UNICE
THE VOICE OF BUSINESS IN EUROPE

22.3/4/1 7 October 2002

Preliminary draft proposal for a Council Regulation on the law applicable to non-contractual obligations

(Rome II Regulation)

UNICE Comments

EXECUTIVE SUMMARY

UNICE – The Voice of Business in Europe, welcomes the opportunity offered by the European Commission to comment on the preliminary draft proposal for a Council Regulation on the law applicable to non-contractual obligations.

Nevertheless, UNICE doubts that such an instrument is necessary "for the functioning of the internal market". Private international law in itself is an insufficient instrument for fostering an internal market. Traditionally, the purpose of conflict of law rules is to ensure that the courts and interested parties can determine the law governing a specific relationship or situation, no more, no less. A Regulation in this area cannot be a substitute for a real internal market based on the "country of origin principle". In the absence of evidence of a need for a Regulation on law applicable to non-contractual obligations, the Commission should refrain from proposing such a Regulation.

UNICE regrets that the preliminary draft proposal does not contain any indication as to the reasons why the Commission sees a need for the Rome II Regulation, or why it proposes to choose one solution as opposed to another for determining the law applicable to non-contractual obligations.

In this context, UNICE recommends, if the Commission decides to pursue the proposal of the Rome II Regulation, that it conducts further consultation on a new draft proposal which must include an extensive explanatory memorandum.

In the event of the Commission deciding to pursue the preliminary draft proposal, UNICE:

- **Urges** the Commission to restrict the scope of the regulation to torts only**;**
- **Urges** the Commission to adopt as a general rule that the law applicable to torts shall be the law of the country in which the alleged tort is committed (lex loci delicti). This would provide legal certainty, simplicity and consistency;
- **Urges** the Commission to provide for exceptions to the lex loci delicti rule only if an when such exceptions meet certain minimum requirements of foreseeability from the perspective of the tortfeasor;
- **Urges** that the preliminary draft proposal expressly excludes the application of third country laws to the extent that such laws provide for the award of non-compensatory (e.g. punitive) damages;
- **Strongly welcomes and supports** the "carve-out" foreseen in Article 23(2) and the Commission's intention to exclude existing and future Community instruments based on a country of origin approach (e.g.: the e-commerce Directive and the Television without Frontiers Directive) from the scope of application of the preliminary draft proposal;

- **Points** out that the divergences between the language versions of the preliminary draft proposal heighten the complexity of the issue and severely hamper consultation;

- **Suggests** that the preliminary draft proposal be redrafted in order to provide for vocabulary which is consistent with other existing instruments in the field of private international law (Brussels Regulation, Rome Convention on law applicable to contractual obligations or Rome I, relevant Hague Convention)

- **Recommends** that intellectual property, at least industrial property (patent, trademarks and designs) be excluded from the scope of the preliminary draft proposal;

- **Recommends** that the Commission refrain from referring to novel concepts such as "unfair practices", for which no definition exists at European level because doing so will create legal uncertainty and prejudges the outcome of stakeholder consultation related to other Commission initiatives (i.e. in this instance the Green Paper on EU Consumer Protection);

- **Welcomes** the possibility for parties to choose the law applicable to non-contractual obligations but submits that the unnecessary restrictions to freedom of choice currently included in the proposal should be removed.

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UNICE Comments

1. UNICE – The Voice of Business in Europe, welcomes the opportunity offered by the European Commission[1] to comment on the preliminary draft proposal for a Council Regulation on the law applicable to non-contractual obligations. In particular, UNICE welcomes the Commission's statement according to which "*the purpose of this preliminary draft proposal for a Council Regulation is to launch a public debate*[2](…)" on the above-mentioned issue. We acknowledge that the afore-mentioned preliminary draft proposal *"is no more than a Commission staff working paper for the sole purpose of consulting interested parties"*[3].

2. Nevertheless, UNICE regrets that the preliminary draft proposal does not contain any indication as to the reasons why the Commission sees a need for the Rome II Regulation, or why it proposes to choose one solution as opposed to another for determining the law applicable to non-contractual obligations. This lack of justification is detrimental to a full understanding of the reasoning behind the preliminary draft proposal and can result in a lack of acceptance of the preliminary draft. UNICE calls on the Commission to pursue their efforts by making available when possible the responses received from interested parties regarding the preliminary draft proposal, to issue for further consultation a Green Paper containing justifications for each provision of the draft proposal and to hold a public hearing on the draft proposal in order for the "*public debate*" sought by the Commission to effectively take place.

I. GENERAL COMMENTS

Necessity of the Rome II Regulation?

3. UNICE, the Voice of Business in Europe, firstly is of the opinion that there is no need for an instrument such as the Regulation on law applicable to non-contractual obligations outlined in the preliminary draft proposal. UNICE believes that European business needs a real internal market based on a "country of origin principle", mutual recognition and substantive harmonisation only when necessary due to distortions in the internal market. Private international law in itself is an insufficient instrument for fostering an internal market. Traditionally, the purpose of conflict of law rules is to ensure that the courts and interested parties can determine the law governing a specific relationship or situation, no more, no less. A Regulation in this area cannot be a substitute for a real internal market based, for example, on the "country of origin principle". In this context, UNICE strongly urges the Commission to refrain from pursuing the preliminary draft proposal.

4. The preliminary draft proposal, void of any explanatory memorandum, further fails to comply with the declared intentions of the Commission in its "Better Regulation Package"[4]. In the Commission Action plan on "Simplifying and improving the regulatory environment" reference is made to a *"consolidated and proportionate instrument for assessing the impact of legislative and policy initiatives (…). The impact assessment will make it easier to decide whether action should be taken at European level."*

[1] http://europa.eu.int/comm/justice_home/unit/civil/consultation/index_en.htm
[2] *Id.* Emphasis added
[3] *Id*
[4] 5 June 2002: COM(2002) 275, "European Governance: Better Lawmaking"; COM(2002) 278, "Action plan 'Simplifying and Improving the Regulatory Environment'"; COM(2002) 277, "Consultation document: Towards a reinforced culture of consultation and dialogue – Proposal for general principles and minimum standards for consultation of interested parties by the Commission"; COM(2002) 276, "Impact Assessment".

This impact assessment is due to be implemented gradually from end 2002. At present, UNICE does not believe there is sufficient evidence of a need for a Regulation harmonising conflict of law rules at European level and urges the Commission to refrain from pursuing the proposal until such evidence through application of the afore-mentioned impact assessment is provided.

5. Without any indication in the preliminary draft proposal itself, we presume that the Rome II Regulation would be based on Article 65(b) EC[5]. In this context, further evidence is needed regarding the proposal's necessity "*for the functioning of the internal market*."

6. UNICE regrets that the Commission seeks to propose such a Regulation before the Council of the European Union decides, pursuant to Article 67(2) EC, for this area to be covered by the procedure under Article 251 EC, i.e. the so-called "co-decision" procedure or before the entry into force of the Treaty of Nice[6] and the new Article 67(5) which provides for "co-decision" in areas covered by Article 65 EC (with the exclusion of aspects related to family law). This would enable the European Parliament to participate fully in the legislative procedure, providing a democratic legitimacy to such texts that has been lacking in previous initiatives related to private international law instruments (e.g. "Brussels Regulation"[7]).

Diverging language versions

7. Throughout the preliminary draft proposal it appears that, at least between the French and English versions, there are divergences in the vocabulary used. This is most regrettable and undermines the benefits of any consultation. Given the importance of vocabulary used in concepts relevant to Private International Law, differences between language versions and use of incoherent terms makes the preliminary draft proposal as it is posted on the Commission's website unclear and unnecessarily heightens the complexity of the topic.

8. For example, in its English version, the "General rule" under Article 3 of the preliminary draft proposal provides that:

> "*the law applicable to a non-contractual obligation arising out of a tort or delict shall be the law of the country in which the loss is sustained, irrespective of the country or countries in which the harmful event occurred (…)*".

9. "Place where the harmful event occurred" is a concept that has been subject to interpretation by the European Court of Justice (hereafter ECJ) and in this context, the latter quote from the English version of the preliminary draft proposal is inconsistent.

10. In the preliminary ruling case "Bier v. Mines de Potasse d'Alsace S.A." in 1976[8] the ECJ decided that "the place where the harmful event occurred", in Article 5(3) of the Brussels Convention of 27 September 1968[9] must be understood as being intended to cover **both**:

- *the place where the damage occurs* (incorrectly translated in the preliminary draft proposal as "country in which the loss is sustained"), and
- *the place of the event giving rise to and is at the origin of that damage.*

We will presume that the Commission intended to put forward the "General rule" under Article 3 of the preliminary draft proposal as follows:

> "the law applicable to a non-contractual obligation arising out of a tort or delict shall be the law of the country where the damage occurs, irrespective of the country or countries of the event giving rise to and which is or are at the origin of that damage (…)"

[5] Citation done in accordance with the "Note on the citation of articles of the Treaties in the publications of the Court of Justice and the Court of First Instance" issued by the European Court of Justice, available on http://curia.eu.int/en/jurisp/renum.htm

[6] Article 2 of the Treaty of Nice provides that the Treaty establishing the European Community shall be amended as follows: "In Article 67, the following paragraph shall be added:
'5. By derogation from paragraph 1, the Council shall adopt, in accordance with the procedure referred to in Article 251:(…) - the measures provided for in Article 65 with the exception of aspects relating to family law.'

[7] COUNCIL REGULATION (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (generally referred to as the "Brussels Regulation".

[8] ECJ, 30 November 1976, C-21/76, ECR 1735, in particular paragraph 24.

[9] COUNCIL REGULATION (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, generally speaking, in application of Article 68, supersedes the Brussels Convention and "*in so far as this Regulation replaces the provisions of the Brussels Convention between Member States, any reference to the Convention shall be understood as a reference to this Regulation*".

The foregoing serves only to illustrate difficulties arising from the lack of inherent consistency of the present proposal. It does not indicate that UNICE believes that the foregoing rule would be appropriate for purposes of the present Regulation. Please see paragraphs 21 et seq. below for further comments on the substance of Article 3 of the preliminary draft proposal.

11. Another inconsistency between the English and French language versions can be found under Article 9 "Scope of the law applicable to non-contractual obligations arising out of a tort or delict". While the English version provides that:

> "The law applicable to non-contractual obligations under Articles 3 to 8 and 11 of this Regulation shall govern: (…)".

The French version contains the word "*notamment*" which can be translated by "in particular", "among others" or "notably". A correct translation of the French version into English would read as follows:

> "The law applicable to non-contractual obligations under Articles 3 to 8 and 11 of this Regulation shall govern in particular: (…)".

The words "in particular" would indicate that the list of issues covered is not an exhaustive list. The consequences of the words "in particular" are important given that a national judge, applying the Regulation would not be bound by the list of issues covered by Article 9 and could further broaden the scope. It is important to clarify if the French version reveals the Commission intentions or if it is the English version. Depending on the answer, comments regarding Article 9 could differ.

II. SPECIFIC COMMENTS

Universal application: applicability of third country laws (Article 2)

12. Article 2 of the preliminary draft proposal entitled "Universal application" provides that the law specified by the proposed Regulation shall be applied *whether or not it is the law of a Member State*. Therefore, the rules, as proposed, could lead to the application by courts in the EU of the laws of countries other than EU Member States such as the United States of America with its excessive non-compensatory (i.e. punitive) damages regime.

13. According to Article 9 (5), the applicable law shall govern *the measure of damages in so far as prescribed by law*. As a consequence of this provision, the applicable (foreign) law will determine whether a plaintiff will be able to claim *punitive, non-compensatory* damages.

14. This provision could expose defendants in the EU to excessive non-compensatory (e.g. punitive) damages claims.

15. UNICE believes this would be an unacceptable consequence of the new rules and would propose to strengthen the public order exception of Article 20, so as to make it clear that damages can not be awarded in application of a foreign law to the extent that similar or comparable damages could not have been awarded under the lex fori.

Intellectual Property Rights (IPR)

16. In the field of intellectual property, non-contractual obligations mainly arise as a result from intellectual property right infringement.

17. As to the question whether infringement on intellectual property related issues should be excluded from this regulation, UNICE believes that at least industrial property (patent, trademarks and designs) should be excluded from the scope of the preliminary draft proposal. Clearly, infringement of e.g. a German patent and the resulting damages should not be subject to French law, and vice versa, even if the loss occurs mainly in another state than the state of the IPR concerned. To provide for the contrary hinders severely legal certainty.

18. For example, because of the territorial effect of a patent for the register country it is not acceptable that questions concerning the validity of a patent and its infringement are decided by patent law norms different from those of the register country. The same also applies to the protection aims of these rights.

19. If a company owns or infringes a certain IPR in a certain country, the law of that country should govern the issue. Otherwise, there would arise a difference between e.g. a German patent owned by a German company, so that the loss caused by an infringement occurs in Germany and, therefore, German law applies, and a German patent owned by a Dutch company, so that the infringement-related loss occurs in The Netherlands and Dutch law would suddenly apply. Such strange situations should not be allowed to arise.

20. Should the Commission decide to pursue the proposal, UNICE recommends that for intellectual property, at least industrial property (patent, trademarks and designs) be excluded from the scope of the preliminary draft proposal.

General rule (Article 3)

21. As indicated above, given the divergent language version, the comments made hereafter related to Article 3 will be based on the assumption that the Commission's intention was to provide the following choice of law rule:

> "the law applicable to a non-contractual obligation arising out of a tort or delict shall be the law of the country where the damage occurs, irrespective of the country or countries of the event giving rise to and which is or are at the origin of that damage (…)".

22. On this basis, UNICE understands that the Commission intends to move away from the traditional *lex loci delicti*[10] rule to resolve conflict of laws in relation to torts, in order to give precedence to the law of the country where the damage occurs.

23. The Commission provides no evidence to justify its choice. UNICE believes the proposed rule is contrary to *"the functioning of the internal market"* i.e. Art 65(b) EC, the legal basis upon which the preliminary draft proposal is presumably based.

24. UNICE proposes that, if the Rome II Regulation is to be pursued, the general rule provided under Article 3 should be that the applicable law shall be the law in which the alleged tort occurs (lex loci delicti). This rule has found recognition as the leading principle in determining the law applicable to torts in the legal systems of most, if not all, Member States.

25. The lex loci delicti rule combines legal certainty with simplicity. The rule proposed by the Commission lacks these qualities. It also has lacks the wide acceptance that the lex loci delicti rule, because of the aforementioned qualities, has found in the legal systems of the Member States.

26. UNICE further believes that any exception to the lex loci delicti rule would similarly have to meet certain minimum standards of foreseeability.

Product liability (Article 5)

27. Substantive law regarding product liability has been harmonised by a Council Directive[11] and was to be implemented in Member States by 30 July 1988. Given the level of harmonisation, UNICE reiterates its arguments in favour of the *lex loci delicti* rule (see above paragraphs 24 and 26) as opposed to the rule suggested by the preliminary draft Article 5(1). The default rule under Article 5(2) lacks consistency by stating *"In all other cases, the applicable law shall be that of the country where the tort or delict is committed*". This (underlined) connecting factor is not used in other Articles of the preliminary draft and it is unclear as to what the Commission envisages: is it the country where the damage occurs or the country of the event giving rise to and is at the origin of the damage? Clarification is needed. It must also be noted that a Hague Convention on the law applicable to products liability was concluded on 2 October 1973 and has entered into force in 5 Member States (Finland, France, Luxembourg, Netherlands and Spain). UNICE urges the Commission to ensure that there will not be significant divergences among the EU Member States.

Unfair competition and other unfair practices (Article 6)

Unfair competition

[10] The *lex loci delicti* rule has been the traditional solution adopted in case law since the Middle-Ages, see P. MAYER, "Droit International Privé", Montchrestien, 5° edition, 1994, n° 678.

[11] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, *OJEC L 210, 07.08.1985, p.29.*

28. Regarding unfair competition, the preliminary draft proposal provides for the application of the law of the country in which the action that caused the damage produces its effects (also referred to as "place of business" principle)[12]. According to this principle, claims resulting from unfair competition would be subject to the law of the country on whose markets the effects of the unfair action are felt.

29. This runs contrary to the "country of origin" principle that is enshrined in the Television Without Frontiers Directive[13] and the e-commerce Directive[14]. It is UNICE's understanding that the Commission believes that Article 23 of the preliminary draft proposal provides a carve-out for the latter Directives. This will be discussed below.

30. UNICE regrets that the conflict-of-law rule in Article 6 is unreasonably inflexible and inappropriate. For example if a single act has an effect on the markets of several countries simultaneously (multi-state acts) the application of the law of the country in which the event giving rise to the tort or delict ("country of origin") is more appropriate rather than all the different laws of the countries in which the damage occurs: for the person performing an act of competition, the law of the country of origin is more predictable than several potentially applicable laws.

31. In addition, UNICE submits that the Commission's approach in the preliminary draft proposal is not consistent with the need for a level-playing field in the case of cross-border competition. UNICE believes that if trade between Member States is affected, only European rules should apply and not national laws as is also proposed by the Commission in its proposal for a Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty[15].

Unfair practices

32. It is our understanding that there is currently no European definition of the notion "unfair practices". Indeed, the Commission is currently reflecting on a number of options and questions on the future of the regulation and enforcement of consumer protection[16]. In particular it is suggested that a possible framework Directive could harmonise the legal provisions of the Member States relating to the fairness/unfairness of commercial practices[17].

33. Commissioner Byrne, responsible for health and consumer protection has stated that, following initial consultation with stakeholders on this issue, "*the best approach would be to embark on a further round of consultation on the substance of a framework Directive*"[18]. When presenting what the afore-mentioned framework Directive might look like, Commissioner Byrne states, "*the framework Directive would contain a general clause prohibiting unfair commercial practices detrimental to consumers*"[19]. Regarding the definition of fairness/unfairness, the Follow-up Communication to the Green Paper[20] recognises that this notion is one of the open questions which requires further consultation. In particular the Commission plans on identifying "*the notions/categories of fair/unfair commercial behaviour, which are common to the legal systems of most Member States*"[21].

34. The above quotes reflect the current lack of a common European definition of what constitutes an unfair practice. Furthermore, the Commission is currently assessing if a common definition could exist. In this context it would not be coherent for the Commission to propose adding the terms "unfair practice" in a Regulation on law applicable to non-contractual obligations which potentially would enter into force before the above-mentioned consultations on consumer protection have been concluded and the possible Framework Directive is formally proposed.

35. Including the terms "unfair practice" in the possible Rome II Regulation would subject the notion initially to the divergent interpretation of national judges. Only many years later would the European Court of Justice be able to provide guidance as to the uniform interpretation of such a notion. This would lead to severe legal uncertainty and could prejudge consultations of stakeholders on other initiatives.

[12] DETHLOFF Nina, "*European Conflict of Law provisions governing unfair competition*", Commercial Communications, December 1999, pp. 2-11.
[13] Council Directive 89/558/EEC of 3 October 1989 on the coordination of certain provision (…) concerning the pursuit of television activities, OJEC l 298, 17.10.1989, p. 23.
[14] Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJEC L 178, 17.7.2000, pp. 1-16.
[15] COM(2000) 582, 27.9.2000
[16] "Green Paper on EU consumer protection", October 2001, COM(2001) 531.
[17] "Follow -up Communication to the Green Paper on EU Consumer Protection", 11.6.2002, COM(2002) 289.
[18] Commissioner Byrne's presentation to the Kangaroo Group (MEPs), 9 July 2002.
[19] *Id*.
[20] See above footnote n° 16
[21] *Id*.

36. If the Commission decides to propose a Regulation on the law applicable to non-contractual obligations regardless of the above comments, UNICE recommends that the Commission refrain from referring to novel concepts such as "unfair practices" which will create legal uncertainty and prejudge the outcome of stakeholder consultation related to other Commission initiatives (i.e. Green Paper on EU Consumer Protection).

Defamation (Article 7)

37. This Article is unsatisfactory. Although the Article is entitled "Defamation", it appears that it covers "non-contractual obligations arising from a violation of private or personal rights or from a defamation". The meaning of "private or personal rights" is unclear and could be open to diverging interpretations by national judges.

38. The conflict of law rule is equally unsatisfactory: the law applicable shall be the law of the country where the victim is habitually resident at the time of the tort or delict. This could result in the media having to apply 15 different sets of laws (or more given the universal application provided for in Article 2) which is likely to constrain press freedom in the sense that the media will be much more cautious and hesitant about publication. Potentially a newspaper publisher, before publishing an article on a person would have to discover where that person is "habitually resident" and then seek advice as to the substantive law of that country regarding defamation and the (potentially very broad) "violation of private or personal rights".

39. UNICE suggests, in the interest of legal certainty and consistency with the "country of origin principle", that the Commission proposes as the applicable law, the law of the country where the event giving rise to the tort or delict occurred (i.e. in this context, the law of the country where the publisher has his main establishment).

Violation of the environment (Article 8)

40. The preliminary draft proposal provides that in the case of a violation of the environment, the applicable law shall be the law of the country in whose territory the damage occurs or threatens to occur." This approach is considered to be unacceptable because in many cases it is not reasonably foreseeable where the consequences of an emission into the air or discharge into sea or river will occur. Furthermore, it is unclear what constitutes a "violation of the environment", or why it should be treated differently from other torts.

Scope of the law applicable to non-contractual obligations arising out of a tort or delict (Article 9)

[See above, paragraph 12]

Applicable law to non-contractual obligations arising out of an act other than a tort or delict (Article 10)

41. Chapter 2 and its Article 10 seeks to regulate a collection of rather un-related issues such as "pre-existing relationships", "unjust enrichment and "actions performed without due authority in connection with the affairs of another person".

42. Although it is appropriate that, in the case of a previous relationship, the law applicable to that relationship apply, the meaning of '*a relationship previously existing between the parties'* as referred to in Article 10(1) is entirely unclear and could lead to major legal uncertainty.

43. UNICE would submit that these issues fall outside the scope of an EU Regulation which seeks first of all to regulate *conflict of law rules relating to tort.* In addition, UNICE would observe that it may prove too ambitious for the EU to enact conflict of law rules for legal concepts, such as unjust enrichment, which do not even form part of the substantive laws of all Member-States. Therefore, we fail to see a practical or legal need for codification of private international law rules on these thorny matters.

Freedom of Choice (Article 11)

44. UNICE welcomes the Commission's recognition that the parties may choose the law applicable to a non-contractual obligation (Article 11(1)). However, UNICE regrets that the preliminary draft is silent regarding the formal and substantive conditions that apply to the validity of the choice of applicable law other than that it has to be made "expressly" and "should not affect the rights of third parties". This latter wording is, in our view, both unnecessary and misleading. The legal systems of most (if not all) Member States recognize the principle that contractual arrangements do not affect (the rights of) third parties; to that extent, the rule now proposed is superfluous. It is misleading to the extent it ignores that where a party agreeing to a choice of law has authority (by virtue of, for instance, the law, its statutes or a power of attorney) to represent or commit third parties by way of its choice, the choice will and should be binding on such third parties. The words "should not affect the rights of third parties" should therefore be omitted.

45. Articles 11(2), 11(3), 12 and 13 set limitations on the freedom of the parties to choose the applicable law that not only are potentially conflicting, but also hard to understand. The party autonomy rule recognized in Article 11.1 is generally accepted as a means of redressing the legal uncertainties (both in terms of its qualification and of its consequences) arising from an allegedly tortuous act. Individually and collectively, the aforementioned provisions reduce the effect of the party autonomy rule accepted in Article 11.1, and increase the uncertainties that the choice of law was meant to address. This takes away most of the benefits of the party autonomy rule. In UNICE's view, Articles 11(2), 11(3), 12 and 13 should therefore be omitted.

Habitual Residence (Article 18)

46. Article 18(1) defines "habitual residence" for "bodies corporate and incorporate" as: *"the central administration".* This criterion ignores the fact that in a number of EU countries, the place of *incorporation*, rather than the central administration, determines the domicile of a corporate entity. It also ignores the fact that, in this age of globalisation and advanced telecommunications, quite a few corporations do not have a single central administration.

47. UNICE recommends that clarification be provided regarding the tests in Article 18 for determining the habitual residence for "bodies corporate or unincorporated".

Relationship with other provisions of Community law (Article 23)

48. UNICE strongly welcomes and supports the "carve-out" foreseen in Article 23(2) and the Commission's intention to exclude existing and future Community instruments based on a country of origin approach (e.g.: the e-commerce Directive and the Television without Frontiers Directive) from the scope of application of the preliminary draft proposal. If the Commission decides to pursue this initiative, it is essential that this "carve-out" be maintained throughout the legislative process.

49. Nevertheless we have doubts regarding the wording of what is generally considered as the carve-out in Article 23(2). Under Article 23(2), the Regulation "shall not prejudice the application of Community instruments which, in relation to particular matters and in the areas coordinated by such instruments, subject services to the laws of the Member States (…)". The reference to "particular matters" creates an avoidable uncertainty regarding the possible interpretation of this text, which may encourage Courts in certain Member States to take a restrictive approach and limit the carve-out implemented under Article 23(2) only to the specific matters explicitly mentioned in the targeted internal market Directives. Thus, the carve-out would not apply to matters that are not explicitly mentioned in these instruments but do fall within the co-ordinated field. Taking the e-commerce Directive as an example, this could mean that courts in certain Member States would consider that the carve-out covers matters such as informational requirements, establishment requirements, and service provider liability but that it does not apply to issues such as defamation or unfair competition rules in the on-line world. This would leave a wide margin of interpretation, which would greatly reduce the benefit to the on-line world of the carve-out and certainly remove any hope of legal certainty.

50. UNICE suggests that the Commission delete the words "particular matters" from the preliminary draft proposal. It must also be noted that, in the English version of the preliminary draft proposal, while Article 23(1) provides "This Regulation shall not prejudice the application of provisions which are or will be contained (…)", Article 23(2) only states that "This Regulation shall not prejudice the

application of Community instruments which, (…), subject such services (…)", thus lacking reference to instruments "which are or will be". In our view this is an incorrect translation of the French version and does not properly reflect the Commission's intention exclude existing and future instruments based on a country of origin approach. UNICE recommends that the wording be changed accordingly.

CONCLUSION

51. UNICE welcomes the Commissions efforts to consult with interested parties. Nevertheless, **UNICE believes there is no necessity for such a Regulation to harmonise non-contractual obligations.** Private international law in itself is an insufficient instrument for fostering an internal market. Traditionally, the purpose of conflict of law rules is to ensure that the courts and interested parties can determine the law governing a specific relationship or situation, no more, no less. A Regulation in this area cannot be a substitute for a real internal market based on the "country of origin principle". In the absence of evidence of a need for a Regulation on law applicable to non-contractual obligations, the Commission should refrain from proposing such a Regulation.

52. UNICE regrets that the preliminary draft proposal does not contain any indication as to the reasons why the Commission sees a need for the Rome II Regulation, or why it proposes to choose one solution as opposed to another for determining the law applicable to non-contractual obligations. In addition to our doubts regarding the necessity of a Regulation on the law applicable to non-contractual obligations "for the functioning of the internal market", UNICE does not believe that the preliminary draft proposal is acceptable and submits that if pursued, it will create legal uncertainty to the detriment of the Internal Market.

53. UNICE believes that the Commission should in any event not propose such a Regulation before the Council of the European Union decides, pursuant to Article 67(2) EC, for this area to be covered by the procedure under Article 251 EC, i.e. the so-called "co-decision" procedure. This would enable the European Parliament to participate decisively in the legislative procedure, providing a democratic legitimacy to such texts that has been lacking in previous initiatives related to private international law instruments (e.g. "Brussels Regulation") although they are of utmost importance to European business and citizens alike.

54. If the Commission where to pursue the present Regulation, then UNICE would urge it to give due consideration to the comments given above in relation to the substance and drafting of the present draft Regulation.

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