

Rome II and Defamation: Diana Wallis and the Working Paper

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The Rome II Regulation on the law applicable to non-contractual obligations ((Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ 1997 L 199, p. 40.)) was left incomplete; there was a failure to arrive at a consensus over the appropriate conflict rule to deal with what in the proposal was termed obligations arising out of violations of privacy and rights relating to the personality. This part of this proposal was therefore withdrawn by the Commission at a late stage with the commitment in the review clause to requisition a comprehensive study in this area of conflicts. All the documents prepared in the codecision procedure are available from the Legislative Observatory on the website of the European Parliament.

The study promised by the Commission, the ‘Mainstrat Study’ ((Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, personality, JLS/2007/C4/028, Final Report.)), has now been on the table for some time.

In the European Parliament we have begun to look at the issue again using our power under Article 252 TFEU to ask the Commission to exercise its right of initiative. We held a hearing earlier this year and I have now produced a Working Document. The debate now takes place against a patchwork of new elements. There is a rising clamour of dissatisfaction with so-called ‘libel tourism’ in the English courts which is criticised by media in the UK and beyond; it is not clear that national regulation alone will solve this problem. The media itself now seems more anxious for a European level solution, of course preferably one that recognises the country of editorial control. Yet this country of origin type approach was precisely what prompted the earlier withdrawal and it has now encountered severe difficulties in relation to the European Data Protection Directive.

On the other side of the balance some sort of horizontal approach might now be made easier given that the European Union has through the Lisbon Treaty committed itself to acceding to the ECHR and therefore it could be argued that all jurisdictions should approach the balancing of rights that is necessary in these cases from the same base line. This might produce a common point of departure. Then there is the Icelandic Modern Media Initiative, which is trumpeted by some as having the possibility, given Iceland's bid for EU membership, to bring a US type First Amendment right into the EU. On top of all this of course the Internet continues to develop and the possibilities for ordinary people, perhaps especially vulnerable young people to end up with a real cross-border or worldwide violation of their personality rights is all too real. Interestingly, there is a developing movement on the web in which the excesses of the certain sectors of the press are coming under attack. The question does not reduce simply to the freedom of the press versus rich litigants who would silence debate. It is a constitutional issue and the balance struck by the different national constitutions in this field differs from country to country. This is the fascinating backdrop against which we take up our discussions. The Working Document is very much a consideration of the current status. Your comments and views to feed in to our deliberations would be hugely welcomed. **Download the Working Document.**