

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

2003/0168(COD) - 14/03/2007 - Commission opinion on Parliament's position at 2nd reading

The Commission **accepted 6 amendments** made by Parliament either in their entirety, or subject to rewording or in part only. These include the following:

- 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;

- Parliament's amendment stating that the application of a provision of the law designated by the 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 of the forum. 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 amendment 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;

- the Commission suggested two different recitals to give effect to Parliament's desire to reflect that Rome II also covers obligations based on strict liability, and that the Regulation will 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.

- the Commission states that while it is basically in favour of clarifying the scope of the specific rule on environmental damage, it regrets that the definition adopted by Parliament 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;

- Parliament's amendment on the report on the application of the Regulation states that the latter should consider two questions in particular: the application of foreign law by the courts and tribunals of the Member States, and the law applicable to traffic accidents. While the Commission can basically accept the part concerning the application of foreign law, it considers that the problem of damages, 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, namely, that the report shall consider whether Community legislation specifically dealing with the law applicable to traffic accidents ought to be proposed.

The Commission **did not accept 12 amendments**, amongst which were the following:

- new specific rules governing invasions of privacy and rights relating to the individual. The Commission already had 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;

- Parliament's amendment 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 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;

- 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. However, 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;

- similarly, the Commission rejects the amendment 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;

- the Commission cannot accept an amendment which would abolish the specific rule relating to anti-competitive practices. Preserving this specific rule boosts certainty and foreseeability in the law since it anchors the place where the loss was sustained.

- the Commission cannot accept an amendment reinstating 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.