Rome II: Commission’s opinion on Parliament Second Reading

On March 14th, **the Commission released its opinion** (COM(2007)126 fin.) **on the European Parliament's amendments** to the Council Common Position on Rome II, that were adopted at second reading on 18 January 2007 (see our post here).

The guidelines of the Commission's position had been already expressed by EU Commissioner Franco Frattini during the debate that preceded the vote in the Parliament plenary session (see our resumé here): apart from a formal acknowledgment of some of the Parliament's amendments (aimed to clarify the wording of some recitals and provisions), the Commission rejects most part of the amendments on the controversial issues of the Regulation, on which an agreement could not be reached in the first two stages of the codecision procedure.

In particular, **the following provisions of the Parliament legislative resolution** (hereinafter: EP resolution) **were rejected**:

- **the introduction of a specific rule on violations of privacy and rights relating to the personality** (amendments 9, 15 and 19: new Recital 25a and new Art. 7a of the EP resolution):

> *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.*

On the conflict rule on violations of privacy and rights relating to the personality, see also the letter of 28 February 2007 (Council doc. n. 6899/07) from Peter Hustinx (**European Data Protection Supervisor**) to the President of the Council, expressing some doubts and concerns on the proposed Art. 7a EP Resolution, and **risks of inconsistencies with the Directive 95/46/EC** (on the protection of individuals with regard to the processing of personal data and on the free movement of such data).

- **the possibility for the Court to "reasonably" infer a choice of law by the parties, having regard to other factors than an express clause** (amendment 10: Recital 28 of the EP Resolution):

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 introduction of the *restitutio in integrum* principle in quantifying damages for personal injuries** (amendments 11 and 22: new Recital 29a and new Art. 21a of the EP Resolution):

While [the Commission] 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.

- **the abolition of the specific rule relating to anti-competitive practices**:

The Parliament's vote on the conflict rule for unfair competition was quite contradictory: following the proposal put forward by the Rapporteur Diana Wallis in the Draft Recommendation for Second Reading, the rule itself (Art. 6 of the Council Common Position) has been deleted (see amendment 17). In a last minute attempt to agree on a compromise text, the Rapporteur had nevertheless proposed, a few days before the Parliament's plenary session, a number of modifications (doc. n. PE 382.964v01-00) to the provision of Art. 6 (see Amendment 31) and to the recitals dealing with it (see Amendments 28-30/Recitals 19-21).

In the Parliament's vote, some of the recitals have been adopted, which clarify the wording and the scope of the provision, but the modified text of Art. 6 has been rejected: the final outcome is that Recitals 19, 20 and 21 of the EP Resolution refer to an article which does not exist any more. The Commission emphasizes this paradoxical situation, while partially agreeing on the modifications approved by the Parliament, with a view to retain the special provision:

[P]reserving 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 [of Art. 6], would preserve and even improve the recital […] 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 introduction of a very detailed provision 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** (see Amendment 24/Art. 27):

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.

As regards some **general issues of private international law theory, the Commission rejects the following amendments of the EP resolution**, that had been originally proposed by the Rapporteur Diana Wallis as autonomous provisions (see Amendment 21/Art. 15a and Amendment 22/Art. 15b of the Draft Recommendation for Second Reading) but then adopted by the Parliament in the form of recitals:

- **the introduction of a new recital allowing a litigant to raise the issue of the applicable law** (amendment 12: new Recital 29b of the EP Resolution):

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.

- **the express introduction of the *iura novit curia* principle,**

according to which the Court should determine the content of the applicable foreign law of its own motion (amendment 13: new Recital 30a of the EP Resolution):

> *[The Commission] 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.*

A **partial agreement** was expressed by the Commission **on the definition clause** contained in new Recital 21a (see amendment 32, presented by the Rapporteur a few days before the Parliament's plenary session: doc. n. PE 382.964v01-00), **which clarifies the scope of the specific rule on environmental damage set out in Art. 7** of the Council Common Position, with a view to keep it in line with Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage (see. Art. 2(1) of the directive):

> *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.*

The opinion is the last official statement of the Commission's position on Rome II, prior to the Conciliation Committee that will be convened, in accordance with Art. 251(3) of the EC Treaty, after the formal rejection by the Council of the Parliament legislative resolution (the Council JHA is scheduled on April 19th 2007).