



COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND THE COUNCIL**

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

(presented by the Commission)

## EXPLANATORY MEMORANDUM

### 1. INTRODUCTION

#### 1.1. Context

By Article 2 of the Treaty on European Union, the Member States set themselves the objective of maintaining and developing the Union as an area of freedom, security and justice, in which the free movement of persons is assured and litigants can assert their rights in the courts and before the authorities of all the Member States, enjoying facilities equivalent to those they enjoy in their own country.

To establish a genuine European law-enforcement area, the Community, under Articles 61(c) and 65 of the Treaty establishing the European Community, is to adopt measures in the field of judicial cooperation in civil matters in so far as necessary for the proper functioning of the internal market. The Tampere European Council on 15 and 16 October 1999<sup>1</sup> acknowledged the mutual recognition principle as the cornerstone of judicial cooperation in the Union. It asked the Council and the Commission to adopt, by December 2000, a programme of measures to implement the mutual recognition principle.

The joint Commission and Council programme of measures to implement the principle of mutual recognition of decisions in civil and commercial matters, adopted by the Council on 30 November 2000,<sup>2</sup> states that measures relating to harmonisation of conflict-of-law rules, which may sometimes be incorporated in the same instruments as those relating to jurisdiction and the recognition and enforcement of judgments, actually do help facilitate the mutual recognition of judgments. The fact that the courts of the Member States apply the same conflict rules to determine the law applicable to a practical situation reinforces the mutual trust in judicial decisions given in other Member States and is a vital element in attaining the longer-term objective of the free movement of judgments without intermediate review measures.

#### 1.2. Complementarity with instruments of private international law already in force in the Community

This initiative relates to the Community harmonisation of private international law in civil and commercial matters that began late in the 1960s. On 27 September 1968 the six Member States of the European Economic Community concluded a Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the “Brussels Convention”) on the basis of the fourth indent of Article 293 (formerly 220) of the EC Treaty. This was drawn up on the idea, already described in the EC Treaty, that the establishment of a common market implied the possibility of having a judgment given in any Member State recognised and enforced as easily as possible. To facilitate the attainment of that objective, the Brussels Convention begins by setting out rules identifying the Member State whose courts have jurisdiction to hear and determine a cross-border dispute.

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<sup>1</sup> Presidency conclusions of 16 October 1999, points 28 to 39.

<sup>2</sup> OJ C 12, 15.1.2001, p. 1.

The mere fact that there are rules governing the jurisdiction of the courts does not generate reasonable foreseeability as to the outcome of a case being heard on the merits. The Brussels Convention and the “Brussels I” Regulation that superseded it on 1 March 2001<sup>3</sup> contain a number of options enabling claimants to prefer this or that court. The risk is that parties will opt for the courts of one Member State rather than another simply because the law applicable in the courts of this state would be more favourable to them.

That is why work began on codifying the rules on conflicts of laws in the Community in 1967. The Commission convened two meetings of experts in 1969, at which it was agreed to focus initially on questions having the greatest impact on the operation of the common market the law applicable to tangible and intangible property, contractual and non-contractual obligations and the form of legal documents. On 23 June 1972, the experts presented a first preliminary draft convention on the law applicable to contractual and non-contractual obligations. Following the accession of the United Kingdom, Ireland and Denmark, the group was expanded in 1973, and that slowed progress. In March 1978, the decision was taken to confine attention to contractual obligations so that negotiations could be completed within a reasonable time and to commence negotiations later for a second convention on non-contractual obligations.

In June 1980 the Convention on the law applicable to contractual obligations (the “Rome Convention”) was opened for signature, and it entered into force on 1 April 1991.<sup>4</sup> As there was no proper legal basis in the EC Treaty at the time of its signing, the convention takes the traditional form of an international treaty. But as it was seen as the indispensable adjunct to the Brussels Convention, the complementarity being referred to expressly in the Preamble, it is treated in the same way as the instruments adopted on the basis of Article 293 (ex-220) and is an integral part of the Community *acquis*.

Given the substantial difference in scope between the Brussels and Rome Conventions the former covers both contractual and non-contractual obligations whereas the latter covers only contractual obligations the proposed Regulation, commonly known as “Rome II”, will be the natural extension of the unification of the rules of private international law relating to contractual and non-contractual obligations in civil or commercial matters in the Community.

### **1.3. Resumption of work in the 1990s under the Maastricht and Amsterdam Treaties**

Article K.1(6) of the Union Treaty in the Maastricht version classified judicial cooperation in civil matters in the areas of common interest to the Member States of the European Union. In its Resolution of 14 October 1996 laying down the priorities for cooperation in the field of justice and home affairs for the period from 1 July 1996 to 30 June 1998,<sup>5</sup> the Council stated that, in pursuing the objectives set by the European Council, it intended to concentrate during the above period on certain priority areas, which included the “launching of discussions on the necessity and possibility of drawing up ... a convention on the law applicable to extra-contractual obligations”.

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<sup>3</sup> Council Regulation (EC) No 44/2001 of 22 December 2000, OJ L 12, 16.1.2001, p. 1, replacing the Brussels Convention of 1968, of which a consolidated version was published in OJ C 27, 26.1.1998, p. 1. But the Brussels Convention remains in force for relations between Denmark and the other Member States.

<sup>4</sup> 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.

<sup>5</sup> OJ C 319, 26 October 1996, p. 1.

In February 1998 the Commission sent the Member States a questionnaire on a draft convention on the law applicable to non-contractual obligations. The Austrian Presidency held four working meetings to examine the replies to the questionnaire. It was established that all the Member States supported the principle of an instrument on the law applicable to non-contractual obligations. At the same time the Commission financed a GROTIUS project<sup>6</sup> presented by the European Private International Law Group (GEDIP) to examine the feasibility of a European Convention on the law applicable to non-contractual obligations, which culminated in a draft text.<sup>7</sup> The Council's ad hoc "Rome II" Working Party continued to meet throughout 1999 under the German and Finnish Presidencies, examining the draft texts presented by the Austrian Presidency and by Gedip. An initial consensus emerged on a number of conflict rules, which this proposal for a Regulation duly reflects.

The Amsterdam Treaty, which entered into force on 1 May 1999, having moved cooperation in civil matters into the Community context, the Justice and Home Affairs Council on 3 December 1998 adopted the 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.<sup>8</sup> It recalls that principles such as certainty in the law and equal access to justice require among other things "*clear designation of the applicable law*" and states in paragraph 40 that "*The following measures should be taken within two years after the entry into force of the Treaty: ... b) drawing up a legal instrument on the law applicable to non-contractual obligations (Rome II)*".

On 3 May 2002, the Commission launched consultations with interested circles on an initial preliminary draft proposal for a "Rome II" Regulation prepared by the Directorate-General for Justice and Home Affairs. The consultations prompted a very wide response, and the Commission received 80 or so written contributions from the Member States, academics, representatives of industry and consumers' associations.<sup>9</sup> The written consultation procedure was followed by a public hearing in Brussels on 7 January 2003. This proposal duly reflects the comments received.

## **2. PROPOSAL FOR A EUROPEAN PARLIAMENT AND COUNCIL REGULATION**

### **2.1. General purpose - to improve the foreseeability of solutions regarding the applicable law**

The purpose of this proposal for a regulation is to standardise the Member States' rules of conflict of laws regarding non-contractual obligations and thus extend the harmonisation of private international law in relation to civil and commercial obligations which is already well advanced in the Community with the "Brussels I" Regulation and the Rome Convention of 1980.

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<sup>6</sup> Project No GR/97/051.

<sup>7</sup> Accessible at [http://www.drt.ucl.ac.be/gedip/gedip\\_documents.html](http://www.drt.ucl.ac.be/gedip/gedip_documents.html).

<sup>8</sup> OJ C 19, 23.1.1999, p. 1.

<sup>9</sup> The contributions received by the Commission can be consulted at: [http://europa.eu.int/comm/justice\\_home/news/consulting\\_public/rome\\_ii/news\\_summary\\_rome2\\_en.htm](http://europa.eu.int/comm/justice_home/news/consulting_public/rome_ii/news_summary_rome2_en.htm).

The harmonisation of conflict rules, which must be distinguished from the harmonisation of substantive law, seeks to harmonise the rules whereby the law applicable to an obligation is determined. This technique is particularly suitable for settling cross-border disputes, as, by stating with reasonable certainty the law applicable to the obligation in question irrespective of the forum, it can help to develop a European area of justice. Instead of having to study often widely differing conflict rules of all the Member States' courts that might have jurisdiction in a case, this proposal allows the parties to confine themselves to studying a single set of conflict rules, thus reducing the cost of litigation and boosting the foreseeability of solutions and certainty as to the law.

These general observations are particularly apt in the case of non-contractual obligations, the importance of which for the internal market is clear from sectoral instruments, in force or in preparation, governing this or that specific aspect (product liability or environmental liability, for example). The approximation of the substantive law of obligations is no more than embryonic. Despite common principles, there are still major divergences between Member States, in particular as regards the following questions: the boundary between strict liability and fault-based liability; compensation for indirect damage and third-party damage; compensation for non-material damage, including third-party damage; compensation in excess of actual damage sustained (punitive and exemplary damages); the liability of minors; and limitation periods. During the consultations undertaken by the Commission, several representatives of industry stated that these divergences made it difficult to exercise fundamental freedoms in the internal market. They realised that harmonisation of the substantive law was not a short-term prospect and stressed the importance of the rules of conflict of laws to improve the foreseeability of solutions.

A comparative law analysis of the rules of conflict of laws reveals that the present situation does not meet economic operators' need for foreseeability and that the differences are markedly wider than was the case for contracts before the harmonisation achieved by the Rome Convention. Admittedly, the Member States virtually all give pride of place to the *lex loci delicti commissi*, whereby torts/delicts are governed by the law of the place where the act was committed. The application of this rule is problematic, however, in the case of what are known as "complex" torts/delicts, where the harmful event and the place where the loss is sustained are spread over several countries.<sup>10</sup> There are variations between national laws as regards the practical impact of the *lex loci delicti commissi* rule in the case of cross-border non-contractual obligations. While certain Member States still take the traditional solution of applying the law of the country where the event giving rise to the damage occurred, recent developments more commonly tend to support the law of the country where the damage is sustained. But to understand the law in force in a Member State, it is not enough to ascertain whether the harmful event or the damage sustained is the dominant factor. The basic rule needs to be combined with other criteria. A growing number of Member States allow a claimant to opt for the law that is most favourable to him. Others leave it to the courts to determine the country with which the situation is most closely connected, either as a basic rule or exceptionally where the basic rule turns out to be inappropriate in the individual case. Generally speaking most Member States use a sometimes complex combination of the different solutions. Apart from the diversity of solutions, their legibility is not improved by the fact that only some of the Member States have codified their conflict-of-laws rules; in the others, solutions emerge gradually from the decisions of the courts and often remain uncertain, particularly as regards special torts/delicts.

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<sup>10</sup> See the decision of the Court of Justice in the following notes as regards the account to be taken of this spreading of factors for the international jurisdiction of the courts.

There is no doubt that replacing more than fifteen national systems of conflict rules<sup>11</sup> by a single set of uniform rules would represent considerable progress for economic operators and the general public in terms of certainty as to the law.

The next need is to analyse the conflict rules in the context of the rules governing the international jurisdiction of the courts. Apart from the basic jurisdiction of the courts for the place of the defendant's habitual residence, provided for by Article 2 of the "Brussels I" Regulation, Article 5(3) provides for a special head of jurisdiction in relation to torts/delicts and quasi-delict in the form of "*the courts for the place where the harmful event occurred...*". The Court of Justice has always held that where the place where the harmful act occurred and the place where the loss is sustained are not the same, the defendant can be sued, at the claimant's choice, in the courts either of the place where the harmful act occurred or of the place where the loss is sustained.<sup>12</sup> Admittedly, the Court acknowledged that each of the two places could constitute a meaningful connecting factor for jurisdiction purposes, since each could be of significance in terms of evidence and organisation of the proceedings, but it is also true that the number of forums available to the claimant generates a risk of forum-shopping.

This proposal for a Regulation would allow parties to determine the rule applicable to a given legal relationship in advance, and with reasonable certainty, especially as the proposed uniform rules will receive a uniform interpretation from the Court of Justice. This initiative would accordingly help to boost certainty in the law and promote the proper functioning of the internal market. It is also in the Commission's programme of measures to facilitate the extra-judicial settlement of disputes, since the fact that the parties have a clear vision of their situation makes it all the easier to come to an amicable agreement.

## **2.2. Legal basis**

Since the Amsterdam Treaty came into force, conflict rules have been governed by Article 61(c) of the EC Treaty. Under Article 67 of the EC Treaty, as amended by the Nice Treaty that entered into force on 1 February 2003, the Regulation will be adopted by the codecision procedure laid down by Article 251 of the EC Treaty.

Article 65(b) provides: "*Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken ... in so far as necessary for the proper functioning of the internal market, shall include: promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws ...*"

The Community legislature has the power to put flesh on the bones of this Article and the discretion to determine whether a measure is necessary for the proper functioning of the internal market. The Council exercised this power when adopting the Vienna action plan of 3 December 1998<sup>13</sup> on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, point 40(c) of which calls expressly for a "Rome II" instrument.

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<sup>11</sup> There are more than fifteen national systems because the United Kingdom does not have a unitary system.

<sup>12</sup> Case 21/76 *Mines de Potasse d'Alsace* [1976] ECR 1735 (judgment given on 30.11.1976).

<sup>13</sup> OJ C 19, 23.1.1999, p. 1.

Harmonisation of the conflict rules helps to promote equal treatment between economic operators and individuals involved in cross-border litigation in the internal market. It is the necessary adjunct to the harmonisation already achieved by the “Brussels I” Regulation as regards the rules governing the international jurisdiction of the courts and the mutual recognition of judgments. Given that there are more than fifteen different systems of conflict rules, two firms in distinct Member States, A and B, bringing the same dispute between them and a third firm in country C before their respective courts would have different conflict rules applied to them, which could provoke a distortion of competition. Such a distortion could also incite operators to go forum-shopping.

But the harmonisation of the conflict rules also facilitates the implementation of the principle of the mutual recognition of judgments in civil and commercial matters. The mutual recognition programme<sup>14</sup> calls for the reduction and ultimately the abolition of intermediate measures for recognition of a judgment given in another Member State. But the removal of all intermediate measures calls for a degree of mutual trust between Member States which is not conceivable if their courts do not all apply the same conflict rule in the same situation.

Title IV of the EC Treaty, which covers the matters to which this proposal for a Regulation applies, does not apply to Denmark by virtue of the Protocol concerning it. Nor does it apply to the United Kingdom or Ireland, unless those countries exercise their option of joining the initiative (opt-in clause) on the conditions set out in the Protocol annexed to the Treaty. At the Council meeting (Justice and Home Affairs) on 12 March 1999, these two Member States announced their intention of being fully associated with Community activities in relation to judicial cooperation in civil matters. They were also fully associated with the work of the ad hoc Council working party before the Amsterdam Treaty entered into force.

### **2.3. Justification for proposal in terms of proportionality and subsidiarity principles**

The technique of harmonising conflict-of-laws rules fully respects the subsidiarity and proportionality principles since it enhances certainty in the law without demanding harmonisation of the substantive rules of domestic law.

As for the choice of instrument, point 6 of the Protocol on the application of the principles of subsidiarity and proportionality provides that “*Other things being equal, directives should be preferred to regulations and framework directives to detailed measures.*” But for the purposes of this proposal a Regulation is the most appropriate instrument. It lays down uniform rules for the applicable law. These rules are detailed, precise and unconditional and require no measures by the Member States for their transposal into national law. They are therefore self-executing. The nature of these rules is the direct result of the objective set for them, which is to enhance certainty in the law and the foreseeability of the solutions adopted as regards the law applicable to a given legal relationship. If the Member States had room for manoeuvre in transposing these rules, uncertainty would be reintroduced into the law, and that is precisely what the harmonisation is supposed to abolish. The Regulation is therefore the instrument that must be chosen to guarantee uniform application in the Member States.

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<sup>14</sup> OJ C 12, 15.1.2001, p. 8.

### 3. INDIVIDUAL PROVISIONS

#### *Article 1 - Material scope*

Like the Brussels Convention and the “Brussels I” Regulation, the proposed Regulation covers civil and commercial obligations. This is an autonomous concept of Community law that has been interpreted by the Court of Justice. The reference to this makes it clear that the “Brussels I” Regulation, the Rome Convention and the Regulation proposed here constitute a coherent set of instruments covering the general field of private international law in matters of civil and commercial obligations.

The scope of the Regulation covers all non-contractual obligations except those in matters listed in paragraph 2. Non-contractual obligations are in two major categories, those that arise out of a tort or delict and those that do not. The first category comprises obligations relating to tort or delict, and the second comprises obligations relating to what in some jurisdictions is termed “quasi-delict” or “quasi-contract”, including in particular unjust enrichment and agency without authority or negotiorum gestio. The latter category is governed by section 2. But the demarcation line between contractual obligations and obligations based on tort or delict is not identical in all the Member States, and there may be doubts as to which instrument the Rome Convention or the proposed Regulation should be applied in a given dispute, for example in the event of pre-contractual liability, of *culpa in contrahendo* or of actions by creditors to have certain transactions by their debtors declared void as prejudicial to their interests. The Court of Justice, in actions under Articles 5(1) and (3) of the Brussels Convention, has already had occasion to rule that tort/delict cases are residual in relation to contract cases, which must be defined in strict terms.<sup>15</sup> It will no doubt refine its analysis when interpreting the proposed Regulation.

The proposed Regulation would apply to all situations involving a conflict of laws, i.e. situations in which there are one or more elements that are alien to the domestic social life of a country that entail applying several systems of law. Under Article 1(2), the following are excluded from the scope of the proposed Regulation:

- a) non-contractual obligations arising out of family or similar relationships: family obligations do not in general arise from a tort or delict. But such obligations can occasionally appear in the family context, as is the case of an action for compensation for damage caused by late payment of a maintenance obligation. Some commentators have suggested including these obligations within the scope of the Regulation on the grounds that they are governed by the exception clause in Article 3(3), which expressly refers to the mechanism of the “secondary connection” that places them under the same law as the underlying family relationship. Since there are so far no harmonised conflict-of-laws rules in the Community as regards family law, it has been found preferable to exclude non-contractual obligations arising out of such relationships from the scope of the proposed Regulation.
- b) Non-contractual obligations arising in connection with matrimonial property regimes and successions: these are excluded for similar reasons to those given at point a).

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<sup>15</sup> Case 34/82 *Martin Peters* [1983] ECR I-987 (judgment given on 22 March 1983); Case C-26/91 *Jacob Handte* [1992] ECR I-3697 (judgment given on 17 June 1992); Case C-334/00 *Fonderie Officine Meccaniche Tacconi* [2002] ECR I-7357 (judgment given on 17.9.2002).

- c) Non-contractual obligations arising out of 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; this point is taken over from Article 1(2)(c) of the Rome Convention. It is incorporated here for the same reasons as are given in the Giuliano-Lagarde Report,<sup>16</sup> namely that the Regulation is not the proper instrument for such obligations, that the Geneva Conventions of 7 June 1930 and 19 March 1931 regulate much of this matter and that these obligations are not dealt with uniformly in the Member States.
- d) The personal legal liability of officers and members as such for the debts of a company or firm or other body corporate or unincorporate, and the personal legal liability of persons responsible for carrying out the statutory audits of accounting documents: this question cannot be separated from the law governing companies or firms or other bodies corporate or unincorporate that is applicable to the company or firm or other body corporate or unincorporate in connection with whose management the question of liability arises.
- e) Non-contractual obligations among the settlers, trustees and beneficiaries of a trust: trusts are a sui generis institution and should be excluded from the scope of this Regulation as previously from the Rome Convention.
- f) non-contractual obligations arising out of nuclear damage: this exclusion is explained by the importance of the economic and State interests at stake and the Member States' contribution to measures to compensate for nuclear damage in the international scheme of nuclear liability established by the Paris Convention of 29 July 1960 and the Additional Convention of Brussels of 31 January 1963, the Vienna Convention of 21 May 1963, the Convention on Supplementary Compensation of 12 September 1997 and the Protocol of 21 September 1988.

These being exceptions, the exclusions will have to be interpreted strictly.

The proposed Regulation does not take over the exclusion in Article 1(2)(h) of the Rome Convention, which concerns rules of evidence and procedure. It is clear from Article 11 that, subject to the exceptions mentioned, these rules are matters for the *lex fori*. They would be out of place in a list of non-contractual obligations excluded from the scope of this Regulation.

### *Article 2 – Universal application*

Under Article 2, this is a universal Regulation, meaning that the uniform conflict rules can designate the law of a Member State of the European Union or of a third country.

This is a firmly-rooted principle of the law concerning conflict of laws and already exists in the Rome Convention, the conventions concluded in the Hague Conference and the domestic law of the Member States.

Given the complementarity between “Brussels I” and the proposed Regulation, the universal nature of the latter is necessary for the proper functioning of the internal market as avoiding distortions of competition between Community litigants. If the “Brussels I” Regulation distinguishes *a priori* between situations in which the defendant is habitually resident in the

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<sup>16</sup> Report on the Convention on the law applicable to contractual obligations, OJ C 282, 31.10.1980, p. 1.

territory of a Member State and those in which he is habitually resident in a third country,<sup>17</sup> it still governs both purely “intra-Community” situations and situations involving a “foreign” element. For the rules of recognition and enforcement, first of all, all judgments given by a court in a Member State that are within the scope of the “Brussels I” Regulation qualify for the simplified recognition and enforcement scheme; the law under which the judgment was given the law of a Member State or of a third country therefore has very little impact. As for the rules of jurisdiction, the “Brussels I” Regulation also applies where the defendant is habitually resident outside Community territory: this is the case where the dispute is within an exclusive jurisdiction rule,<sup>18</sup> where the jurisdiction of the court proceeds from a jurisdiction clause,<sup>19</sup> where the defendant enters an appearance<sup>20</sup> and where the *lis pendens* rule applies;<sup>21</sup> in general, Article 4(2) specifies that where the defendant is habitually resident in a third country, the claimant, if habitually resident in a Member States, may rely on exorbitant rules of the law of the country where he is habitually resident, irrespective of his nationality. It follows from all these provisions that the “Brussels I” Regulation applies both to “intra-Community” situations and to situations involving an “extra-Community” element.

What must be sought, therefore, is equal treatment for Community litigants, even in situations that are not purely “intra-Community”. If there continue to be more than fifteen different systems of conflict rules, two firms in distinct Member States, A and B, bringing the same dispute between them and a third firm in country C before their respective courts, would have different conflict rules applied to them, which could provoke a distortion of competition as in purely intra-Community situations.

Moreover, the separation between “intra-Community” and “extra-Community” disputes is by now artificial. How, for instance, are we to describe a dispute that initially concerns only a national of a Member State and a national of a third country but subsequently develops into a dispute concerning several Member States, for instance where the Community party joins an insurer established in another Member State or the debt in issue is assigned. Given the extent to which economic relations in the internal market are now intertwined, all disputes potentially have an intra-Community nature.

And on purely practical grounds, evidence presented to the Commission by the legal professions – both bench and bar – in the course of the written consultation emphasised that private international law in general and the conflict rules in particular are perceived as highly complex. This complexity would be even greater if this measure had the effect of doubling the sources of conflict rules and if practitioners now had to deal not only with Community uniform rules but also with distinct national rules in situations not connected as required with Community territory. The universal nature of the proposed Regulation accordingly meets the concern for certainty in the law and the Union' s commitment in favour of transparent legislation.

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<sup>17</sup> Article 2(1).

<sup>18</sup> Article 22.

<sup>19</sup> Article 23.

<sup>20</sup> Article 24.

<sup>21</sup> Article 27.

### Article 3 – General rules

Article 3 lays down general rules for determining the law applicable to non-contractual obligations arising out of a tort or delict. It covers all obligations for which the following Articles lay down no special rule.

The Commission's objectives in confirming the *lex loci delicti commissi* rule are to guarantee certainty in the law and to seek to strike a reasonable balance between the person claimed to be liable and the person sustaining the damage. The solutions adopted here also reflect recent developments in the Member States' conflict rules.

#### Paragraph 1 - General rule

Article 3(1) takes as the basic rule the law of the place where the direct damage arises or is likely to arise. In most cases this corresponds to the law of the injured party's country of residence. The expression “is likely to arise” shows that the proposed Regulation, like Article 5(3) of the “Brussels I” Regulation, also covers preventive actions such as actions for a prohibitive injunction.

The place or places where indirect damage, if any, was sustained are not relevant for determining the applicable law. In the event of a traffic accident, for example, the place of the direct damage is the place where the collision occurs, irrespective of financial or non-material damage sustained in another country. In a Brussels Convention case the Court of Justice held that the “*place where the harmful event occurred*” does not include the place where the victim suffered financial damage following upon initial damage arising and suffered by him in another Contracting State.<sup>22</sup>

The rule entails, where damage is sustained in several countries, that the laws of all the countries concerned will have to be applied on a distributive basis, applying what is known as “*Mosaikbetrachtung*” in German law.

The proposed Regulation also reflects recent developments in the Member States' conflict rules. While the absence of codification in several Member States makes it impossible to give a clear answer for the more than fifteen systems, the connection to the law of the place where the damage was sustained has been adopted by those Member States where the rules have recently been codified. The solution applies to the Netherlands, the United Kingdom and France, but also in Switzerland. In Germany, Italy and Poland, the victim may opt for this law among others.

The solution in Article 3(1) meets the concern for certainty in the law. It diverges from the solution in the draft Convention of 1972, which takes as its basic rule the place where the “harmful event” occurred. But the Court of Justice has held that the “harmful event” covers both the act itself and the resultant damage. This solution reflects the specific objectives of international jurisdiction but it does not enable the parties to foresee the law that will be applicable to their situation with reasonable certainty.

The rule also reflects the need to strike a reasonable balance between the various interests at stake. The Commission has not adopted the principle of favouring the victim as a basic rule, which would give the victim the option of choosing the law most favourable to him. It considers that this solution would go beyond the victim's legitimate expectations and would

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<sup>22</sup> Case C-364/93 *Marinari v Lloyds Bank* [1995] ECR I –2719 (judgment given on 19.9.1995).

reintroduce uncertainty in the law, contrary to the general objective of the proposed Regulation. The solution in Article 3 is therefore a compromise between the two extreme solutions of applying the law of the place where the event giving rise to the damage occurs and giving the victim the option.

Article 3(1), which establishes an objective link between the damage and the applicable law, further reflects the modern concept of the law of civil liability which is no longer, as it was in the first half of the last century, oriented towards punishing for fault-based conduct: nowadays, it is the compensation function that dominates, as can be seen from the proliferation of no-fault strict liability schemes.

But the application of the basic rule might well be inappropriate where the situation has only a tenuous connection with the country where the damage occurs. The following paragraphs therefore exclude it in specified circumstances.

#### *Paragraph 2 – Law of the common place of residence*

Paragraph 2 introduces a special rule where the person claimed to be liable and the person who has allegedly sustained damage are habitually resident in the same country, the law of that country being applicable. This is the solution adopted by virtually all the Member States, either by means of a special rule or by the rule concerning connecting factors applied in the courts. It reflects the legitimate expectations of the two parties.

#### *Paragraph 3 – General exception and secondary connection*

Like Article 4(5) of the Rome Convention, paragraph 3 is a general exception clause which aims to bring a degree of flexibility, enabling the court to adapt the rigid rule to an individual case so as to apply the law that reflects the centre of gravity of the situation.

Since this clause generates a degree of unforeseeability as to the law that will be applicable, it must remain exceptional. Experience with the Rome Convention, which begins by setting out presumptions, has shown that the courts in some Member States tend to begin in fact with the exception clause and seek the law that best meets the proximity criterion, rather than starting from these presumptions.<sup>23</sup> That is why the rules in Article 3(1) and (2) of the proposed Regulation are drafted in the form of rules and not of mere presumptions. To make clear that the exception clause really must be exceptional, paragraph 3 requires the obligation to be “*manifestly more closely connected*” with another country.

Paragraph 3 then allows the court to be guided, for example, by the fact that the parties are already bound by a pre-existing relationship. This is a factor that can be taken into account to determine whether there is a manifestly closer connection with a country other than the one designated by the strict rules. But the law applicable to the pre-existing relationship does not apply automatically, and the court enjoys a degree of discretion to decide whether there is a significant connection between the non-contractual obligations and the law applicable to the pre-existing relationship.

The text states that the pre-existing relationship may consist of a contract that is closely connected with the non-contractual obligations in question. This solution is particularly interesting for Member States whose legal system allows both contractual and non-contractual

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<sup>23</sup> Cf. point 3.2.5 of the Green Paper on converting the Convention of Rome of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation.

obligations between the same parties. But the text is flexible enough to allow the court to take account of a contractual relationship that is still only contemplated, as in the case of the breakdown of negotiations or of annulment of a contract, or of a family relationship. By having the same law apply to all their relationships, this solution respects the parties' legitimate expectations and meets the need for sound administration of justice. On a more technical level, it means that the consequences of the fact that one and the same relationship may be covered by the law of contract in one Member State and the law of tort/delict in another can be mitigated, until such time as the Court of Justice comes up with its own autonomous response to the situation. The same reasoning applies to the consequences of the nullity of a contract, already covered by a special rule in Article 10(1)(e) of the Rome Convention. Certain Member States having expressed a reservation as to this Article, the use of the secondary connection mechanism will overcome the difficulties that might flow from the application of two separate instruments.

But where the pre-existing relationship consists of a consumer or employment contract and the contract contains a choice-of-law clause in favour of a law other than the law of the consumer's habitual place of residence, the place where the employment contract is habitually performed or, exceptionally, the place where the employee was hired, the secondary connection mechanism cannot have the effect of depriving the weaker party of the protection of the law otherwise applicable. The proposed Regulation does not contain an express rule to this effect since the Commission considers that the solution is already implicit in the protective rules of the Rome Convention: Articles 5 and 6 would be deflected from their objective if the secondary connection validated the choice of the parties as regards non-contractual obligations but their choice was at least partly invalid as regards their contract.

#### *Article 4 – Product liability*

Article 4 introduces a specific rule for non-contractual obligations in the event of damage caused by a defective product. For the definition of product and defective product for the purposes of Article 4, Articles 2 and 6 of Directive 85/374 will apply.<sup>24</sup>

Directive 85/374 approximated the Member States' substantive law regarding strict liability, i.e. no-fault liability. But there is no full harmonisation, as the Member States are authorised to exercise certain options. The Directive does not affect national law concerning fault-based liability, which the victim can always rely on, and covers only certain types of damage. The scope of the special rule in Article 4 is consequently broader than the scope of Directive 85/374, as it also applies to actions based on purely national provisions governing product liability that do not emanate from the Directive.

Apart from respecting the parties' legitimate expectations, the conflict rule regarding product liability must reflect also the wide scatter of possible connecting factors (producer's headquarters, place of manufacture, place of first marketing, place of acquisition by the victim, victim's habitual residence), accentuated by the development of international trade, tourism and the mobility of persons and goods in the Union. Connection solely to the place of

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<sup>24</sup> Council Directive 85/374/EEC of 25.7.1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ L 210, 7.8.1985, p. 29), as amended by Directive 1999/34/EC of 10 May 1999 (OJ L 141, 4.6.1999, p. 20).

the direct damage is not suitable here as the law thus designated could be unrelated to the real situation, unforeseeable for the producer and no source of adequate protection for the victim.<sup>25</sup>

Countries in which there are special rules thus tend to provide for a rule requiring several elements to be present in the same country for that country's law to be applicable. This is also the approach taken in the Hague Convention 1973 on the law applicable to products liability, in force in five Member States.<sup>26</sup> Under Article 25 of the proposed Regulation, the Convention will remain in force in the Member States that have ratified it when the Regulation comes into force. The 1973 Convention determines the law applicable to the liability of manufacturers, producers, suppliers and repairers on the basis of the following factors, whether distributed or combined on a complex basis: the place of damage, place of the habitual residence of the victim, principal place of business of the manufacturer or producer, place where the product was acquired.

The proposed Regulation acknowledges the specific constraints inherent in the subject-matter in issue but nevertheless proceeds from the need for a rule to avoid being unnecessarily complex.

Under Article 4, the applicable law is basically the law of the place of where the person sustaining damage has his habitual residence. But this solution is conditional on the product having been marketed in that country with the consent of the person claimed to be liable. In the absence of consent, the applicable law is the law of the country in which the person claimed to be liable has his habitual residence. Article 3(2) (common habitual residence) and (3) (general exception clause) also apply.

The fact that this is a simple and predictable rule means that it is particularly suitable in an area where the number of out-of-court settlements is very high, partly because insurers are so often involved. Article 4 strikes a reasonable balance between the interests in issue. Given the requirement that the product be marketed in the country of the victim's habitual residence for his law to be applicable, the solution is foreseeable for the producer, who has control over his sales network. It also reflects the legitimate interests of the person sustaining damage, who will generally have acquired a product that is lawfully marketed in his country of residence.

Where the victim acquires the product in a country other than that of his habitual residence, perhaps while travelling, two hypotheses need to be distinguished: the first is where the victim acquired abroad a product also marketed in their country of residence, for instance in order to enjoy a special offer. In this case the producer had already foreseen that his activity might be evaluated by the yardstick of the rules in force in that country, and Article 4 designates the law of that country, since both parties could foresee that it would be applicable.

In the second hypothesis, by contrast, where the victim acquired abroad a product that is not lawfully marketed in their country of habitual residence, none of the parties would have expected that law to be applied. A subsidiary rule is consequently needed. The two connecting factors discussed during the Commission's consultations were the place where the damage is sustained and the habitual residence of the person claimed to be liable. Since the large-scale mobility of consumer goods means that the connection to the place where the damage is

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<sup>25</sup> Such a case might be a German tourist buying French-made goods in Rome airport to take to an African country, where they explode and cause him to sustain damage.

<sup>26</sup> Finland, France, Luxembourg the Netherlands and Spain. The convention is also in force in Norway, Croatia, Macedonia, Slovenia and Yugoslavia.

sustained no longer meets the need for certainty in the law or for protection of the victim, the Commission has opted for the second solution.

The rule in Article 4 corresponds not only to the parties' expectations but also to the European Union's more general objectives of a high level of protection of consumers' health and the preservation of fair competition on a given market. By ensuring that all competitors on a given market are subject to the same safety standards, producers established in a low-protection country could no longer export their low standards to other countries, which will be a general incentive to innovation and scientific and technical development.

The expression “*person claimed to be liable*” does not necessarily mean the manufacturer of a finished product; it might also be the producer of a component or commodity, or even an intermediary or a retailer. Anybody who imports a product into the Community is considered in certain conditions to be responsible for the safety of the products in the same way as the producer.<sup>27</sup>

#### *Article 5 – Unfair competition*

Article 5 provides for an autonomous connection for actions for damage arising out of an act of unfair competition.

The purpose of the rules against unfair competition is to protect fair competition by obliging all participants to play the game by the same rules. Among other things they outlaw acts calculated to influence demand (misleading advertising, forced sales, etc.), acts that impede competing supplies (disruption of deliveries by competitors, enticing away a competitor's staff, boycotts), and acts that exploit a competitor's value (passing off and the like). The modern competition law seeks to protect not only competitors (horizontal dimension) but also consumers and the public in general (vertical relations). This three-dimensional function of competition law must be reflected in a modern conflict-of-laws instrument.

Article 5 reflects this triple objective since it refers to the effect on the market in general, the effect on competitors' interests and the effect on the broad and rather vague interests of consumers (as opposed to the individual interests of a specific consumer). This last concept is taken over from a number of Community consumer-protection directives, in particular Directive 98/27 of 19 May 1998.<sup>28</sup> This is not to say that the concept relates solely to actions brought by a consumers' association; given the triple objective of competition law, virtually any act of unfair competition also affects the collective interests of consumers, and it is neither here nor there whether the action is brought by a competitor or an association. But Article 5 applies also to actions for injunctions brought by consumer associations. The proposed Regulation thus sits well with recent decisions of the Court of Justice on the Brussels Convention holding, for instance, that “*a preventive action brought by a consumer protection organisation for the purpose of preventing a trader from using terms considered to be unfair in contracts with private individuals is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of that convention*”.<sup>29</sup>

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<sup>27</sup> Directive 85/374, Article 3(2).

<sup>28</sup> Parliament and Council Directive 98/27/EC of 19 May 1998 on injunctions for the protection of consumers' interests: OJ L 166, 11.6.1998, p. 51.

<sup>29</sup> Case C-167/2000 *Henkel* (judgment given on 1.10.2002).

Comparative analysis of the Member States' private international law shows that there is a broad consensus in favour of applying the law of the country in which the market is distorted by competitive acts. This result is obtained either through the general principle of the *lex loci delicti* or by a specific connection (Austria, Netherlands, Spain and also Switzerland) and corresponds to recommendations extensively made by academic writers and by the Ligue internationale du droit de la concurrence en matière de publicité.<sup>30</sup> The current situation, however, is one of uncertainty, particularly in countries where the courts have not had an opportunity to rule on how the *lex loci delicti* rule should operate in practice. The establishment of a uniform conflict rule here would thus enhance the foreseeability of court decisions.

Article 5 provides for connection to the law of the State in whose territory “*competitive relations or the collective interests of consumers are affected or are likely to be affected*” by “*an act of unfair competition*”. This is the market where competitors are seeking to gain the customer's favour. This solution corresponds to the victims' expectations since the rule generally designates the law governing their economic environment. But it also secures equal treatment for all operators on the same market. The purpose of competition law is to protect a market; it pursues a macro-economic objective. Actions for compensation are purely secondary and must be dependent on the overall judgement of how the market functions.

Regarding the assessment of the impact on the market, academic writers generally acknowledge that only the direct substantial effects of an act of unfair competition should be taken into account. This is particularly important in international situations since anti-competitive conduct commonly has an impact on several markets and gives rise to the distributive application of the laws involved.

The need for a special rule here is sometimes disputed on the ground that it would lead to the same solution as the general rule in Article 3, the damage for which compensation is sought being assimilated to the anti-competitive effect on which the application of competition law depends. While the two very often coincide in territorial terms, they will not automatically do so: for instance, the question of the place where the damage is sustained is tricky where two firms from State A both operate on market B. Moreover, the rules of secondary connection, of the common residence and the exception clause are not adapted to this matter in general.

Paragraph 2 deals with situations where an act of unfair competition targets a specific competitor, as in the case of enticing away a competitor's staff, corruption, industrial espionage, disclosure of business secrets or inducing breach of contract. It is not entirely excluded that such conduct may also have a negative impact on a given market, but these are situations that have to be regarded as bilateral. There is consequently no reason why the victim should not enjoy the benefit of Article 3 relating to the common residence or the general exception clause. This solution is in conformity with recent developments in private international law: there is a similar provision in section 4(2) of the Dutch Act of 2001 and section 136(2) of the Swiss Act. The German courts take the same approach.

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<sup>30</sup> Resolution passed at the Amsterdam congress in October 1992, published in the *Revue internationale de la concurrence* 1992 (No 168), p. 51, this Resolution having also called for an effort to harmonise the substantive rules here.

## Article 6 - Violations of privacy and rights relating to the personality

The Regulation follows the approach generally taken by the law of the Member States nowadays and classifies violations of privacy and rights relating to the personality, particularly in the event of defamation by the mass media, in the category of non-contractual obligations rather than matters of personal status, except as regards rights to the use of a name.

There are specific provisions on respect for privacy and freedom of expression and information, also covering respect for media freedom and pluralism, in the Charter of Fundamental Rights of the European Union and in the Council of Europe Convention on the Protection of Human Rights and Fundamental Freedoms. The Community institutions and the Member States are required to respect these fundamental values. The European Court of Human Rights has already given valuable pointers to how to reconcile the two principles in the event of defamation proceedings. International conventions have helped to approximate the rules governing freedom of the press in the Member States, but differences remain as regards the practical application of that freedom. Operators regard the foreseeability of the law applicable to their business as of the greatest importance.

A study of the conflict rules in the Member States shows that there is not only a degree of diversity in the solutions adopted but also considerable uncertainty as to the law. In the absence of codification, court decisions laying down general rules are still lacking in many Member States.<sup>31</sup> The connecting factors in the other Member States vary widely: the publisher's headquarters or the place where the product was published (Germany and Italy, at the victim's option); the place where the product was distributed and brought to the knowledge of third parties (Belgium, France, Luxembourg); the place where the victim enjoys a reputation, presumed to be his habitual residence (Austria). Other Member States follow the principle of favouring the victim, by giving the victim the option (Germany, Italy), or applying the law of the place where the damage is sustained where the *lex loci delicti* does not provide for compensation (Portugal). The UK solution is very different from the solutions applied in other Member States, for it differentiates depending whether the publication is distributed in the UK or elsewhere: in the former case the only law applicable is the law of the place of distribution; in the latter case the court applies both the law of the place of distribution and the *lex fori* ("double actionability rule"). This rule protects the national press, as the English courts cannot give judgment against it if there is no provision for this in English law.<sup>32</sup>

Given the diversity and the uncertainties of the current situation, harmonising the conflict rule in the Community will increase certainty in the law.

The content of the uniform rule must reflect the rules of international jurisdiction in the "Brussels I" Regulation. The effect of the *Mines de Potasse d'Alsace* and *Fiona Shevill* judgments<sup>33</sup> is that the victim may sue for damages either in the courts of the State where the publisher of the defamatory material is established, which have full jurisdiction to compensate for all damage sustained, or in the courts of each State in which the publication was

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<sup>31</sup> Denmark, Finland, Greece, Ireland (doctrine of the "proper law of the tort"), Netherlands, Spain and Sweden.

<sup>32</sup> Some academic writers in England doubt, however, whether invasions of privacy are also covered by this rule.

<sup>33</sup> Case C 68/93 *Fiona Shevill and others v Press Alliance SA* [1995] ECR I - 415 (judgment given on 7 March 1995).

distributed and the victim claims to have suffered a loss of reputation, with jurisdiction to award damages only for damage sustained in their own State. Consequently, if the victim decides to bring the action in a court in a State where the publication is distributed, that court will apply its own law to the damage sustained in that State. But if the victim brings the action in the court for the place where the publisher is headquartered, that court will have jurisdiction to rule on the entire claim for damages: the *lex fori* will then govern the damage sustained in that country and the court will apply the laws involved on a distributive basis if the victim also claims compensation for damage sustained in other States.

In view of the practical difficulties in the distributive application of several laws to a given situation, the Commission proposed, in its draft proposal for a Council Regulation of May 2002, that the law of the victim's habitual residence be applied. But there was extensive criticism of this during the consultations, one of the grounds being that it is not always easy to ascertain the habitual residence of a celebrity and another being that the combination of rules of jurisdiction and conflict rules could produce a situation in which the courts of the State of the publisher's establishment would have to give judgment against the publisher under the law of the victim's habitual residence even though the product was perfectly in conformity with the rules of the publisher's State of establishment and no single copy of the product was distributed in the victim's State of residence. The Commission has taken these criticisms on board and reviewed its proposal.

Article 6(1) of the proposed Regulation now provides for the law applicable to violations of privacy and rights relating to the personality to be determined in accordance with the rules in Article 3, which posit the law of the place where the direct damage is sustained, unless the parties reside in the same State or the dispute is more closely connected with another country.

In *Fiona Shevill* the Court of Justice ruled on the actual determination of the place where the damage was sustained in the event of defamation by the press, opting for the “*State in which the publication was distributed and where the victim claims to have suffered injury to his reputation*”. The place where a publication is distributed is the place where it comes to the knowledge of third parties and a person's reputation is liable to be harmed. This solution is in conformity with the victim's legitimate expectations without neglecting those of media firms. A publication can be regarded as distributed in a country only if it is actually distributed there on a commercial basis.

But the Commission has been sensitive to concerns expressed both in the press and by certain Member States regarding situations in which a court in Member State A might be obliged to give judgment against a publisher with its own nationality A under the laws of Member State B, or even a third country, even though the publication in dispute was perfectly in conformity with the rules applicable in Member State A. It has been pointed out that the application of law B could be unconstitutional in country A as violating the freedom of the press. Given that this is a sensitive issue, where the Member States' constitutional rules diverge quite considerably, the Commission has felt that Article 6(1) should make it explicitly clear that the law designated by Article 3 must be disapplied in favour of the *lex fori* if it is incompatible with the public policy of the forum in relation to freedom of the press.

The law designated by Article 6(1) does not seem to provide a proper basis for settling the question whether and in what conditions the victim can oblige the publisher to issue a corrected version and exercise a right of reply. Paragraph 2 accordingly provides that the right of reply and equivalent measures will be governed by the law of the country in which the broadcaster or publisher is established.

### *Article 7 - Violation of the environment*

Article 7 lays down a special rule for civil liability in relation to violations of the environment. Reflecting recent developments in the substantive law, the rule covers both damage to property and persons and damage to the ecology itself, provided it is the result of human activity.

European or even international harmonisation is particularly important here as so many environmental disasters have an international dimension. But the instruments adopted so far deal primarily with questions of substantive law or international jurisdiction rather than with harmonisation of the conflict rules. And they address only selected types of cross-border pollution. In spite of this gradual approximation of the substantive law, not only in the Community, major differences subsist – for example in determining the damage giving rise to compensation, limitation periods, indemnity and insurance rules, the right of associations to bring actions and the amounts of compensation. The question of the applicable law has thus lost none of its importance.

Analysis of the current conflict rules shows that the solutions vary widely. The *lex fori* and the law of the place where the dangerous activity is exercised play a certain role, particularly in the international Conventions, but the most commonly applied solution is the law of the place where the loss is sustained (France, United Kingdom, Netherlands, Spain, Japan, Switzerland, Romania, Turkey, Quebec) or one of the variants of the principle of the law that is most favourable to the victim (Germany, Austria, Italy, Czech Republic, Yugoslavia, Estonia, Turkey, Nordic Convention of 1974 on the protection of the environment, Convention between Germany and Austria of 19 December 1967 concerning nuisances generated by the operation of Salzburg airport in Germany). The Hague Conference has also put an international convention on cross-border environmental damage on its work programme, and preparatory work seems to be moving towards a major role for the place where the damage is sustained, though the merits of the principle of favouring the victim are acknowledged.

The uniform rule proposed in Article 7 takes as its primary solution the application of the general rule in Article 3(1), applying the law of the place where the damage is sustained but giving the victim the option of selecting the law of the place where the event giving rise to the damage occurred.

The basic connection to the law of the place where the damage was sustained is in conformity with recent objectives of environmental protection policy, which tends to support strict liability. The solution is also conducive to a policy of prevention, obliging operators established in countries with a low level of protection to abide by the higher levels of protection in neighbouring countries, which removes the incentive for an operator to opt for low-protection countries. The rule thus contributes to raising the general level of environmental protection.

But the exclusive connection to the place where the damage is sustained would also mean that a victim in a low-protection country would not enjoy the higher level of protection available in neighbouring countries. Considering the Union's more general objectives in environmental matters, the point is not only to respect the victim's legitimate interests but also to establish a legislative policy that contributes to raising the general level of environmental protection, especially as the author of the environmental damage, unlike other torts or delicts, generally derives an economic benefit from his harmful activity. Applying exclusively the law of the place where the damage is sustained could give an operator an incentive to establish his

facilities at the border so as to discharge toxic substances into a river and enjoy the benefit of the neighbouring country's laxer rules. This solution would be contrary to the underlying philosophy of the European substantive law of the environment and the "polluter pays" principle.

Article 7 accordingly allows the victim to make his claim on the basis of the law of the country in which the event giving rise to the damage occurred. It will therefore be for the victim rather than the court to determine the law that is most favourable to him. The question of the stage in proceedings at which the victim must exercise his option is a question for the procedural law of the forum, each Member State having its own rules to determine the moment from which it is no longer possible to file new claims.

A further difficulty regarding civil liability for violations of the environment lies in the close link with the public-law rules governing the operator's conduct and the safety rules with which he is required to comply. One of the most frequently asked questions concerns the consequences of an activity that is authorised and legitimate in State A (where, for example, a certain level of toxic emissions is tolerated) but causes damage to be sustained in State B, where it is not authorised (and where the emissions exceed the tolerated level). Under Article 13, the court must then be able to have regard to the fact that the perpetrator has complied with the rules in force in the country in which he is in business.

#### *Article 8 – Infringement of intellectual property rights*

Article 8 lays down special rules for non-contractual obligations flowing from an infringement of intellectual property rights. According to Recital 14 the term intellectual property rights means copyright, related rights, *sui generis* right for protection of databases and industrial property rights.

The treatment of intellectual property was one of the questions that came in for intense debate during the Commission's consultations. Many contributions recalled the existence of the universally recognised principle of the *lex loci protectionis*, meaning the law of the country in which protection is claimed on which e.g. the Bern Convention for the Protection of Literary and Artistic Works of 1886 and the Paris Convention for the Protection of Industrial Property of 1883 are built. This rule, also known as the "territorial principle", enables each country to apply its own law to an infringement of an intellectual property right which is in force in its territory: counterfeiting an industrial property right is governed by the law of the country in which the patent was issued or the trade mark or model was registered; in copyright cases the courts apply the law of the country where the violation was committed. This solution confirms that the rights held in each country are independent.

The general rule contained in Article 3(1) does not appear to be compatible with the specific requirements in the field of intellectual property. To reflect this incompatibility, two approaches were discussed in the course of preparatory work. The first is to exclude the subject from the scope of the proposed Regulation, either by means of an express exclusion in Article 1 or by means of Article 25, which preserves current international conventions. The second is to lay down a special rule, and this is the approach finally adopted by the Commission with Article 8.

Article 8(1) enshrines the *lex loci protectionis* principle for infringements of intellectual property rights conferred under national legislation or international conventions.

Paragraph 2 concerns infringements of unitary Community rights such as the Community trade mark, Community designs and models and other rights that might be created in future such as the Community patent for which the Commission has adopted a proposal for a Council regulation<sup>34</sup> on 1 August 2000. The *locus protectionis* referring to the Community as a whole, the non contractual obligations that are covered by the present proposal for a regulation are directly governed by the unitary Community law. In case of infringements and where for a specific question the Community instrument neither contains a provision of substantive law nor a special conflict of laws' rule, Article 8(2) of the proposed regulation contains a subsidiary rule according to which the applicable law is the law of the Member State in which an act of infringement of the Community right has been committed.

*Article 9 – Law applicable to non-contractual obligations  
arising out of an act other than a tort or delict*

In all the Member States' legal systems there are obligations that arise neither out of a contract nor out of a tort or delict. The situations that are familiar to all the Member States are payments made by mistake and services rendered by a person that enable another person to avoid sustaining personal injury or loss of assets.

Since these obligations are clearly distinguished by their own features from torts and delicts, it has been decided that there should be a special section for them.

To reflect the wide divergences between national systems here, technical terms need to be avoided. This Regulation refers therefore to “*non-contractual obligations arising out of an act other than a tort or delict*”. In most Member States there are sub-categories for repayment of amounts wrongly received or unjust enrichment on the one hand and agency without authority (*negotiorum gestio*) on the other. Both the substantive law and the conflict rules are still evolving rapidly in most of the Member States, which means that the law is far from certain. The uniform conflict rule must reflect the divergences in the substantive rules. The difficulty is in laying down rules that are neither so precise that they cannot be applied in a Member State whose substantive law makes no distinction between the various relevant hypotheses nor so general that they might be open to challenge as serving no obvious purpose. Article 9 seeks to overcome the problem by laying down specific rules for the two sub-categories, unjust enrichment and agency without authority, while leaving the courts with sufficient flexibility to adapt the rule their national systems.

The secondary connection technique, confirmed by paragraph 1, is particularly important here, for example where an agent exceeds his authority or where a third-party debt is settled. The rule is accordingly a strict one. The obligation is so closely connected with the pre-existing relationship between the parties that it is preferable for the entire legal situation to be governed by the same law. As in the case of the general exception clause in Article 3(3), the expression “pre-existing relationship” applies particularly to pre-contractual relationships and to void contracts.

Paragraph 2 reflects the legitimate expectations of the parties where they are habitually resident in the same country.

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<sup>34</sup> OJ C 337 E, 28.11.2000, p. 78.

Paragraph 3 concerns unjust enrichment in the absence of a pre-existing relationship between the parties, in which case the non-contractual obligation is governed by the law of the country in which the enrichment occurs. The proposed rule is a conventional one, found also in the GEDIP draft and the Swiss legislation.

Paragraph 4, concerning *negotiorum gestio* (agency without authority), distinguishes between measures to be described as assistance and measures that might be described as interference. Measures of assistance mean one-off initiatives taken on an exceptional basis by the “agent”, who deserves special protection since he acted in order to preserve the interests of the “principal”, which justifies a local connection to the law of the property or person assisted. In the case of measures of interference in the assets of another person, as in the case of payment of a third-party debt, it is the “principal” who deserves protection. The applicable law is therefore generally the law of the latter's place of habitual residence.

Paragraph 5, like the first sentence of Article 3, provides an exception clause.

To ensure that several different laws are not applicable to one and the same dispute, paragraph 6 excludes from this Article non-contractual obligations relating to intellectual property, to which Article 8 alone applies. E.g. an obligation based on unjust enrichment arising from an infringement of an intellectual property right is accordingly governed by the same law as the infringement itself.

#### *Article 10 - Freedom of choice*

Paragraph 1 allows the parties to choose the law applicable to the non-contractual obligation after the dispute has arisen. The proposed Regulation thus follows recent developments in national private international law, which likewise tend to encourage greater freedom of will,<sup>35</sup> even if the situation is less frequent than in contract cases. For this reason, the rule is based on objective connecting factors, unlike the Rome Convention.

Freedom of will is not accepted, however, for intellectual property, where it would not be appropriate.

As in Article 3 of the Rome Convention, it is stated that the choice must either be explicit or emerge clearly from the circumstances of the case. Since the proposed Regulation does not allow an *ex ante* choice, there is no need for special provisions to protect a weaker party.

Paragraph 1 further specifies that the parties' choice may not affect the rights of third parties. The typical example is the insurer's obligation to reimburse damages payable by the insured.

Paragraph 2 puts a restriction on freedom of will, which is inspired by Article 3(3) of the Rome Convention and applies where all the elements of the situation (except the choice of law) are located in a country other than the one whose law is chosen. In reality this is a purely internal situation regarding a Member State and is within the scope of the Regulation only because the parties have agreed on a choice of law. The choice by the parties is not deactivated, but it may not operate to the detriment of such mandatory provisions of the law which might otherwise be applicable.

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<sup>35</sup> Examples include section 6 of the Dutch Act of 11 April 2001 and section 42 of the German EGBGB.

In this Article the concept of “mandatory rules”, unlike the overriding mandatory rules referred to in Article 12, refers to a country’s rules of internal public policy. These are rules from which the parties cannot derogate by contract, particularly those designed to protect weaker parties. But internal public policy rules are not necessarily mandatory in an international context. They must be distinguished from the rules of international public policy of the forum referred to in Article 22 and from the overriding mandatory rules referred to in Article 12.

Paragraph 3 represents an extension by analogy of the limit provided for by paragraph 2 and applies where all the elements of the case apart from the choice of law are located in two or more Member States. It has the same objective, i.e. to prevent the parties frustrating the application of mandatory rules of Community law through the choice of the law of a third country.

#### *Article 11 – Scope of the law applicable to non-contractual obligations*

Article 11 defines the scope of the law determined under Articles 3 to 10 of the proposed Regulation. It lists the questions to be settled by that law. The approach taken in the Member States is not entirely uniform: while certain questions, such as the conditions for liability, are generally governed by the applicable law, others, such as limitation periods, the burden of proof, the measure of damages etc., may fall to be treated by the *lex fori*. Like Article 10 of the Rome Convention, Article 11 accordingly lists the questions to be settled by the law that is actually designated.

In line with the general concern for certainty in the law, Article 11 confers a very wide function on the law designated. It broadly takes over Article 10 of the Rome Convention, with a few changes of detail:

- a) “The conditions and extent of liability, including the determination of persons who are liable for acts performed by them”; the expression “conditions ... of liability” refers to intrinsic factors of liability. The following questions are particularly concerned: nature of liability (strict or fault-based); the definition of fault, including the question whether an omission can constitute a fault; the causal link between the event giving rise to the damage and the damage; the persons potentially liable; etc. “Extent of liability” refers to the limitations laid down by law on liability, including the maximum extent of that liability and the contribution to be made by each of the persons liable for the damage which is to be compensated for. The expression also includes division of liability between joint perpetrators.
- b) “The grounds for exemption from liability, any limitation of liability and any division of liability”: these are extrinsic factors of liability. The grounds for release from liability include *force majeure*; necessity; third-party fault and fault by the victim. The concept also includes the inadmissibility of actions between spouses and the exclusion of the perpetrator’s liability in relation to certain categories of persons.
- c) “The existence and kinds of damage for which compensation may be due”: this is to determine the damage for which compensation may be due, such as personal injury, damage to property, moral damage and environmental damage, and financial loss or loss of an opportunity.

- d) “the measures which a court has power to take under its procedural law to prevent or terminate damage or to ensure the provision of compensation”: this refers to forms of compensation, such as the question whether the damage can be repaired by payment of damages, and ways of preventing or halting the damage, such as an interlocutory injunction, though without actually obliging the court to order measures that are unknown in the procedural law of the forum.
- e) “the measure of damages in so far as prescribed by law”: if the applicable law provides for rules on the measure of damages, the court must apply them.
- f) “the question whether a right to compensation may be assigned or inherited”: this is self-explanatory. In succession cases, the designated law governs the question whether an action can be brought by a victim’s heir to obtain compensation for damage sustained by the victim.<sup>36</sup> In assignment cases, the designated law governs the question whether a claim is assignable<sup>37</sup> and the relationship between assignor and debtor.
- g) The law that is designated will also determine the “persons entitled to compensation for damage sustained personally”: this concept particularly refers to the question whether a person other than the “direct victim” can obtain compensation for damage sustained on a “knock-on” basis, following damage sustained by the victim. Such damage might be non-material, as in the pain and suffering caused by a bereavement, or financial, as in the loss sustained by the children or spouse of a deceased person.
- h) “liability for the acts of another person”: this concept concerns provisions in the law designated for vicarious liability. It covers the liability of parents for their children and of principals for their agents.
- 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”; the law designated governs the loss of a right following failure to exercise it, on the conditions set by the law.

#### *Article 12 - Overriding mandatory rules*

This Article closely follows the corresponding Article of the Rome Convention.

In *Arblade*, the Court of Justice gave an initial definition of overriding mandatory rules (also called public-order legislation) as “*national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State*”.<sup>38</sup> What is specific about them is that the courts do not even apply their own conflict rules to determine the law applicable to a given situation and to evaluate in practical terms whether its

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<sup>36</sup> It goes without saying that the law governing the injured party's succession applies to the determination of the heirs, this being a preliminary to the main action.

<sup>37</sup> Article 12(2) of the Rome Convention.

<sup>38</sup> Cases C-369/96 and C-376/96 [1999] ECR I-8453 (judgment given on 23.11.1999).

content would be repugnant to the values of the forum, but they apply their own rules as a matter of course.<sup>39</sup>

Paragraph 2 allows the courts to apply the overriding mandatory rules of the forum. As the Court also held in *Arblade*, in intra-Community relations the application of the mandatory rules of the forum must be compatible with the fundamental freedoms of the internal market.<sup>40</sup>

Paragraph 1 refers to foreign mandatory rules, where the court enjoys considerable discretion if there is a close connection with the situation, depending on its nature, its purposes and the consequences of applying it. Under the Rome Convention, Germany, Luxembourg and the United Kingdom have exercised their right to refrain from applying Article 7(1), relating to foreign mandatory rules. But the Commission like most of the contributors during the written consultations sees no reason to exclude this possibility since references to foreign mandatory rules have been perfectly exceptional hitherto.

#### *Article 13 – Rules of safety and conduct*

Where the law that is designated is not the law of the country in which the event giving rise to the damage occurred, Article 13 of the proposed Regulation requires the court to take account of the rules of safety and conduct which were in force at the place and time of the relevant event.

This article is based on the corresponding articles of the Hague Conventions on traffic accidents (Article 7) and product liability (Article 9). There are equivalent principles in the conflict systems of virtually all the Member States, either in express statutory provisions or in the decided cases.

The rule in Article 13 is based on the fact that the perpetrator must abide by the rules of safety and conduct in force in the country in which he operates, irrespective of the law applicable to the civil consequences of his action, and that these rules must also be taken into consideration when ascertaining liability. Taking account of foreign law is not the same thing as applying it: the court will apply only the law that is applicable under the conflict rule, but it must take account of another law as a point of fact, for example when assessing the seriousness of the fault or the author's good or bad faith for the purposes of the measure of damages.

#### *Article 14 – Direct action*

Article 14 determines the law applicable to the question whether the person sustaining damage may bring a direct action against the insurer of the person liable. The proposed rule strikes a reasonable balance between the interests at stake as it protects the person sustaining damage by giving him the option, while limiting the choice to the two laws which the insurer

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<sup>39</sup> This is the international public policy exception, to which Article 22 is devoted.

<sup>40</sup> Paragraph 31 of the judgment states that “*The fact that national rules are categorised as public-order legislation does not mean that they are exempt from compliance with the provisions of the Treaty*” and that “*The considerations underlying such national legislation can be taken into account by Community law only in terms of the exceptions to Community freedoms expressly provided for by the Treaty and, where appropriate, on the ground that they constitute overriding reasons relating to the public interest*”.

can legitimately expect to be applied the law applicable to the non-contractual obligation and the law applicable to the insurance contract.

At all events, the scope of the insurer's obligations is determined by the law governing the insurance contract.

As in Article 7, relating to the environment, the form of words used here will avert the risk of doubts where the victim does not exercise his right of option.

#### *Article 15 – Subrogation and multiple liability*

This Article is identical to Article 13 of the Rome Convention.

It applies in particular to the relationship between insurer and perpetrator to determine whether the form has a right of action by way of subrogation against the latter.

Where there are several perpetrators, it also applies where one of the joint and several debtors makes a payment.

#### *Article 16 – Formal validity*

Article 16 is inspired by Article 9 of the Rome Convention.

Although the concept of formal validity plays a minor role in the creation of non-contractual obligations, an obligation can well arise as a result of a unilateral act by one or other of the parties.

To promote the validity of such acts, Article 16 provides for an alternative rule along the lines of Article 9 of the Rome Convention, whereby the act 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 - Burden of proof*

Article 17 is identical to Article 14 of the Rome Convention.

It provides that the law governing non-contractual obligations applies to the extent that it contains, in matters of non-contractual obligations, rules which raise presumptions of law or determine the burden of proof. This is a useful provision as questions relating to evidence are basically matters for the procedural law of the *lex fori*.

Paragraph 2 concerns the admissibility of modes of proving acts intended to have legal effect referred to in Article 16. It does not cover evidence of legal facts, which is also covered by the *lex fori*. The very liberal system of Article 14(2) of the Rome Convention is used here, providing for the alternative application of the *lex fori* and the law governing the form of the relevant act.

### *Article 18 – Assimilation to the territory of a State*

Article 18 applies to situations in which one or more of the connecting factors in the conflict rules of the proposed Regulation relate to an area that is not subject to territorial sovereignty.

The text proposed by the Commission in the written consultation procedure in May 2002 contained a special conflict rule. One of the difficulties with this rule lay in the diversity of the situations concerned. It is by no means certain that a single rule will adequately cover the position of a collision between ships on the high seas, the explosion of an electronic device or the breakdown of negotiations in an aircraft in flight, pollution caused by a ship at sea etc.

The contributions received by the Commission have made it aware that the proposed rule made it all too easy to designate the law of a flag of convenience, which would be contrary to the more general objectives of Community policy. Many contributors had doubts about the value added by a rule which, where two or more laws are potentially involved, as in collision cases, merely refers to the principle of the closest connection.

Rather than introducing a special rule here, Article 18 offers a definition of the “territory of a State”. This solution is founded on the need to strike a reasonable balance between divergent interests by means of the different conflict rules in the proposed Regulation where one or more connecting factors are located in an area subject to no sovereignty. The general rule in Article 3 and the special conflict rules accordingly apply.

The definitions in the proposed text are inspired by section 1 of the Dutch Act on conflicts of laws in relation to obligations arising out of unlawful acts (11 April 2001).

### *Article 19 – Assimilation to habitual residence*

This article deals with the concept of habitual residence for companies and firms and other bodies corporate or unincorporate and for natural persons exercising a liberal profession or business activity in a self-employed capacity.

In general terms the proposed Regulation is distinguished from the “Brussels I” Regulation by the fact that, in accordance with the generally accepted solution in conflict matters, the criterion used here is not domicile but the more flexible criterion of habitual residence.

With regard to companies and firms and other bodies corporate or unincorporate, simply taking over the alternative rule in Article 60 of the “Brussels I” Regulation, whereby the domicile of a body corporate is either its registered office, or its central administration, or its principal establishment, would not make the applicable law adequately foreseeable.

Article 19(1) accordingly provides that the principal establishment of a company or firms or other body corporate or unincorporate is considered to be its habitual residence. However, the second sentence of paragraph 1 states that where the event giving rise to the damage occurs or the damage is sustained in the course of operation of a subsidiary, a branch or any other establishment, the establishment takes the place of the habitual residence. Like Article 5(5) of the “Brussels I” Regulation, the purpose of this is to respect the legitimate expectations of the parties.

Paragraph 2 determines the habitual residence of a natural person exercising a liberal profession or business activity in a self-employed capacity, for whom the professional establishment operates as habitual residence.

### *Article 20 – Exclusion of renvoi*

This Article is identical to Article 15 of the Rome Convention.

To avoid jeopardising the objective of certainty in the law that is the main inspiration for the conflict rules in the proposed Regulation, Article 20 excludes renvoi. Consequently, designating a law under uniform conflict rules means designating the substantive rules of that law but not its rules of private international law, even where the law thus designated is that of a third country.

### *Article 21 – States with more than one legal system*

This Article is identical to Article 19 of the Rome Convention.

The uniform rules also apply where several legal systems coexist in a single State. Where a State has several territorial units each with its own rules of law, each of those units is considered a country for the purposes of private international law. Examples of those States are the United Kingdom, Canada, the United States and Australia. For example, if damage is sustained in Scotland, the law designated by Article 3(1) is Scots law.

### *Article 22 – Public policy of the forum*

This Article corresponds to Article 16 of the Rome Convention relating to the mechanism of the public policy exception. Like the Rome Convention, this concerns a State's public policy in the private international law sense, a more restrictive concept than public policy in the domestic law sense. The words "of the forum" have been added to distinguish the rules of public policy in the private international law sense, which proceed solely from the national law of a State, from those flowing from Community law, to which the specific rule of Article 23 applies.

The mechanism of the public policy exception allows the court to disapply rules of the foreign law designated by the conflict rule and to replace it by the *lex fori* where the application of the foreign law in a given case would be contrary to the public policy of the forum. This is distinguished from overriding mandatory rules: in the latter case, the courts apply the law of the forum automatically, without first looking at the content of the foreign law. The word "manifestly" incompatible with the public policy of the forum means that the use of the public policy exception must be exceptional.

In a Brussels Convention case the Court of Justice held that the concept of public policy remains a national concept and that "...it is not for the Court to define the content of the public policy of a Contracting State...", but it must none the less "review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition of a judgment emanating from another Contracting State".<sup>41</sup>

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<sup>41</sup> Case C-38/98 *Renault v Maxicar* [2000] ECR I-2973 (judgment given on 11.5.2000).

### *Article 23 – Relationship with other provisions of Community law*

Paragraph 1 refers to the traditional mechanisms of private international law that can be found in the treaties and the secondary legislation and entail special conflict rules in specific matters, mandatory rules of Community and the Community public policy exception.

Paragraph 2 refers more particularly to the specific principles of the internal market relating to the free movement of goods and services, commonly known as the “mutual recognition” and “home-country control” principles.

### *Article 24 – Non-compensatory damages*

Article 24 is the practical application of the Community public policy exception provided for by the third indent of Article 23(1) in the form of a special rule.

In the written consultation, many contributors expressed concern at the idea of applying the law of a third country providing for damages not calculated to compensate for damage sustained. It was suggested that it would be preferable to adopt a specific rule rather than to apply the public policy exception of the forum, as is the case of section 40-III of the German EGBGB.

The effect of Article 24 is accordingly that 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 will be contrary to Community public policy.

The words used are descriptive rather than technical legal terms, too loosely tied to a specific legal system. Compensatory damages serve to compensate for damage sustained by the victim or liable to be sustained by him at a future date. Non-compensatory damages serve a punitive or deterrent function.

### *Article 25 – Relationship with existing international conventions*

Article 25 allows Member States to go on applying choice of law rules laid down in international conventions to which they are party when this Regulation is adopted.

These conventions include the Hague Conventions on traffic accidents (4 May 1971) and product liability (2 October 1973).

### *Article 26 – List of conventions referred to in Article 25*

To make it easier to identify the conventions to which Article 25 applies, Article 26 provides that the Member States are to notify the Commission of the list, which the Commission is then to publish in the *Official Journal of the European Union*. The Member States are also to notify the Commission of denunciations of these conventions so that it can update the list.

Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND THE COUNCIL**  
**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 Article 61(c) thereof,

Having regard to the proposal from the Commission,<sup>42</sup>

Having regard to the opinion of the European Economic and Social Committee,<sup>43</sup>

Acting in accordance with the procedure laid down in Article 251 of the Treaty,<sup>44</sup>

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.<sup>45</sup>
- (3) The Tampere European Council on 15 and 16 October 1999<sup>46</sup> approved the principle of mutual recognition of judgments as a priority matter in the establishment of a European law-enforcement area. The Mutual Recognition Programme<sup>47</sup> states that measures relating to harmonisation of conflict-of-law rules are measures that “actually do help facilitate the implementation of the principle”.

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<sup>42</sup> OJ C [... ], [... ], p. [... ] .

<sup>43</sup> OJ C [... ], [... ], p. [... ] .

<sup>44</sup> Opinion of the European Parliament of [...] (OJ C [... ], [... ], p. [... ] .

<sup>45</sup> 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.

<sup>46</sup> Presidency conclusions of 16 October 1999, points 28 to 39.

<sup>47</sup> OJ C 12, 15.1.2001, p. 1.

- (4) 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 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 of the Regulation must be determined in such a way as to be consistent with Regulation (EC) No 44/2001<sup>48</sup> and the Rome Convention of 1980.<sup>49</sup>
- (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.
- (8) 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) 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) Regarding product liability, 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) In matters of unfair competition, the conflict rule must 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.
- (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.

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<sup>48</sup> OJ L 12, 16.1.2001, p. 1.

<sup>49</sup> 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) Regarding violations of the environment, Article 174 of the Treaty, which provides that there must be 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) Regarding violations of intellectual property rights, the universally acknowledged principle of the *lex loci protectionis* should be preserved. For the purposes of the present Regulation, the term intellectual property rights means copyright, related rights, sui generis right for the protection of databases and industrial property rights.
- (15) Similar rules should be 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 obligations are governed by another law.
- (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.
- (20) 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.
- (21) 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.

- (22) [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.]
- (23) 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 maintenance obligations;
- b) non-contractual obligations arising out of matrimonial property regimes and successions;
- c) 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) 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;
- e) non-contractual obligations among the settlers, trustees and beneficiaries of a trust;
- f) non-contractual obligations arising out of nuclear damage.

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*

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

## **Chapter II - Uniform rules**

### **SECTION 1**

#### **RULES APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS ARISING OUT OF A TORT OR DELICT**

### *Article 3 – General rule*

1. 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.

### *Article 4 – Product liability*

Without prejudice to Article 3(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, 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*

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 directly and substantially affected.
2. Where an act of unfair competition affects exclusively the interests of a specific competitor, Article 3(2) and (3) shall 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*

The law applicable to a non-contractual obligation arising out of a violation of the environment shall be the law determined by the application of Article 3(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 – Infringement of intellectual property rights*

1. The law applicable to a non-contractual obligation arising from an infringement of a 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.

**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*

1. If a non-contractual obligation arising out of an act other than a tort or delict concerns a relationship previously existing between the parties, such as a contract closely connected with the non-contractual obligation, it shall be governed by the law that governs that relationship.
2. Without prejudice to paragraph 1, where the parties have their habitual residence in the same country when the event giving rise to the damage occurs, the law applicable to the non-contractual obligation shall be the law of that country.
3. Without prejudice to 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.
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.

### **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.

##### *Article 11 – Scope of the law applicable to non-contractual obligations*

The law applicable to non-contractual obligations under Articles 3 to 10 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 – Overriding mandatory rules*

1. Where the law of a specific third 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.

2. 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.

#### *Article 13 – Rules of safety and conduct*

Whatever may be the applicable law, in determining liability account shall be taken 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 – Direct action against the insurer of the person liable*

The right of persons who have suffered damage to take direct action against the insurer of the person claimed to be liable shall be governed by the law applicable to the non-contractual obligation unless the person who has suffered damage prefers to base his claims on the law applicable to the insurance contract.

#### *Article 15 – 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.

### *Article 16 – 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 – Burden of proof*

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 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 establishment 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 establishment 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 establishment 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 – 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.

#### *Article 23 – Relationship with other provisions of Community law*

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:

- 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.

## **Chapter IV – Final provisions**

*Article 26 – List of conventions referred to in Article 25*

1. The Member States shall notify the Commission, no later than 30 June 2004, of the list of conventions referred to in Article 25. 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 list.

*Article 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*