

Judicial cooperation in civil and commercial matters: cross-border disputes, non-contractual obligations, Rome II

2003/0168(COD) - 25/09/2006 - Council position

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

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

The substantive differences in the common position in comparison with the amended proposal of the Commission and the Parliament's amendment are summarised as follows:

As regards the substantive departures from the Commission's amended proposal:

Scope: Article 1(2)(g) reflects the Commission's amended proposal (Article 1(2)(h)) where the Commission suggested the exclusion from scope of violations of privacy and of rights relating to personality when perpetrated by the media. The common position goes, however, further. It does not limit this exclusion only to non-contractual obligations entered into by the media, but extends it to all and any such non-contractual obligation. The main reason for this approach was the ultimate inability to agree on the scope (definition) of media in this context. This exclusion is mitigated by the wording of the review clause (Article 30) which focuses the attention to this specific area of non-contractual obligation as a specific subject of the report on the application of the future Regulation.

Product liability: Article 5 on product liability departs in its drafting approach considerably from the Commission's proposal (Article 6 of the amended proposal), albeit not in its intention. The common position reflects the need for a specific rule on products liability which strikes an appropriate balance between the interests of the victim and the person liable. The Commission continues to regret the approach in the common position which provides for a rather complex system of cascade application of connecting factors. It remains persuaded that its original solution offered an equally balanced solution for the interests at stake, while expressed in much simpler drafting.

Unfair competition: Article 6 extends the application of the rule on unfair competition also to acts restricting free competition, while Article 7 of the Commission's amended proposal applies only to unfair commercial practices.

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

The text of the provision in the common position is a redraft which attempts to give effect to the main objections of the Commission during the discussions in the Council. Its scope is now defined more precisely and is, in particular, limited to the issue of liability of employers, workers and/or trade unions in the context of an industrial action.

Overriding mandatory provisions: the articles on mandatory provisions have been simplified.

Public policy on the forum: the application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy ("ordre public") of the forum.

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

Relationship with other international conventions (Article 28) : the Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them insofar as such conventions concern matters governed by this Regulation.

New provisions introduced by the Council

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

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

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