailed rule explaining the relationship between the different sources of Community law (in particular as regards the relationship with specific instruments promoting the proper functioning of the internal market). In view of the recent developments in the European Parliament and the Council in the context of negotiations of other proposals such specifically tailored provision in this instrument seems no longer necessary.

Article 28 on the relationship with other international conventions differs from the Commission's amended proposal in that it

- a) does not limit the application of paragraph 1 to multilateral conventions only and to such which are concluded in "particular matters",
- b) contains a specific rule in paragraph 2 for the priority of the Regulation over conventions concluded exclusively between the Member States,
- c) as a consequence of the above, the provision gives priority to The Hague 1971 Traffic Accidents and the 1973 Products Liability Conventions in all circumstances, even when all relevant aspects of the situation are situated in the Community.

While the first two above mentioned departures from the amended text of the proposal do not, in principle, generate difficulties for the Commission, the Commission continues to regret the approach adopted in the common position, giving a general priority to multilateral conventions even when all relevant aspects of the situation are locating only within the Community. The European Parliament wished in such circumstances to give priority to the new regulation over the Hague Traffic Accidents Convention. The approach in the Common position undermines the strivings for harmonised solutions within the Community.

Even though this aspect is somewhat mitigated by the specific reference to traffic accidents issues in the Review Clause (Article 30 in the common position), which is intended to give special attention to the issue of traffic accidents in the report on the application of the Regulation in order to evaluate the effects of absence of fully harmonised rules on law applicable on traffic accidents within the Community, the Commission still would have preferred the text proposed in its amended proposal (Article 24(2) of that proposal).

The Commission regrets that the declaration which it made during the final stage of the negotiations in the Council¹ is not accurately reflected in the recital 33 of the common position.

3.3. Parliament's amendments

Overall, the common position incorporates, either fully or in spirit, most of the European Parliament's amendments on the substantive provisions of the proposal which were accepted by the Commission and reflected in its amended proposal.

There are, however, some important divergences between the amended proposal and the common position as regards the Parliament's amendments which have already been referred to in point 3.2 above, such as:

Article 9 in the common position reflects amendment 31 by the European Parliament which the Commission did not accept and was not part of its amended proposal;

Article 27 in the common position does not incorporate in its entirety Article 3 of the amended proposal which reflected Parliament's amendment 24;

Article 28 in the common position is based on a different perspective when compared to Article 24 of the amended proposal as regards, in particular, the relationship to the Hague 1971 Traffic Accidents Convention as suggested by the Parliament's amendment 53.

3.4. New provisions introduced by the Council:

Article 2 is a provision of a technical nature which intends to provide definition of certain concepts used throughout the Regulation with the intention to simplify the drafting of its individual provisions.

¹ At the JHA Council meeting in Luxembourg (27 and 28 April 2006) the Commission made this declaration: "The Commission is prepared, in appropriate cases, to examine the possibility of making proposal to the Council authorising Member States to conclude international agreements concerning specific sectoral matters which contain provisions on the law applicable to non-contractual obligations. This remains without prejudice to the possibility of the Community to negotiate and conclude such international agreements in accordance with the provisions of Article 300 EC."

Article 12 introduces a specific proposal for non-contractual obligations preceding the conclusion of a contract. Such specific provision was not included in the Commission's proposal, even though the intention was always to cover this type of obligations by this instrument. This reflected the line taken in the case law of the European Court of Justice in the context of the 1968 Brussels Convention (replaced by Regulation 44/2001), whereby this type of obligations is to be considered non-contractual². The Commission has originally opted for a more flexible solution in the Article 5(3) of its amended proposal, whereas the Council seems to prefer a more detailed provision on the issue. The content of the proposed provision leads, in principle, to the same result as envisaged by the Commission, i.e. to the application of the law of the country which is most closely connected with the non-contractual obligation.

4. CONCLUSION

The Commission accepts the common position in the light of the fact that it includes the key elements included in its initial proposal and Parliament's amendments as incorporated into its amended proposal.

² Following the same reasoning, this type of obligations was excluded from the scope of the Commission's proposal for a Regulation on the Law Applicable to Contractual Obligations ("Rome I") adopted on 15 December 2005 - COM(2005) 650 final, 2005/0261 (COD).