

**ARGUMENTS FOR A COMPLETE EXCLUSION OF VIOLATION OF PRIVACY/
RIGHTS OF PERSONALITY FROM THE SCOPE OF ROME II
November 2006**

Objectives:

In view of the second reading of the draft Regulation on applicable law to defamation, ENPA, FAEP, EPC, FEP and EFJ are recommending the European Parliament to:

- Accept the exclusion of violation of privacy/rights of personality from the scope of Rome II
- Reject the specific mention to defamation and personality rights in the review clause
- Reintroduce reference to compatibility with other EU legislation (notably Internal Market instruments)

➤ **Reasoning - Exclusion from the scope**

The EP amendment adopted in first reading on Article 6 was an acceptable compromise for the media sector as it would have ensured a balanced approach between respect of press freedom and respect of privacy. The solution adopted was a country of destination principle and not a country of origin principle, only the latter would have allowed full legal certainty to the media. However, it has been extremely difficult for the Council to find an agreement among Member States on this amendment. As a result, the Council and the Commission both decided to exclude completely the issue of violation of privacy and rights to the personality from the scope of Rome II.

In our view, the exclusion represents an acceptable solution for ENPA, FAEP, EPC, FEP and EFJ for the following reasons:

1. The absence of a legal basis for regulating violation of privacy and rights to the personality

Article 65 of the EC Treaty mentioned by the Commission as the legal basis for Rome II provides that *“measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken ... in so far as necessary for the proper functioning of the Internal Market, shall include: promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws ...”*

An EU intervention in the area of applicable law to violation of privacy and rights to the personality does not fulfil the criteria of the proper functioning of the Internal Market in particular because there is not a significant number of cross-border cases in the area of violation of privacy/defamation. This fact has even been admitted by the Commission's service (DG JHA) during the exchange of views in the JURI committee on October 2 and at the seminar organised by the ALDE group on October 17.

The principle of necessity and proportionality of an EU initiative is therefore not fulfilled. In consequence, there is no legal basis for regulating privacy issues/defamation in the scope of Rome II.

This argument has always been flagged by publishers' associations since the beginning of the debate in 2002, but was never taken into account by the Commission. Statistics have also been produced to show the insignificant number of cases in this area. Thus, in this

context where the Commission finally seems to recognise this fact, one may question the coherence of having a review clause, article 26, making a specific reference to privacy, rights to the personality and defamation.

2. The risk of lowering further the value of press freedom across the EU

If the discussion on Article 6 is reopened in second reading, this will lead to difficult and long negotiations between the EP and the Council. While it is impossible to predict what outcome conciliation would deliver, for the press sector it could mean a risk to compromise on what was already a compromise (the EP amendment).

The EP amendment was the minimum that the media could accept as a measure regulating applicable law to violation of privacy. Compromising further will inevitably hinder the level of protection of press freedom as it is currently applied by each Member State.

It is important that the European Parliament understands that press freedom is applied in various ways in the different EU Member States. Newspapers, magazines and other press products are written by journalists according to their cultural, historical and political background which vary from one country to another. The different ways according to which journalists write articles and report on events are part of the pluralism and cultural diversity of each Member State and the EU and contribute to press freedom.

If Rome II would lead to the situation where an article written completely lawfully under the law of one Member States would be subject to liability and sanctions under the law of other 25 Member States, publishers and journalists would be reluctant to publish an article and to disseminate this article across Europe.

Ultimately, the EU citizens will be penalised by such a situation as they would not be able to access to different types of news treated in a different ways according to the values of each Member State.

3. Individual freedoms should not pre-empt on collective freedoms

The discussions on applicable law to violation of privacy and rights of personality have revealed that in some EU policy initiatives, the individual freedom (privacy right) may pre-empt on collective freedom (press freedom).

Journalists and media are operating in an increasingly more restricted sphere where individual freedoms are being considered before public freedoms (examples of terrorism, protection of sources). This will inevitably have an impact on freedom of the press as being part of public freedoms.

The European Convention on Human Rights is applied by the European Court of Fundamental Rights making sure that limits are respected on both sides.

As several academics and lawyers indicated during the seminar on October 17, an absence of a rule in this field does not seem to present practitioners with a major problem, especially as media and journalists prefer to stay with their national law, even if this law is less favourable to them, what matters is legal certainty.

For the time being, it seems preferable to let the Court and the judges do their work in this field, especially as this is what judges, practitioners, media and journalists are asking for, instead of establishing a rule of applicable law that may impede on press freedom.

The conclusion of all academics and practitioners at the ALDE seminar was to leave the issue of defamation alone and to allow case law to develop in the rare cases of cross-border disputes.

4. Forthcoming review of the “Brussels I” Regulation

The European Commission has asked the University of Heidelberg to produce a study in view of the forthcoming revision of the Brussels I regulation, which is due in 2007. In this context it therefore seems useful to consider first the revision of the Brussels I regulation before determining an applicable law which may impact the place of jurisdiction, especially as the European Commission seems to consider that due to the insignificant number of cross-border cases in this area, it is not necessary to deal with this issue in Rome II and an exclusion is acceptable.

➤ **Reasoning – reject specific mention in review clause**

If the Regulation anyway excludes the issue of violation of privacy/rights of personality, there should be no need to include a specific mention to the subject in the review clause.

In any event, review clauses of EU legal instruments are general in nature and do not habitually single out one area for special scrutiny in any review process.

➤ **Reasoning – reintroduction of Internal Market clause**

The Rome II Regulation could have an impact on areas already dealt with in other Community instruments, in particular those covered by Internal Market legislation. In order to ensure coherence and compatibility in the functioning of the Internal Market, the provisions of the Rome II Regulation must be without prejudice to existing laws, as is the case with most EU legislation.

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