



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 14.3.2007
COM(2007) 126 final

2003/0168 (COD)

COMMISSION OPINION

**in accordance with point (c) of the third subparagraph of Article 251(2) of the EC Treaty
on the European Parliament's amendments
to the Council common position on
the proposal for a**

**REGULATION OF THE EUROPEAN PARLIAMENT AND THE COUNCIL
ON THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS
("ROME II")**

AMENDING THE PROPOSAL OF THE COMMISSION pursuant to Article 250 (2) of the
EC Treaty

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1. INTRODUCTION

Point (c) of the third subparagraph of Article 251(2) of the EC Treaty provides that the Commission is to issue an opinion on the amendments proposed by the European Parliament at second reading. The Commission hereby issues its opinion on the 19 amendments proposed by Parliament.

2. BACKGROUND

The proposal¹ was adopted by the Commission on 22 July 2003 and transmitted to the European Parliament and the Council the same day. The European Economic and Social Committee adopted its opinion on the Commission proposal on 2 June 2004². The European Parliament adopted 54 amendments at first reading in plenary session on 6 July 2005³. The Commission adopted its amended proposal on 21 February 2006⁴. The Council adopted its common position on 25 September 2006⁵. The Commission adopted its communication on the Council common position on 27 September 2006⁶. The European Parliament adopted 19 amendments at second reading in plenary session on 18 January 2007.

3. AIM OF THE PROPOSAL

International jurisdiction, recognition and enforcement in a Member State of judgments given in another Member State are dealt with by Regulation (EC) No 44/2001 of 22 December 2000, which applies to both contractual and non-contractual obligations in civil and commercial matters. As regards the applicable law, the provisions governing contracts applied by the Member States were harmonised by the *Rome Convention of 1980 on the law applicable to contractual obligations*, which the Commission is proposing to replace by the

¹ COM(2003)427 final. 2003/0168 (COD).

² OJ C 241, 28.9.2004, p. 1.

³ A6-0211/2005.

⁴ COM(2006)83 final.

⁵ Common Position (EC) No 22/2006 (OJ L 289 E, 28.11.2006, p. 68).

⁶ COM(2006) 566final.

"Rome I" Regulation⁷, currently being negotiated in the Council and Parliament. However, there are no general harmonised rules within the Community for determining the law applicable to non-contractual obligations. The Commission proposal is intended to fill this gap.

Thus, the Commission proposal aims at harmonising the legal provisions applicable to non-contractual obligations of a civil and commercial nature (traffic accidents, product liability, unfair competition etc.) and at adopting a common rule across the European Union for determining the law applicable to such obligations.

The aim of the harmonisation of these provisions is twofold: to offer a higher level of legal certainty to individuals and economic operators and to avoid forum shopping, which leads to potentially different substantive results for the parties depending on which court is seized of the matter.

4. THE COMMISSION'S OPINION ON THE EUROPEAN PARLIAMENT'S AMENDMENTS

4.1. Amendments accepted in their entirety by the Commission

- The Commission accepts **amendment 1**. This is a technical drafting change to reflect that the fact that the Rome Convention of 1980 on the law applicable to contractual obligations will be replaced by the future "Rome I" Regulation, currently being negotiated in the Council and Parliament.
- The Commission accepts **amendment 23**. In its original proposal the Commission preferred a form of words that made it clearer that non-compensatory damages are not *per se* contrary to public policy if the amount is reasonable. But, since the rule proposed by Parliament leaves the courts with considerable room for discretion, the Commission can now accept the form of words proposed by Parliament.
- The Commission accepts **amendment 30**, which clarifies the scope of the special rule on acts of unfair competition by adding a reference to Articles 81 and 82 of the Treaty. But it fails to grasp Parliament's intentions in deciding to keep the recital relating to the special rule on acts of unfair competition while wishing to delete the rule itself (amendment 17).

4.2 Amendments accepted by the Commission in their entirety subject to rewording or in part only

- Regarding **amendment 3**, the Commission has nothing against a recital recalling that Rome II also covers obligations based on strict liability or against the determination of categories of person who can be held liable for the acts they commit. But it considers that these are two distinct questions which should be covered by separate recitals so as to slot into the logical sequence of the Regulation. It is proposed that recital 11 be worded as follows: "*The concept of non-contractual obligation varies from one Member State to another. For the purposes of this Regulation, it should therefore be seen as an autonomous concept. In particular, it should include obligations based on strict liability.*" A new recital 28a could then be inserted as follows: "*Certainty as to the law requires that the Regulation*

⁷ COM(2005)650 final.

determine with precision the scope of the applicable law governing matters such as the determination of categories of person who can be held liable for the acts they commit."

- **Amendment 28** would make two technical drafting changes. The Commission shares Parliament's concern for terminological consistency between language versions. Recital 19 would introduce "*unfair competition*" and "*restrictions of competition*", referred to expressly in relation to Article 6 of the Council common position (English and French versions). In the French version of the common position, recital 19 also expressly refers to the two concepts, unlike the English version. The Commission accordingly proposes that the English version of recital 19 be aligned on the French version. The proposal that the word "*market*" be used at the end of the recital does not adequately reflect the dual aspect of Article 6, which seeks to protect both relations between competitors and the collective interests of consumers⁸. The Commission would accordingly propose the following form of words: "*The connection to the law of the country where relations between competitors or the collective interests of consumers are, or are likely to be, affected generally satisfies these objectives.*"
- While the Commission is basically in favour of clarifying the scope of the specific rule on environmental damage, it regrets that the definition adopted in **amendment 32** is so restrictive, confining the scope so that the rule would not apply, for instance, to air pollution. The Commission can accept a definition only if it covers all non-contractual obligations in respect of environmental damage, irrespective of the nature of the damage.
- By virtue of **amendment 26**, the report on the application of the Regulation should consider two questions in particular: the application of foreign law by the courts and tribunals of the Member States (second and third paragraphs of the amendment), and the law applicable to traffic accidents. While the Commission can basically accept the part concerning the application of foreign law, as in the amended proposal, it considers that the problem of damages, mentioned at the end of the second paragraph of the article, extends beyond that question. This is a complex point of substantive civil law, and Rome II is not the proper place for addressing it. As to the part concerning traffic accidents, the Commission's working method in preparing its report would be dictated to it in great detail. Since the Commission has its own detailed rules governing its working method, it prefers to stand by the form of words used in the amended proposal: "*The report shall consider whether Community legislation specifically dealing with the law applicable to traffic accidents ought to be proposed.*"

4.3 Amendments not accepted by the Commission

- The Commission does not accept **amendment 4**, which provides in very general terms that the court must have a margin of discretion in applying the Regulation. While it is true that the court has a margin of discretion to determine the applicable law under the specific provisions of Articles 4, 5, 10, 11 and 12, the same does not apply to the other rules. The effect of the proposed wording would therefore be to lower the level of legal certainty aimed at by the Regulation. The Commission accordingly considers that recitals 16 and 18, which refer expressly to the specific rules, will suffice.

⁸ Directive 98/27/EC of 19 May 1998 on injunctions for the protection of consumers' interests uses the same expression "*collective interests of consumers*".

- It does not accept **amendments 9, 15 and 19**, which introduce a new specific rule governing invasions of privacy and rights relating to the individual. The Commission already rejected this rule at first reading. Given the political impasse in the Council, the Commission would now prefer to exclude this tricky question from the scope of the Regulation, as in its amended proposal, especially since there is very little international litigation in this area.
- The Commission cannot accept **amendment 10**, which makes provision for cases where the parties have not made an express choice of law and the court is empowered to have regard to other factors to infer a choice. The proposed form of words is not compatible with the legal certainty objective, which requires certainty as to the existence of a choice by the parties.
- The Commission does not accept **amendments 11 and 22**, which would introduce the restitutio in integrum principle in quantifying damages for personal injury victims. While it agrees that this is a very interesting idea for improving the situation of road traffic victims, it considers that this constitutes harmonisation of the Member States' substantive civil law which is out of place in an instrument harmonising the rules of private international law.
- **Amendment 12** would insert a new recital allowing a litigant who so wishes to raise the issue of the applicable law. The Commission already explained in its amended proposal that, while it supported the idea of easing the task of a court faced with international litigation, this was not something that could be expected of all the parties, in particular those who are not legally represented. Since it cannot accept a rule such as this, the Commission cannot accept either a mere recital, especially as this is a horizontal issue that should be addressed in a broader context. But the Commission is willing to look into the question of the application of foreign law in the courts of the Member States in the report on the application of the Regulation, as proposed in the amended proposal.
- For the same reasons the Commission rejects **amendment 13**, whereby the court should determine the content of the applicable foreign law of its own motion, although it could ask the parties to assist it. It believes that in the current situation most Member States would be unable to apply such a rule as the requisite structures are not in place. But it agrees that this is an avenue well worth exploring and that special attention should be paid to it in the implementation report.
- Since Parliament has rejected the amendment that would insert a new Article 15a, the Commission cannot support **amendment 16**, which refers expressly to an Article 15a that is no longer in the body of the Regulation.
- The Commission cannot accept **amendment 17**, which would abolish the specific rule relating to anti-competitive practices. As the amended proposal already explained, preserving this specific rule boosts certainty and foreseeability in the law since it anchors the place where the loss was sustained. Moreover, the Commission fails to grasp the intentions of Parliament, which, despite this deletion, would preserve and even improve the recital (recital 21) relating to the specific rule. If Parliament actually wished to preserve the specific rule, the Commission would accept the rule as proposed in amendment 31, rejected by Parliament.
- The Commission cannot accept **amendment 24**, which reinstates a rule on the relationship between Rome II and other Community instruments containing rules having an impact on

the applicable law, in particular the internal market instruments. In view of the recent developments in the European Parliament and the Council in the context of negotiations of other proposals, such a specifically tailored provision in this instrument no longer seems necessary.

5. CONCLUSION

Under Article 250(2) of the EC Treaty, the Commission amends its proposal in accordance with the above.