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STATEMENT OF THE COUNCIL'S REASONS

Subject : Common position adopted by the Council on 25 September 2006 with a view to the adoption of a Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations

STATEMENT OF THE COUNCIL'S REASONS

I. Introduction

The Council reached general agreement on the text of the draft Regulation on the law applicable to non-contractual obligations on 1-2 June 2006. This led to the adoption of a common position on 25 September 2006 under the co-decision procedure.

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.¹

When adopting its position, the Council took into account the opinion of the European Parliament delivered at first reading on 6 July 2005.²

The purpose of this proposal is to lay down a uniform set of rules of law applicable to non-contractual obligations, irrespective of the country of the court in which an action is brought. This should increase certainty as to the applicable law and improve the predictability of legal disputes and the free movement of judgements.

II. Analysis of the common position

I. General

The Council's common position follows largely the same line as the Commission's original proposal as modified by the amended proposal submitted to the Council on 22 February 2006.³

¹ See ref to I/A-item note 12219/2006 CODEC 838 JUSTCIV 181;

² See 10812/05 CODEC 590 JUSTCIV 132;

³ See 6622/06 JUSTCIV 32 CODEC 171;

The principal changes made to the text are as follows:

1. In comparison with the original Commission proposal the scope of the instrument has been clarified and further elaborated. Civil and commercial matters do not cover liability of the State for acts and omissions in the exercise of state authority ("acta iure imperii"). An additional exclusion has been added to Article 1(2) (g) to reflect the discussions and the final compromise on violations of privacy and rights relating to personality.
2. The Regulation follows the same logic as the original Commission proposal in the sense that the Regulation sets out a general rule for the law applicable to a tort/delict. The general rule consists of applying the law of the country where damage occurred. This has not changed as compared to the original Commission proposal. Article 4(2) sets out an exception from the general principle, creating a special connection where the parties have their habitual residence in the same country. Article 4(3) should be understood as an 'escape clause' from Articles 4(1) and 4(2), where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country.

As a matter of principle, the general rule should be applicable to all non-contractual obligations covered by the Regulation. Only in certain limited, duly justified circumstances should the general rule be derogated from and special rules applied. In accordance with the conditions specified in Article 14 the parties may agree to submit non-contractual obligations to the law of their choice.

3. In comparison with the original Commission proposal, the scope of the special rules has been further clarified in order to facilitate their practical application. The Regulation currently contains special rules in matters of product liability, unfair competition, environmental damage, infringements of intellectual property and industrial action.

4. Negotiations over violations of privacy and rights relating to personality caused difficulties to many delegations. The Council examined this issue on numerous occasions and carefully considered all options on the negotiating table, including the proposal by the European Parliament.

Nevertheless, as a final compromise and in an attempt to reconcile the conflicting interests, the Council decided to delete the special rule on violations of privacy and rights relating to personality at this stage. As indicated above, such matters are currently excluded from the scope of the Regulation by Article 1(2) g.

However, this has to be read together with Article 30. The review clause, proposed by the European Parliament and currently contained in Article 30, makes provision for a report to be submitted by the Commission at the latest four years after the date of entry into force of the Regulation. The report should consider in particular non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

5. Differently from the original Commission proposal, the Regulation now also contains a rule on industrial action in line with the proposal of the European Parliament. With the aim of balancing the interests of workers and employers, this rule consists of applying the law of the country where the industrial action was taken. However, this provision caused such difficulties to two delegations that they voted against the common position.
6. The original proposal of the Commission contained one provision for non-contractual obligations arising out of acts other than torts/delicts. The Regulation now includes a specific chapter with separate provisions on unjust enrichment, *negotiorum gestio* and *culpa in contrahendo*.
7. The Articles on mandatory provisions, relationship with other Community law provisions and relationship with existing international conventions have further been simplified.

8. The Regulation now contains, as requested by the European Parliament, a review clause, which obliges the Commission to submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of the Regulation. In particular, the report shall consider non-contractual obligations arising out of traffic accidents and out of violations of privacy and rights relating to personality, including defamation.

Other amendments are of a more formal nature and have been made to render the text easier to read.

After revision by Legal/Linguistic Experts, the text and the recitals have been re-numbered. A table in the Annex sets out the respective numbers as set out in the common position and as they were indicated in the original proposal.

2. Parliament's amendments

The Council has accepted many of European Parliament's amendments. In some cases, however, the discussions in the Council and the revision of the text by Legal/Linguistic Experts showed the need for certain technical clarifications. In order to ensure correspondence to the provisions of the Regulation, the recitals have been adapted and updated.

The changes made to Articles 1, 2, 4, 9, 10, 11, 12, 28 and 30 require the inclusion of additional recitals.

Recitals 1-5 have been updated in order to take account of the latest developments at political level. Accordingly, the reference to the 1998 Action Plan has been replaced by guidelines contained in the Hague Programme adopted by the European Council in 2004.

a) Amendments accepted in their entirety

Amendments 12, 17, 21, 22, 35, 37, 39, 40, 45, 51, 52 and the oral amendments can be accepted as presented by the European Parliament since they contribute either to the clarity and consistency of the instrument or to questions of detail.

b) Amendments accepted in substance

Amendments 2, 15, 18, 19, 20, 23, 24, 28, 31, 34, 38, 45, 54 can be accepted in substance subject to re-drafting.

Amendment 2 is covered by current recitals (29) and (31).

The substance of **amendment 15** is taken over by recital (24).

The changes proposed by **amendment 18** are reflected in substance in Articles 2 and 1(1).

Amendments 19 and 20 are included in the text of Articles 1(2) b and 1(2) d. However, the drafting has been simplified, in particular due to the inclusion of Article 2.

Amendment 23 is accepted in substance. However, the Council considers that in view of the changes made to recital (9) and Article 1(1) this amendment is redundant.

The Council consider that the changes proposed by **amendment 24** are covered in substance by the changes made to Articles 16, 26 and 27, as well as recital (31).

The Council can accept the principle of **amendments 28 and 34**, which would change the structure and the title of the sections. The Council considers that this is reflected in the current structure of the Regulation, which is divided into, Chapter I - Scope, Chapter II - Torts/delicts, Chapter III - Unjust enrichment, *negotiorum gestio* and *culpa in contrahendo*, Chapter IV - Freedom of choice and Chapter V - Common provisions, and would serve the same purpose.

Amendment 31 introduces a new provision on industrial action. This is in line with the negotiations in the Council. However, the substance of the rule has been further elaborated in Article 9 and by recitals (24) and (25).

The substance of **amendment 38** is taken over by Article 14. However, the Council has tried to simplify the wording and render it more flexible.

The substance of **amendment 46** is taken over by Article 18.

c) Amendments accepted in part

Amendment 3, 14, 25, 26, 36, 44, 53 and 54 can be accepted in part.

Amendment 3 is only partly acceptable since the recital relates to Article 4 and amendment 26 on Article 4 is not fully accepted. The first sentence of the amendment is reflected in substance in the current text of recitals (13) and (14). The last part of the amendment is reflected in the current text of recital (28).

Amendment 14 proposes, firstly, to add the words 'in so far as appropriate' so as to add emphasis to the discretion of the court and, secondly, to exclude this possibility in matters of violations of privacy and unfair competition. While the Council can accept the first part of the amendment, matters of violations of privacy have been excluded from the scope, and the Council sees no justification for making an exception for cases of unfair competition.

Amendment 25 is acceptable in principle. However, the conditions for expressing *ex ante* choice should in view of the Council be laid down in clear and unequivocal terms.

Amendment 26 relates to the general rule contained in Article 4.

With regard to Article 4(1) the Council can accept the changes proposed.

On the other hand, the Council cannot accept the changes to paragraph 2. Paragraph 2 brings in a specific rule on traffic accidents which would subject the non-contractual obligation and the amount of damages to two different laws. As the Commission has stated in its revised proposal¹ this solution diverges from the law in force in the Member States and cannot therefore be adopted without prior in-depth analysis. It is accordingly proposed that the question be considered in detail in the report foreseen by Article 30.

As to Article 4(3), it should be seen as an escape clause from Articles 4(1) and (2), where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country. In the light of this, the Council sees no need for listing specific factors.

Amendment 36 relates to the new Article 10. While in principle the changes proposed are acceptable, the Council considers that the law of the country in which enrichment took place is a more appropriate connecting factor in case the applicable law cannot be determined on the basis of Article 10(1) or (2).

The first part of **amendment 44** is acceptable to the Council. However, in the course of the negotiations it was agreed to delete paragraph (2) that would create fundamental problems to certain Member States and therefore the Council cannot accept this part of the amendment.

¹ See 6622/06 JUSTCIV 32 CODEC 171;

Amendment 53 is accepted in part. The Council considers that it would be more appropriate to have the Regulation take automatically precedence over conventions concluded exclusively between two or more of the Member States insofar as such conventions concern matters governed by the Regulation. The amendment proposed to Article 28(3) is not accepted since the Hague Convention provides for a specific regime on traffic accidents and many of the Member States that are contracting parties to the Convention expressed their wish to preserve this regime. In this context, regard should be had to the review clause in Article 30, which makes a specific reference to traffic accidents.

The Council welcomes the review clause as proposed by **amendment 54**. However, the Council suggests that a more generic review clause is more appropriate to ensure effective evaluation in the framework of the existing competencies (see Article 30).

d) Amendments rejected

Amendments 1, 4, 5, 6, 8, 10, 11, 13, 16, 27, 29, 32, 33, 41, 42, 43, 47, 49, 50, 56 and 57 are rejected.

Amendment 1 refers to the Rome I Regulation. However, until the Regulation is adopted, it is more appropriate to refer to the existing 1980 Rome I Convention on the law applicable to contractual obligations.

Amendment 4 relates to the changes proposed to the general rule (amendment 26). Since amendment 26 was rejected in part, the corresponding changes to the recital would have to be rejected.

In view of the changes made to the scope of the Regulation, the Council sees no need for **amendment 5**.

Amendment 6, 8, 11 and 13 would adapt the recitals to reflect the deletion of several special rules from the Regulation as proposed by amendments 27 (product liability), 29 (unfair competition and acts restricting free competition) and 33 (violations of the environment). The Council cannot accept the deletion of these special rules, therefore the corresponding amendments to the recitals would have to be rejected as well. However, the Council has made an effort to clearly define the scope of these special rules in order to facilitate their practical application.

Amendments 10 and 56 would have to be rejected since non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation, have been excluded from the scope of the Regulation

Amendment 16 is not acceptable to the Council, since the Council rejects amendment 42 to which this amendment corresponds.

Amendment 27 would abolish the special rule on product liability. The Council considers that the application of the general rules in cases of product liability would not allow foreseeing the applicable law with reasonable certainty. Creation of a cascade system of connecting factors, together with a foreseeability clause, appears to be a balanced solution in view of this objective.

Amendment 29 proposes to delete the specific rule on unfair competition. The Council cannot accept that. The rule in Article 6 is not an exception to the general rule contained in Article 4(1) but rather clarifies it in order to determine where the damage arises. In matters of unfair competition, the rule should protect competitors, consumers and the general public and ensure that the market economy functions properly. The connection to the place where the competitive relations or the collective interests of consumers are affected, or in case of restrictions of competition, the country where the restriction has or is likely to have effect, generally satisfy these objectives. The non-contractual obligations arising out of restrictions of competition in Article 6(3) should cover infringements of both Community and national competition law.

Amendment 32 is related to amendment 26 which is rejected by the Council to the extent it relates to traffic accidents. For the same reasons as indicated above, this amendment is rejected.

The Council cannot accept the deletion of the special rule for environmental damage as proposed by **amendment 33**. The proposed rule reflects the 'polluter pays' principle promoted by the Community and already applied in several Member States.

The Council cannot accept **amendment 41** since it would appear to be in contradiction with the changes proposed by amendment 40 which the Council accepts.

Amendments 42 and 43 address the question of the application of foreign law by the court. The Council rejects these amendments since this question should be tackled in a different context.

Since amendment 22 was accepted, **amendment 47** is redundant in the view of the Council.

The Council considers that the clarification contained in Article 23(2) is sufficient for the purposes of natural persons acting in the course of their business activities. Thus, **amendment 49** is rejected.

Amendment 50 aims at clarifying the concept of public policy. It would be difficult for the time-being to lay down common criteria and reference instruments for the purposes of defining public policy. For these reasons amendment 50 is rejected.

Amendment 57 relates to Article 6 of the original Commission proposal. The Council examined this issue on numerous occasions and carefully considered all options on the negotiating table, including the solution proposed by the European Parliament. However, as a final compromise and in an attempt to reconcile the conflicting interests, the Council proposes to delete the special rule on violations of privacy and rights relating to personality at this stage. Accordingly amendment 57 has to be rejected. Instead the Regulation provides in Article 1(2) (g) for an exclusion from the scope.

However, this should be read together with Article 30. The review clause contained in Article 30 makes provision for a report to be submitted by the Commission at the latest four years after the date of entry into force of the Regulation. The report shall consider in particular non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

III. Conclusion

The Council considers that the text of the common position on Regulation on the law applicable to non-contractual obligations creates a balanced system of conflict-of-law rules in the field of non-contractual obligations and achieves the desired uniformity of rules of applicable law. Furthermore, the common position is in broad terms in line with the original proposal of the Commission and the opinion of the European Parliament.

TABLE OF CORRESPONDENCE

| The original Commission proposal | The Council's common position |
|---|--------------------------------------|
| Recital (1) | Recital (1) |
| new | Recital (2) |
| Recital (2) | deleted |
| Recital (3) | Recital (3) |
| new | Recital (4) |
| new | Recital (5) |
| Recital (4) | Recital (6) |
| Recital (5) | Recital (7) |
| new | Recital (8) |
| new | Recital (9) |
| new | Recital (10) |
| new | Recital (11) |
| Recital (6) | Recital (12) |
| Recital (7) | Recital (13) |
| Recital (8) | Recital (14) |
| new | Recital (15) |
| new | Recital (16) |
| Recital (9) | Recital (17) |
| Recital (10) | Recital (18) |
| Recital (11) | Recital (19) |
| new | Recital (20) |
| new | Recital (21) |
| Recital (12) | deleted |
| Recital (13) | Recital (22) |
| Recital (14) | Recital (23) |
| new | Recital (24) |
| new | Recital (25) |
| Recital (15) | Recital (26) |

| The original Commission proposal | The Council's common position |
|---|--------------------------------------|
| new | Recital (27) |
| Recital (16) | Recital (28) |
| Recital (17) | Recital (29) |
| Recital (18) | Recital (30) |
| Recital (19) | Recital (31) |
| Recital (20) | Recital (32) |
| new | Recital (33) |
| Recital (21) | Recital (34) |
| Recital (22) | Recital (35) |
| Recital (23) | Recital (36) |
| Article 1 | Article 1 |
| new | Article 2 |
| Article 2 | Article 3 |
| Article 3 | Article 4 |
| Article 4 | Article 5 |
| Article 5 | Article 6 |
| Article 6 | deleted |
| Article 7 | Article 7 |
| Article 8 | Article 8 |
| new | Article 9 |
| Article 9(1) | Article 12 |
| Article 9(2) | Article 10(2), 11(2), 12(2)b |
| Article 9(3) | Article 10 |
| Article 9(4) | Article 11 |
| Article 9(5) | Article 10(4), 11(4), 12(2)c |
| Article 9(6) | Article 13 |
| Article 10 | Article 14 |
| Article 11 | Article 15 |

| The original Commission proposal | The Council's common position |
|---|--------------------------------------|
| Article 12 | Article 16 |
| Article 13 | Article 17 |
| Article 14 | Article 18 |
| Article 15(1) | Article 19 |
| Article 15(2) | Article 20 |
| Article 16 | Article 21 |
| Article 17 | Article 22 |
| Article 18 | deleted |
| Article 19 | Article 23 |
| Article 20 | Article 24 |
| Article 21 | Article 25 |
| Article 22 | Article 26 |
| Article 23 | Article 27 |
| Article 24 | deleted |
| Article 25 | Article 28 |
| Article 26 | Article 29 |
| new | Article 30 |
| Article 27 second section | Article 31 |
| Article 27 first and third sections | Article 32 |