

# EUROPEAN PARLIAMENT

2004



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*Committee on Legal Affairs*

PROVISIONAL  
2003/0168(COD)

29.3.2005

**\*\*\*I**

## **DRAFT REPORT**

on the proposal for a regulation of the European Parliament and of the Council  
on the law applicable to non-contractual obligations ("Rome II")  
(COM(2003)0427 – C5-0338/2003 – 2003/0168(COD))

Committee on Legal Affairs

Rapporteur: Diana Wallis

### ***Symbols for procedures***

- \* Consultation procedure  
*majority of the votes cast*
- \*\*I Cooperation procedure (first reading)  
*majority of the votes cast*
- \*\*II Cooperation procedure (second reading)  
*majority of the votes cast, to approve the common position  
majority of Parliament's component Members, to reject or amend  
the common position*
- \*\*\* Assent procedure  
*majority of Parliament's component Members except in cases  
covered by Articles 105, 107, 161 and 300 of the EC Treaty and  
Article 7 of the EU Treaty*
- \*\*\*I Codecision procedure (first reading)  
*majority of the votes cast*
- \*\*\*II Codecision procedure (second reading)  
*majority of the votes cast, to approve the common position  
majority of Parliament's component Members, to reject or amend  
the common position*
- \*\*\*III Codecision procedure (third reading)  
*majority of the votes cast, to approve the joint text*

(The type of procedure depends on the legal basis proposed by the Commission)

### ***Amendments to a legislative text***

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

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## DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II")  
(COM(2003)0427 – C5-0338/2003 – 2003/0168(COD))

(Codecision procedure: first reading)

*The European Parliament,*

- having regard to the Commission proposal to the European Parliament and the Council (COM(2003)0427)<sup>1</sup>,
  - having regard to Articles 251(2) and 61(c) of the EC Treaty, pursuant to which the Commission submitted the proposal to Parliament (C5-0338/2003),
  - having regard to Rule 51 of its Rules of Procedure,
  - having regard to the report of the Committee on Legal Affairs and the opinion of the Committee on Civil Liberties, Justice and Home Affairs (A6-0000/2050),
1. Approves the Commission proposal as amended;
  2. Calls on the Commission to refer the matter to Parliament again if it intends to amend the proposal substantially or replace it with another text;
  3. Instructs its President to forward its position to the Council and Commission.

Text proposed by the Commission

Amendments by Parliament

### Amendment 1 Recital 5

(5) The scope of *the* Regulation must be determined in such a way as to be consistent with Regulation (EC) No 44/2001 *and the Rome Convention of 1980*.

(5) The scope *and provisions* of *this* Regulation must be determined in such a way as to be consistent with *Council* Regulation (EC) No 44/2001 *of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and Regulation (EC) No .../... on the law applicable to contractual obligations ("Rome I")*.

*Justification*

<sup>1</sup> OJ C ... / Not yet published in OJ.

*It is self-evident that the Regulation should be consistent not only with the 1980 Rome Convention, which will continue in being owing to the fact that Denmark is not participating in the adoption of the Regulation, but also with the new regulation which will emerge from the Rome I project.*

Amendment 2  
Recital 5 a (new)

***(5a) 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 instruments of secondary legislation other than this Regulation, such as conflict rules in specific matters, overriding mandatory rules of Community origin, and the basic legal principles of the internal market. As a result, this Regulation should promote the proper functioning of the internal market, in particular the free movement of goods and services.***

*Justification*

*This amendment, which is based on the wording of the Commission's recital 19, should be read together with the amendment to Article 1 (Material scope, which should read "substantive scope"). It is essential that the rules of this Regulation should not hamper the proper functioning of the Internal Market.*

Amendment 3  
Recital 7

***(7) The principle of the lex loci delicti commissi is the basic solution for non-contractual obligations in virtually all the Member States, but the practical application of the principle where the component factors of the case are spread over several countries is handled differently. This situation engenders uncertainty in the law.***

***(7) It is necessary to have conflict rules which are as uniform as possible throughout the Member States in order to minimise uncertainty in the law. But the need for legal certainty must always be subordinate to the overriding need to do justice in individual cases and consequently the courts must be able to exercise discretion. Furthermore, it is necessary to respect the intentions of the parties where they have made an express choice as to the law applicable to an issue***

*in tort or delict or where such a choice may reasonably be inferred by the court.*

*Justification*

*Whereas to select the lex loci delicti commissi as the basic solution has its attractions, more flexibility needs to be built into the rules so as to allow the courts to do justice in individual cases. Moreover, it is important to respect party autonomy.*

Amendment 4

Recital 8

**(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.***

**(8) This Regulation should** 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. ***It should also satisfy the reasonable expectations of the parties by allowing courts to take an approach to the question of the law applicable in a given dispute which satisfies the needs of international trade and transactions in a Community of States without internal borders.***

*Justification*

*See the justification to the amendment to recital 7. Moreover, it is uncertain what the "modern approach to civil liability" is. Also it is not felt that the reference to systems of strict liability is necessary.*

Amendment 5

Recital 8 a (new)

***(8a) The conflict of laws rules set out in this Regulation also cover obligations based on strict liability and the harmonised rules on connecting factors also apply to the question of the capacity to incur liability in tort/delict.***

*Justification*

*In view in particular (but not only) of the obligations arising from traffic accidents based on*

*the strict liability of the vehicle owner, it is important to make it plain that the conflict rules also cover strict liability. It is also worth making it clear that the harmonised rules on connecting factors apply to the question of the capacity to incur liability in tort/delict.*

Amendment 6

Recital 9

***(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.*** ***deleted***

*Justification*

*This recital is unnecessary in view of the new approach adopted herein.*

Amendment 7

Recital 9 a (new)

***(9a) In considering the question of the applicable law, it is also necessary to have regard to the need to ensure a high level of consumer protection and to underline the importance given to consumer protection by the Community legislature.***

Amendment 8

Recital 10

***(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.*** ***deleted***

*Justification*

*It is considered that the general rules can cater perfectly well for product liability cases.*

Amendment 9  
Recital 11

***(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.*** ***deleted***

*Justification*

*It is considered that the general rules can cater perfectly well for cases involving unfair competition. Moreover, it is uncertain what exactly is intended to be covered by "matters of unfair competition". In the event that it should be regarded as imperative to have a special rule for "matters of unfair competition", a definition clause should be included.*

Amendment 10  
Recital 12

***(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.***

***(12) A specific rule is needed for violations of privacy and rights relating to the personality owing in particular to the role played by the media in society and in order to take account of the case-law of the Court of Justice of the European Communities<sup>1</sup>. In particular, a manifestly closer connection with a particular country may be deemed to exist, having regard to factors such as the country to which a publication or broadcast is principally directed or the language of the publication or broadcast or sales or audience size in a given country as a proportion of total sales or audience size. Similar considerations should apply in respect of Internet publication.***

<sup>1</sup> ***Case C-68/93 Fiona Shevill and Others [1995] ECR I-415.***

*Justification*

*See the justification to the first amendment to Article 6.*

Amendment 11  
Recital 12

***(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.***

***(12) A special rule is required for violations of privacy and rights relating to the personality committed by broadcasters or the press, having regard to the fundamental principle of freedom of the press. The country for which the publication or broadcasting service is mainly intended should be determined by factors such as the language of publication or broadcast, the volume of sales or the audience size. In this respect, the country in which editorial control is exercised may constitute an alternative connecting factor.***

*Justification*

*Alternative amendment designed to cater for publishers'/broadcasters' concerns.*

Amendment 12  
Recital 13

***(13) Regarding violations of the environment, Article 174 of the Treaty, which provides that there must a high level of protection based on the precautionary principle and the principle that preventive action must be taken, the principle of priority for corrective action at source and the principle that the polluter pays, fully justifies the use of the principle of discriminating in favour of the person sustaining the damage.***

***deleted***

*Justification*

*It is considered that the general rules can cater perfectly well for violations of the environment. Moreover, it is uncertain what is meant by "violations of the environment" and this Regulation should be concerned solely with what the applicable law should be, not with*

*the substantive law on environmental liability. In the event that it should be regarded as imperative to have a special rule for "violations of the environment", a definition clause should be included.*

Amendment 13  
Recital 14

(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.

(14) Regarding **infringements** of intellectual property rights, the universally acknowledged principle of the *lex loci protectionis* should be preserved. For the purposes of the present Regulation, the **expression** intellectual property rights **should be understood as meaning** copyright **and** related rights, **the** sui generis right for the protection of databases and industrial property rights.

*Justification*

*Seeks to improve the terminology of the English version.*

Amendment 14  
Recital 15

(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.

(15) **Special** rules should be **laid down** for **liability arising out of** unjust enrichment **or** agency without authority.

*Justification*

*Special rules should be laid down for non-contractual liability arising out of unjust enrichment or agency without authority.*

Amendment 15  
Recital 18 a (new)

**(18a) The law applicable to a non-contractual obligation arising out of any industrial action, pending or carried out, should be the law of the country in which the action is to be taken or has been taken.**

*Justification*

*The rights of workers to take collective action, including strike action, guaranteed under national law must not be undermined.*

Amendment 16  
Recital 18 b (new)

***(18b) Whereas the law or laws designated by the provisions of this Regulation govern loss allocation, as a general rule the rules relating to the quantum of any damages awarded should be those of the court seised of the matter. But, having regard to Regulation (EC) No 44/2001 and the Fourth and Fifth Motor Insurance Directives, in the case of traffic accidents the court seised should apply the rules relating to quantum of the individual victim's place of habitual residence, unless it would be inequitable to do so.***

*Justification*

*It is important to make it clear that the rules relating to the quantification of damages should be those of the forum. However, in the case of traffic accidents it will often be more equitable to apply the rules of the victim's country of residence (e.g. where the victim requires life-long care). Moreover, it is appropriate to refer to the Brussels I Regulation and the Fourth and Fifth Motor Insurance Directives, since Article 11(2) of that Regulation, in conjunction with the Motor Insurance Directives, allows injured parties to bring a direct action against the insurers in a cross-border case.*

Amendment 17  
Recital 18 c (new)

***(18c) In the interests of ensuring that the issue of applicable law is properly considered by the parties and the court, the parties should be under a duty to inform the court in the document originating proceedings and the defence of the law or laws which they maintain are applicable to all or any parts of the claim.***

*Justification*

*This simple requirement will ensure that the issue of applicable law is duly considered by both the parties and the court, thus helping to ensure legal certainty.*

Amendment 18  
Recital 18 d (new)

***(18d) It is important to make it clear that the court seised should establish the content of the foreign law of its own motion.***

*Justification*

*At present, the position varies from jurisdiction to jurisdiction and this would make for uniformity of approach.*

Amendment 19  
Recital 19

***(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.*** ***deleted***

*Justification*

*This recital has been amended and renumbered recital 5a.*

Amendment 20  
Article 1, paragraph 2, points (d) and (e)

(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;

(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  
***vis-à-vis the company audited and its members;***

(e) non-contractual obligations among the *settlers*, trustees and beneficiaries of a trust;

(e) non-contractual obligations among the *settlers*, trustees and beneficiaries of a trust  
***created voluntarily;***

*Justification*

*The first limb of this amendment reflects the concern that two different conflicts regimes might apply, say, where a potential purchaser of a company brings claims against the vendor's financial advisers and the company's auditors.*

*The second limb relating to trusts is designed to ensure greater consistency with the 1985 Hague Convention on recognition of trusts and to avoid difficulty or confusion arising from the employment of the trust in common-law jurisdictions as a device for dealing with situations such as unjust enrichment.*

Amendment 21  
Article 1, paragraph 2 a (new)

***2a. This Regulation shall not prejudice the application or adoption of acts of the institutions of the European Communities which:***

***(a) in relation to particular matters, lay down choice-of-law rules relating to non-contractual obligations; or***

***(b) lay down rules which apply irrespective of the national law governing the non-contractual obligation in question by virtue of this Regulation; or***

***(c) prevent application of a provision or provisions of the law of the forum or of the law designated by this Regulation; or***

***(d) lay down provisions designed to contribute to the proper functioning of the***

***internal market in so far as they cannot be applied in conjunction with the law designated by the rules of private international law.***

*Justification*

*It is better to deal with the substantive scope of the Regulation in a single article, clearly delimiting where Community law displaces the rules of private international law. The new indent (d) is intended to cover existing Internal Market instruments such as the television without frontiers and the e-commerce directives.*

Amendment 22

Chapter II, Section 1, Article 2 a (new)

***Article 2a***

***Freedom of choice***

***1. The parties may agree, by an agreement entered into after their dispute arose or, where there is a pre-existing arms-length commercial relationship between traders of equal bargaining power, by an agreement freely negotiated before the dispute arose, to submit non-contractual obligations to the law of their choice. The choice must be expressed or demonstrated with reasonable certainty by the circumstances of the case. It may not affect the rights and obligations of third parties and shall be without prejudice to the application of mandatory rules within the meaning of Article 12.***

***2. A choice of law made by the parties shall not deprive an employee who is a party to a contract of employment of the protection that would be afforded to him by the mandatory rules***

***(a) of the country in which he habitually carries out his employment in performance of the contract; or***

***(b) if the employee does not carry out his work in any one country, of the law of the country in which the place of business through which he was engaged is***

*situated; or*

*(c) of the country with which the contract is most closely connected.*

***3. If all the other elements of the situation at the time when the loss or damage is sustained are located in one or more of the Member States of the European Community, the parties' choice of the applicable law shall not debar the application of provisions of Community law.***

#### *Justification*

*It seems more logical to move the former Article 10 to the beginning of the Regulation, since it is clear that if the parties have reached an agreement between them as to the applicable law, account should be taken of the parties' intention before applying exogenous rules in order to determine the applicable law. This also promotes judicial economy.*

*In addition, there seems to be no reason why parties in an arms-length commercial relationship should not be able to agree on the law applicable to any claim in tort/delict before any such claim arises. This may be convenient to businesses wishing to regulate all potential aspects of their relationship from the outset. However, the wording of this amendment is designed to exclude consumer contracts and agreements not freely negotiated (such as standard-form contracts - *contrats d'adhésion*) where the contracting parties do not have equal bargaining power (e.g. insurance, franchise and licensing contracts). There also seems to be no reason why such agreements cannot be concluded in relation to intellectual property.*

*The new provisions relating to contracts of employment and consumer contracts reflect the position under the Rome Convention on contractual obligations.*

#### Amendment 23 Article 3

##### 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.

##### Article 3

##### General rule

1. ***In the absence of an agreement within the meaning of Article 2a and unless otherwise provided for in this Regulation, the*** law applicable to a non-contractual obligation ***arising out of a tort or a delict*** shall be the law of the country in which the damage ***occurs*** or is likely to ***occur***, 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.**

2. Notwithstanding *paragraph 1 and by way of exception*, 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.

***The factors that may be taken into account as manifestly connecting a non-contractual obligation with another country include:***

***(a) as far as loss-distribution and legal capacity are concerned, the fact that the person(s) claimed to be liable and the person(s) sustaining loss or damage have their habitual residence in the same country or that the relevant laws of the country of habitual residence of the person(s) claimed to be liable and of the country of residence of the person(s) sustaining loss or damage are substantially identical;***

***(b) a pre-existing legal or de facto relationship between the parties, such as, for example, a contract, that is closely connected with the non-contractual obligation in question;***

***(c) the need for certainty, predictability and uniformity of result;***

***(d) protection of legitimate expectations;***

***(e) the policies underlying the foreign law to be applied and the consequences of applying that law.***

***3. In resolving the question of the applicable law, the court seised shall, where necessary, subject each specific issue of the dispute to separate analysis.***

#### *Justification*

*For the sake of clarity, consistency and an appropriate measure of flexibility, the rapporteur has opted for a flexible general rule which should apply to all torts/delicts in the absence of a choice of law or of special rules set out in the succeeding articles, together with a provision indicating circumstances in which, exceptionally, that rule may be displaced by virtue of the existence of a manifestly closer connection with a country other than that indicated by the general rule. It is considered that this provision can cater for product liability, unfair competition and violations of the environment.*

*The rapporteur considers that, in so far as it is provided that each specific issue of an international dispute requires separate analysis, courts can avoid all potentially applicable *statuta odiosa*, by applying, where necessary, *dépeçage* (see Friedrich K. Juenger, *The Problem with Private International Law*, Rome 1999, *Centro di studi e ricerche di diritto comparato e straniero*).*

*This is reinforced by point 2(c), which enables the court seised to decline to apply a provision or provisions of foreign law whose consequences would be repugnant.*

*This approach is designed to maximise legal certainty while allowing courts to use their discretion in choosing the solution which best accords with the need to do justice to the victim and with the reasonable expectations of the parties, whilst minimising the risk of forum shopping.*

*Paradoxically, excessively rigid - ostensibly simple - rules do not necessarily lead to greater legal certainty or to predictability of outcome, which is so important for practitioners. For instance, such rules often result in the courts using recategorisation of issues as procedural in order to do justice in particular cases.*

#### Amendment 24 Article 4

##### ***Article 4***

***deleted***

##### ***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.*

*Justification*

*It is considered that liability for defective products can be dealt with under Article 3, as amended.*

Amendment 25  
Section 1A, Title (new)

**SECTION 1A**  
**SPECIAL RULES APPLICABLE TO**  
**SPECIFIC TORTS/DELICTS AND**  
**NON-CONTRACTUAL OBLIGATIONS**

Amendment 26  
Article 5

*Article 5* *deleted*

*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.*

*Justification*

*It is considered that unfair competition can be dealt with under Article 3, as amended. Moreover, in the absence of clarity as to what is covered by "acts of unfair competition", the*

*rapporteur considers that this provision is best omitted. If, ultimately, it is decided that "acts of unfair competition" should be expressly catered for in this Regulation, the rapporteur considers that such acts should be defined in a definition clause.*

Amendment 27  
Article 6

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 6

Violations of privacy and rights relating to the personality

***1. As regards*** the law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality, ***the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur shall be applicable, but a manifestly closer connection with a particular country may be deemed to exist having regard to factors such as the country to which a publication or broadcast is principally directed or the language of the publication or broadcast or sales or audience size in a given country as a proportion of total sales or audience size or a combination of these factors. This provision shall apply mutatis mutandis to Internet publication.***

2. The law applicable to the right of reply or equivalent measures ***and to any preventive measures or prohibitory injunctions against a publisher or broadcaster regarding the content of a publication or broadcast*** shall be the law of the country in which the ***publisher or*** broadcaster has its habitual residence.

*Justification*

*The amended version of Article 6 is consistent with the judgment in Case C-68/93 Fiona Shevill and Others [1995] ECR I-415. This rule has been formulated to cover situations in which a manifestly closer connection may be considered to exist with the country of the principal place of publication or broadcasting. This will make for more legal certainty for publishers and broadcasters and result in a straightforward rule applying to all publications, even those carried out on the Internet.*

*The amendment to the second paragraph relating to injunctive relief is more realistic, given that such relief has to be sought and granted swiftly and is interim in nature.*

Amendment 28  
Article 6

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 6

Violations of privacy and rights relating to the personality

1. ***A non-contractual obligation, arising out of a violation of privacy or rights relating to the personality, caused by a publication or broadcast, shall be governed by the law of the country for which the publication or broadcasting service is mainly intended, or, in the alternative, by the law of the country in which the editorial decision is taken.***
2. The law applicable to the right of reply or equivalent measures ***and to any preventive measures, including prohibitory injunctions, both provisional and permanent, against a publisher or broadcaster regarding the content of a publication or broadcast*** shall be the law of the country in which the ***publisher or broadcaster*** has its habitual residence.

*Justification*

*This amendment is intended as an alternative to the preceding amendment and has been inserted at the request of publishers/broadcasters.*

Amendment 29  
Article 6, paragraph 2 a (new)

***2a. Paragraph 2 shall also apply to a violation of privacy or of rights relating to the personality resulting from the handling of personal data.***

*Justification*

*This amendment is intended to fill a perceived lacuna in the proposal for a regulation.*

Amendment 30  
Article 6a (new)

**Article 6a**

**Industrial action**

***The law applicable to a non-contractual obligation arising out of industrial action, pending or carried out, shall be the law of the country in which the action is to be taken or has been taken.***

*Justification*

*The rights of workers to take collective action, including strike action, guaranteed under national law must not be undermined.*

Amendment 31  
Article 6 b (new)

**Article 6b**

**Traffic accidents**

***1. Until such time as the Community adopts detailed legislation on the law applicable to traffic accidents, Member States shall either apply the general rules set out in this Regulation, subject to Article 13, or the Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents.***

***2. In the case of personal injuries arising out of traffic accidents the court seised should apply the rules relating to the quantum of damages of the individual victim's place of habitual residence, unless it would be inequitable to do so.***

Amendment 32  
Article 7

**Article 7**

**deleted**

***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.*

*Justification*

*It is considered that violations of the environment can be dealt with under Article 3, as amended. Moreover, in the absence of any definition of what is meant by "violations of the environment", the rapporteur prefers to make no express mention of such.*

Amendment 33  
Section 2, Title

**SECTION 2** *deleted*

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

*Justification*

*This title is now redundant.*

Amendment 34  
Article 9

**Article 9** *deleted*

***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.**

*Justification*

*Replaced by Articles 9a and 9b.*

Amendment 35  
Article 9 a (new)

**Article 9a**

**Unjust enrichment**

**1. If a non-contractual obligation arising out of unjust enrichment concerns a relationship previously existing between**

*the parties, such as a contract closely connected with that non-contractual obligation, it shall be governed by the law that governs that relationship.*

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

*3. Where the applicable law cannot be determined on the basis of paragraphs 1 and 2, the applicable law shall be the law of the country in which the events giving rise to unjust enrichment substantially occurred, irrespective of the country in which the enrichment occurred.*

*4. Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of unjust enrichment is manifestly more closely connected with a country other than the one indicated by paragraphs 1, 2 or 3, the law of that other country shall apply.*

#### *Justification*

*These rules closely accord with the general rules for torts/delicts. In addition, the rapporteur disagrees with the Commission's original idea that the law applicable in cases of unjust enrichment should be the law of the country in which enrichment takes place. The place where enrichment takes place may be entirely fortuitous (e.g. dependent upon where a fraudster chooses to open the bank account to which monies are fraudulently paid over).*

Amendment 36  
Article 9 b (new)

#### *Article 9b*

##### *Negotiorum gestio*

*1. If a non-contractual obligation arising out of an action or actions performed without due authority in connection with the affairs of another person concerns a relationship previously existing between*

*the parties, such as a contract closely connected with that non-contractual obligation, it shall be governed by the law that governs that relationship.*

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

*3. Where the applicable law cannot be determined on the basis of paragraphs 1 and 2, the applicable law shall be the law of the country in which the action took place.*

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

#### *Justification*

*These rules closely accord with the general rules for torts/delicts.*

Amendment 37  
Article 10

*Article 10*

*deleted*

#### *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.***

*Justification*

*Covered by the new Article 2a.*

Amendment 38  
Article 11, point (a)

a) the ***conditions*** and extent of liability, including the determination of persons ***who are liable for acts performed by them***;

a) the ***basis*** and extent of liability, including the determination of persons ***whose acts give rise to liability***;

*Justification*

*Corrects the English version to bring it into line with the other language versions and aligns the wording with existing private international law conventions.*

Amendment 39  
Article 11, subparagraph 1 a (new)

***Except where otherwise provided in this Regulation or in a valid choice-of-law agreement, the court seised shall apply its national rules relating to the quantification of damages, unless the circumstances of the case warrant the application of another State's rules.***

*Justification*

*This clarifies the position relating to the quantification of damages. Normally, the court seised will apply its national law, but, in cases such as road accidents, it may apply the rules*

of another country.

Amendment 40  
Article 11 a (new)

**Article 11a**

**Contentions as to applicable law**

**Any litigant making a claim or counterclaim before a national court or tribunal which falls within the scope of this Regulation shall notify the court or tribunal and any other parties by way of a simple statement contained in the statement of claim or other equivalent originating document of the law or laws which that litigant maintains are applicable to all or any parts of his/her claim.**

*Justification*

*This simple requirement will ensure that the issue of applicable law is properly considered by both the parties and the court thus helping to ensure legal certainty.*

Amendment 41  
Article 11 b (new)

**Article 11b**

**Determination of the content of foreign law**

- 1. The court seised shall establish the content of the foreign law of its own motion. To this end, the parties' collaboration may be required.**
- 2. If it is impossible to establish the content of the foreign law and the parties agree, the law of the court seised shall be applied.**

*Justification*

*This clarification should ensure a more uniform approach to the application of foreign law by courts throughout the EU.*

Amendment 42  
Article 12

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 12

Overriding mandatory rules

1. *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.*

2. *Where the law of a specific country is applicable by virtue of this Regulation, effect may be given to the mandatory rules of another country with which the situation is closely connected, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the non-contractual obligation. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.*

*Justification*

*The new order of the paragraphs seems more logical. The English text has been corrected to align it with the other language versions.*

Amendment 43  
Article 13

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

Article 13

Rules of safety and conduct

Whatever may be the applicable law, in determining liability account shall be taken, *as a matter of fact*, of the rules of

were in force at the place and time of the event giving rise to the damage.

safety and conduct which were in force at the place and time of the event giving rise to the damage.

*Justification*

*This point is made by the Commission in its explanatory memorandum and should be reflected in the text of the Regulation itself.*

Amendment 44  
Article 14

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 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 ***in so far as this possibility exists under one of those laws.***

*Justification*

*Clarification requested by the insurance industry.*

Amendment 45  
Article 17, paragraph 2 a (new)

***2a. Notwithstanding Articles 11 a and 11 b and paragraphs 1 and 2 of this Article, the rules of this Regulation shall not apply to evidence and procedure.***

*Justification*

*This amendment corresponds to Article 1(2)(h) of the Rome Convention on the law applicable to contractual obligations.*

Amendment 46  
Article 22

Article 22

Publicity 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 22

Publicity policy of the forum

**1.** 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.

**1a.** *In particular, the application of a rule of law of any country specified by this Regulation may be refused and/or the law of the forum applied if such application would be in breach of fundamental rights and freedoms as enshrined in the European Convention on Human Rights, national constitutional provisions and international humanitarian law.*

**1b.** *Furthermore, 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 may be regarded as being contrary to the public policy ("*ordre public*") of the forum.*

*Justification*

*The new second paragraph is intended as a clarification of the meaning of public policy at Community level.*

*The new third paragraph has been added as it is thought beyond the scope of this Regulation to introduce a new concept of "Community public policy" and remove the possibility of awarding exemplary or punitive damages as the Commission proposed in Article 24. The rapporteur is conscious that the existence of such damages may act as an incentive for forum shopping and therefore has included in the new review clause a commitment on the part of the Commission to examine the whole question of damages in this context when it reviews the implementation of the Regulation.*

Amendment 47  
Article 23

**Article 23**

***deleted***

***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.***

### *Justification*

*Corresponding provisions have been inserted into Article 1, paragraph 2a.*

Amendment 48  
Article 24

*Article 24*

*deleted*

### *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.***

*Justification*

*Whilst the rapporteur has sympathy with this provision, she has preferred to add an amended version to Article 22.*

Amendment 49  
Article 25

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.

Article 25

Relationship with existing international conventions

*1.* This Regulation shall not prejudice the application of international conventions to which the Member States are parties when this Regulation is adopted and which, in relation to particular matters, lay down conflict of law rules relating to non-contractual obligations.

*2. The rules of this Regulation shall prevail over the rules of international conventions concluded between two or more Member States unless those conventions are listed in Annex 1.*

Amendment 50  
Article 26 a (new)

*Article 26a*

*Review*

*Not later than ...\* , the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation and, if necessary, make further proposals to adapt it.*

*In making its report, the Commission shall pay particular attention to the effects of the way in which foreign law is treated in the different jurisdictions and the question of damages, including the possibility of awarding exemplary or*

*punitive damages in certain jurisdictions.*

*It shall also consider whether Community legislation specifically dealing with the law applicable to traffic accidents ought to be proposed.*

*The report shall include an analytical study of the extent to which courts in the Member States apply foreign law in practice, including recommendations as to the desirability of a common approach to the application of foreign law.*

*\* Three years after the date of adoption of this Regulation.*

#### *Justification*

*The rapporteur considers that such a review clause is both desirable and necessary.*

## EXPLANATORY STATEMENT

The amendments presented to the proposal for a regulation are intended to rationalise and simplify the original proposal. The rapporteur suggests that the best approach is first to consider whether the parties have agreed on what the applicable law should be (Article 2a). Indeed, she can see no reason why parties should not be able to agree to submit non-contractual obligations to the law of their choice before, and not only after, the dispute arises, where it is clear beyond doubt that the parties are in a pre-existing arms-length commercial relationship. She has also made it possible for such agreements to be made in respect of disputes relating to intellectual property rights. She is conscious that this is controversial, but considers that it warrants being debated.

Otherwise the courts should apply either the rules set out in Article 3 or the successive rules for specific non-contractual obligations.

Article 3 opts in the first place for the *lex loci delicti commissi*. But, exceptionally, where the non-contractual obligation is manifestly more closely connected with another country, the court should opt for the law of that country. The connecting factors specifically mentioned allow courts to apply the law of the place of habitual residence of the victim and the tortfeasor or to take account of a pre-existing legal or *de facto* relationship between them. This is designed, as points (c) and (d) make plain, to produce certainty, predictability and uniformity of result and protect legitimate expectations.

Your rapporteur takes the view that the complexity of many cases is such that a flexible regime is more appropriate than rigid rules for each class of non-contractual obligation. Small factual differences in cases can substantially alter the parties' expectations and the policy considerations at stake. Moreover, in disputes which take place in a Community of States without borders, all having different legal systems but sharing a common heritage of human rights provisions and Community law, justice will often be served by applying *dépeçage*. It is for this reason, that Article 3(3) provides that the court seised must, where necessary, subject each issue of the dispute to separate analysis. This may prove necessary, *inter alia*, in order to avoid having to apply *statuta odiosa* of non-Community countries. What is essential is that courts are provided with a clear instrument which allows them the necessary flexibility in order to do justice to the parties in individual cases.

As far as traffic accidents are concerned, the rapporteur considers that since several Member States have ratified the Hague Convention, they should be free to continue to apply it until such time as a Community instrument has been adopted. In addition, since it would in some cases plainly be equitable to award damages for personal injuries on the scale of the victim's country of residence and not on the scale of the country in which the accident occurred, a provision is included to this effect. In this connection, the rapporteur considers that it is important to include a reference to the Brussels I Regulation and the Fourth and Fifth Motor Insurance Directives, which allow the victim to bring a direct action against the insurers. The rapporteur has also made it clear that, except where specific reference is made thereto in the Regulation, the question of the quantum of any damages awarded should be dealt with under the law of the forum.

Your rapporteur has provided for special rules for defamation, unjust enrichment, agency without authority and torts arising out of industrial disputes.

In contrast, she has deleted the special provisions on defective products, unfair competition and violations of the environment, on the ground that, in the absence of persuasive evidence to the contrary and clear definitions of the torts/delicts concerned, the general rules are adequate to cope with the situations concerned. Whereas the rapporteur might be persuaded that specific provisions on defective products should be included if a good case were made out for this, she would be loath to include provisions on unfair competition and violations of the environment in the absence of a definition clause clearly setting out what torts/delicts are meant by those expressions.

As far as violations of privacy and rights relating to the personality are concerned, the rapporteur takes the view that the *lex loci delicti commissi* should in principle apply, but that the court should be able to consider that a manifestly closer connection exists with the country of publication or broadcasting having regard to sales per Member State, audience figures and so on. In line with the Brussels I Regulation on the recognition and enforcement of judgments, the court may also take account of the audience to which the publication or broadcast is principally directed. Given that Internet publications are also covered, it will be possible to avoid a situation in which different rules apply to the same publication, depending on whether it is made off- or on-line. Your rapporteur considers that this should conduce to greater legal certainty. In order to take account of concerns expressed by publishers and broadcasters, she has also offered an alternative version of the provisions in question in order to allow full debate to take place in committee.

As far as other non-contractual obligations are concerned, your rapporteur has chosen to deal with unjust enrichment and agency without authority in two separate articles for the sake of simplicity.

The rapporteur is conscious that her approach diverges from that of traditional international conventions in the field of private international law, but would point out that the instrument in preparation is a piece of Community legislation and hence has to satisfy different requirements. In contrast to previous instruments where the Community has taken over an existing international convention on private law, in this instance there was no previous convention, which provides a unique opportunity to legislate in a specifically Community context. In particular, your rapporteur has taken pains to ensure that the regulation can co-exist with Internal Market legislation and promote, rather than hamper, the proper functioning of the Internal Market. Particular consideration has been given to the Regulation's relationship with the television without frontiers and the e-commerce directives. Your rapporteur has been anxious to suggest a principled holistic approach which should avoid the necessity for confusing carve-outs and special regimes, present or future, as these merely serve to make our legislation more complex to navigate and less transparent.

Attention has also been paid to public policy. Your rapporteur considers that it is important to make it clear that embryonic Community public policy exists, as reflected in the ECHR, the Charter of Fundamental Rights, national constitutional provisions and international humanitarian law. The reference to international humanitarian law has been expressly added to avoid courts having to apply rules of law of a non-Community country which would be

repugnant to European systems of values, even though it is implicit already in the rapporteur's reformulation of Article 3.

Your rapporteur has also made it clear that rules of evidence and procedure are outside the scope of this Regulation in accordance with the traditional rules of private international law. Nevertheless, she has included provisions designed to ensure that national procedures are such that courts do in fact consider the question of the applicable law when proceedings falling within the scope of the Regulation are brought. This is essential in order to ensure uniformity of approach throughout the Union.

In addition, the *ordre public* provision has been expanded to cover exemplary and punitive damages, since your rapporteur considers that it is not legally possible in an instrument such as this to legislate to prohibit the award of such damages. She has, however, added a review clause mandating the Commission to examine, three years after the adoption of the Regulation, the question of damages and its impact in terms of forum shopping.

Given the dissatisfaction which has been voiced about the Hague Convention on traffic accidents, your rapporteur proposes to ask the Commission to consider proposing a Community instrument for this area. Pending this, traffic accidents should be able to be dealt satisfactorily under this Regulation, which expressly allows those Member States which have ratified the Hague Convention to continue to apply it. In this connection, the rapporteur would point to the problems caused by the discrepancies in the level of damages awarded by courts in the various Member States, which she considers deserves attention.

Another key part of this review should be the issue of how national courts deal in practice with the application and use of foreign law; more evidence of this needs to be accumulated to ensure that there is equality of treatment with national law so as to encourage confidence in the use of foreign law in national courts and again discourage the perceived need for forum shopping.

Your rapporteur wishes to underline that this Regulation should be seen as both underpinning Member States' differing legal traditions in private law, which arise out of their individually unique historic cultural and social circumstances, but at the same time as providing clear guidance at a Community level as to how those differing traditions should be recognised when conflicts arise by giving proper weight to the priorities of the overall Community legal order. The rapporteur would conclude by stating that this Regulation should assist in ensuring that the Community principles of mutual recognition and trust between the courts of the Member States are upheld.

Lastly, the rapporteur wishes to thank all those who have assisted her by giving her their advice and criticism, especially those who have participated in the work of the Project Team. The rapporteur has studied closely the Swiss Federal Law on Private International Law, the US Second Restatement and other instruments of federal States before reaching her conclusions as to what approach should be adopted.