



HOUSE OF LORDS

European Union Committee

8th Report of Session 2003-04

The Rome II Regulation

Report with Evidence

Ordered to be printed 30 March and published 7 April 2004

Published by the Authority of the House of Lords
London: The Stationery Office Limited
£price

HL Paper 66

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ABSTRACT

The Report examines the Commission's proposal for a Regulation on the choice of law rules applicable to non-contractual obligations ("Rome II").

The Regulation would lay down uniform rules to determine which national law should apply to issues in cases with an international dimension where the claim involves a non-contractual obligation (such as a civil claim arising from a road traffic accident or a defamatory statement in a newspaper or a claim for the recovery of money paid by mistake).

The Report considers, from both legal and practical standpoints, whether Rome II is necessary.

The Report concludes that the Commission has failed to make out a case for the necessity of Rome II. It has not paid sufficient regard to the views of industry, commerce, the media and legal practitioners. It has not demonstrated that Rome II is within the legislative competences exercisable under the Treaty.

On the footing, however, that a Regulation imposing choice of law rules applicable to non-contractual obligations could be validly made pursuant to the Treaty, the Report makes a number of proposals aimed at:

- restricting the scope of the Regulation to cross-border cases;
- clarifying the basic rule by defining what is meant by "damage";
- limiting the number of special rules in the Regulation;
- safeguarding the E-Commerce Directive.

The Report examines what rule should apply in defamation cases and concludes that it would be preferable for the Regulation to prescribe a country of origin rule.

The Report rejects the suggestion that the Regulation can or should harmonise Member States' laws on non-compensatory damages.

The Report notes the changes to the Regulation being considered in the European Parliament.

The Rome II Regulation

CHAPTER 1: INTRODUCTION

The aim of the proposal

1. The aim of the proposed Regulation (commonly referred to as “Rome II”)¹ is to lay down uniform rules to determine which national law should apply to issues in cases with an international dimension where the claim is brought to enforce a non-contractual obligation. The rules will be rules of private international law.
2. Public international law consists of rules and principles which govern the relationship of States with each other. It is concerned with such matters as the recognition of States and governments, the scope of territorial sovereignty, the law of treaties and other international transactions, the judicial settlement of disputes between States, the law of international organisations and the responsibility of States to each other and to the citizens of other States.
3. In contrast, private international law (sometimes referred to as the conflict of laws) deals with disputes between private persons, natural or legal, arising out of situations having a significant connection or connections to more than one country. Private international law covers three basic types of rule:
 - jurisdictional rules (which country’s courts can hear a case);
 - choice of law rules (which country’s law will the court which hears the case apply);
 - rules relating to the recognition and enforcement of judgments of foreign courts (when will a court in one country enforce the decision of a court in another country).

Rome II is a private international law measure of the second type.

4. There already exists within the European Union an established body of private international law rules of the first type and the third type.² As to the second type, the 1980 Rome Convention on the law applicable to contractual obligations (“Rome I”) lays down choice of law rules for contractual claims. The rules are binding on all Member States. So, for example, if an English court is hearing a contractual claim arising out of a contract between an English company and a French company and the parties have, in that contract, chosen French law to govern the contract, Rome I requires the English court to apply French law in order to decide the case.
5. At present, however, each Member State has its own choice of law rules for deciding which system of law will apply to cases other than those to which Rome I applies. In cases involving, for example, non-contractual obligations such as a civil claim arising from a road traffic accident or the discharge of effluent into a river or a defamatory statement in a newspaper or a claim for

¹ Doc 11812/03: Proposed Regulation on the law applicable to non-contractual obligations (“Rome II”).

² See paras 18–24 below.

the recovery of money paid by mistake, there are no Union-wide choice of law rules. The courts of each Member State apply their own national choice of law rules for cases having a foreign element. In some areas, such as torts, each Member State is likely to have well established rules to determine the applicable law—that is certainly the case in the United Kingdom.³ But in other areas there may be little in the way of legislation or case law to assist the court and the identification of the proper law to apply may be a complex task.

6. The Commission has expressed concern that the choice of law rules in different Member States may vary and that, accordingly, the outcome of cases involving non-contractual obligations where there is an international dimension may vary widely from one Member State to another. This, the Commission points out, may produce legal uncertainty, increased costs, and may even prompt claimants to try and litigate their claims in countries whose courts will, they believe, apply the law most favourable to them (“forum shopping”).
7. The proposed Regulation has been brought forward by the Commission as part of ongoing efforts by the European Union to create a genuine European area of freedom and justice. The Community already has the Brussels I Regulation⁴ (which determines which court or courts have jurisdiction over a matter) and Rome I. The Commission sees Rome II as the next step in the harmonisation of private international law in relation to civil and commercial obligations. The objective of Rome II is to ensure that courts in each of the Member States apply the same choice of law rules to disputes involving non-contractual obligations, thereby increasing legal certainty and facilitating mutual recognition of judgments across the Union.
8. When introducing the Commission’s proposal, the Commissioner for Justice and Home Affairs, Antonio Vitorino, said “I am pleased to see this proposal—which, by its nature, affects every European citizen and business—finally adopted. There can be no real European area of justice if in such important matters the outcome of a dispute would vary considerably depending on which national court is seised of the matter.”⁵ Though the subject may be considered as “lawyers’ law” the absence of uniform choice of law rules does, undoubtedly, have potential practical and financial implications for, *inter alia*, manufacturers and distributors of goods in the Community, providers of services including transport and the media, insurers, owners of intellectual property rights and, not least, consumers.
9. Rome II would, the Commission says, complete the harmonisation at Community level of the rules of private international law relating to civil and commercial obligations. Rome I, as mentioned, deals with contractual obligations, Rome II with non-contractual obligations. “Non-contractual obligations” is, however, a term which potentially covers a wide variety of legal subject matter. Some matters, for example torts or delicts (civil wrongs

³ See Part III of the Private International Law (Miscellaneous Provisions) Act 1995.

⁴ Council Regulation (EC) No 44/2001, of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1. The Regulation replaced Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters (the Brussels Convention). See para below.

⁵ Commission Press Release: IP/03/1068, of 22 July 2003: “Il ne saurait y avoir de véritable espace de justice européen si, dans une matière aussi importante, la solution d’un litige variait considérablement en fonction du Tribunal saisi”.

such as negligence, nuisance, defamation), are readily identifiable and, though there may be differences in scope and precise definition from one jurisdiction to another and sometimes grey areas between contractual and tortious liability, the notion of tortious or delictual liability is generally understood across the Union. But the classification and definition of other non-contractual obligations may be more complex and difficult. While some particular matters are expressly excluded from its scope, the Regulation is otherwise intended to cover comprehensively all non-contractual obligations. This raises the question whether the rules set out are sufficiently comprehensive and clearly defined.

The inquiry

10. The proposed Regulation has been the subject of a long period of preparation and detailed consideration and consultation. There was much criticism of the Commission's initial ideas and it is noteworthy that industry queried whether a Rome II Regulation was needed at all. What has now emerged is a revised text, setting out a detailed and extensive set of rules. Having taken a preliminary look at the proposed rules we decided to conduct an inquiry and to hear the views of experts and other interested parties. We have been concerned to ascertain whether a Rome II Regulation is necessary and whether it would bring benefits. These benefits would have to take the form of increased legal certainty and predictability from which might flow reduced costs and benefits for industry as well as for individuals whether as consumers or users of goods and services or as victims of accidents.
11. We received many comments on the detail of the Commission's proposal. We are grateful to all those who gave evidence to us and in particular to the representatives of the Commission, Mr Tenreiro and Ms Hahn, who travelled from Brussels to answer our questions. The evidence, written and oral is published with this Report.

Involvement of the European Parliament

12. The proposal, following the entry into force of the Nice Treaty, is the first of its kind to be subject to co-decision. The Council and the Parliament will act as co-legislators. Detailed consideration is therefore currently under way in both the Council Working Group and the European Parliament's Committee for Legal Affairs and the Internal Market. We have therefore kept in touch with the European Parliament's Committee and the evidence we have received has been made available to them. The Legal Affairs Committee kindly let us have their introductory Working Documents and a copy of the Draft Report prepared by the Committee's Rapporteur, Diana Wallis MEP. In Chapter 4 below we describe and comment on the most important changes suggested in the Draft Report.

CHAPTER 2: BACKGROUND AND OUTLINE OF THE PROPOSAL

Private international law—choice of law rules

13. The proposed Regulation stipulates the rules that are to apply where a court in one Member State is faced with deciding which law to apply in order to resolve a claim alleging a breach of a non-contractual obligation where the facts of the case involve one or more international elements (for example, where the wrongful act occurred outside that Member State).
14. Courts faced with a choice of law issue (“what law should be applied in this case?”) generally have two choices: the court can apply the law of the forum (*lex fori*), *i.e.* its own domestic rules, making no distinction or adaptation because of the foreign element—courts will generally apply the *lex fori* to procedural questions. Or the court can apply the law of another country, for example the place of the transaction or event giving rise to the dispute (*lex loci*) or, if that is fortuitous or otherwise inappropriate, a law having a connection with the parties or the circumstances (such as the law of the domicile or habitual residence of the parties or one or other of them). In deciding what law to apply the court will first have to determine what sort of issue is the subject of the dispute (for example, is it a contractual or tortious matter?)—a process of classification or “characterisation” in which the forum court will generally apply its own domestic rules. The issue having been thus characterised, the choice of law is generally determined having regard to relevant connecting factors (such as, in tort cases, the place where the allegedly wrongful act occurred or its consequences were felt; or the domicile or habitual residence of the parties in family matters; or the intention of the parties, or the place where the contract was concluded or was to be performed, in relation to contracts).

Private international law—Union law-making

15. Under the Treaty of Rome, work on harmonisation within the Community in the field of private international law was achieved by Conventions agreed upon by all Member States. There was no direct Community competence. Article 293 (ex 220) provides that “Member States shall, so far as necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals ... the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards”. Both the Brussels I and Rome I Conventions (described below) were adopted by the Member States pursuant to this provision.
16. The Maastricht Treaty, however, established a Union competence in Justice and Home Affairs matters, which made up the so-called Third Pillar. This provided for co-operation in a number of areas, including judicial co-operation in civil matters. But the Third Pillar maintained an intergovernmental lawmaking structure. While Member States had a general right of initiative, that of the Commission was more limited and the European Parliament played a minimal role.
17. The Amsterdam Treaty created the concept of an “area of freedom, security and justice”, provided for the incorporation of the Schengen *acquis* into the Treaties, and introduced a new Title IV (Visas, asylum, immigration and other policies related to the free movement of persons) into the EC Treaty.

Certain Third Pillar matters were also transferred into the mainstream EC lawmaking structures.⁶ These included judicial co-operation on civil matters. Notwithstanding the existence of Article 293 (ex 220) EC described above, Article 65 EC includes “improving and simplifying ... the recognition and enforcement of decisions in civil and commercial cases” as well as “promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction” as a basis for EC lawmaking competence. Special arrangements, however, enable three Member States in relation to Title IV EC, namely, Denmark, Ireland and the UK to remain outside Title IV but allow the latter two to opt in to individual measures adopted under Title IV. The United Kingdom has opted into the negotiations of Rome II.

18. EC Regulations have now largely replaced Conventions as the means of Community law making in relation to private international law.⁷ With the entry into force of the Amsterdam Treaty Member States agreed that the texts of a number of measures, including certain Conventions which had been negotiated and agreed in the Third Pillar, should be “frozen” and that the measures should be reintroduced under the new Title IV (First Pillar). A number of Conventions have now been converted into Regulations, including the Brussels I Regulation on the jurisdiction and recognition of judgments,⁸ the Insolvency Regulation,⁹ the Regulation on service of judicial and extra judicial documents,¹⁰ and the Regulation, adopted in May 2000, on Jurisdiction Recognition and Enforcement of Judgments in Matrimonial Matters (Brussels II).¹¹ The Commission has published a Green Paper canvassing views on whether to convert the 1980 Rome I Convention into a Community Regulation.
19. The Nice Treaty also introduced a notable institutional and procedural change. Measures under Article 65, with the exception of family law, are now to be adopted by co-decision of the Council and the European Parliament. Qualified majority voting applies in the Council.

⁶ Member States retained temporarily rights of initiative. They had a shared right of initiative with the Commission during a transitional period of five years (a proposal may be brought forward by the Commission or on the initiative of a Member State) (Article 67(1)).

⁷ Conventions are one of the classic instruments of international lawmaking. Entry into force is dependent on sufficient ratification by Contracting States, and may therefore be dependent on the speed of the slowest. Incorporation into domestic law of the United Kingdom may, depending on the nature of the obligations accepted and the extent of any change required, require domestic legislation. EC Regulations, on the other hand, are directly applicable and reproduction in national law is not generally necessary or permissible. Direct applicability therefore arguably imports a greater responsibility on the Community lawmakers to ensure legal certainty.

⁸ Council Regulation (EC) No 44/2001, of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1.

⁹ Council Regulation (EC) No 1346/2000 on insolvency proceedings. [2000] OJ L160/1

¹⁰ Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters. [2000] OJ L 160/37.

¹¹ Council Regulation (EC) No 1347/2000 of 29 May 2000 on the jurisdiction and the recognition and enforcement of judgements in matrimonial matters and in matters of parental responsibility for children of both spouses [2000]OJ L 160/19. The Regulation lays down rules for jurisdiction in divorce, nullity and judicial separation proceedings, and for parental responsibility orders ancillary to those proceedings.

Brussels I

20. The Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters (the Brussels Convention) was concluded by Member States in 1968. It provides a set of rules for determining which Member State's courts have jurisdiction in relation to a particular matter (such as a commercial contract or a tort) and when and how the judgments of the courts of one Member State acting under the Convention must be recognised and enforced in other Member States. The United Kingdom gave effect to the Convention by the Civil Jurisdiction and Judgments Act 1982. The Convention has been amended from time to time to take account of the accession of new Member States to the Community. The Brussels Convention also formed the basis of the Lugano Convention 1988 which extended the rules on jurisdiction and enforcement of judgments to the EFTA countries.
21. The Brussels Convention has been converted into a Community Regulation. For all Member States except Denmark the Convention was replaced as from 1 March 2002 by Council Regulation (EC) No 4/2001 of 22 December 2000 on jurisdiction and enforcement of judgments in civil and commercial matters.¹²
22. The basic rule under the Brussels I Regulation is that a defendant must be sued in the courts of the Member State in which he or she is domiciled. In addition to the general rule Brussels I provides certain rules of special jurisdiction which allow the claimant to choose to bring proceedings before courts other than those in which the defendant is domiciled. One such special rule, in Article 5(3), relates to tort, delict and quasi-delict, where the defendant may be sued in the courts "for the place where the harmful event occurred". This has been the subject of litigation before the European Court of Justice. According to the case law, where the place of the happening of the event giving rise to the alleged liability in tort and the place where that event results in damage are not the same, the expression "place where the harmful event occurred" should be understood as covering both the place where the damage occurred and the place of the event giving rise to it. The defendant may be sued, at the option of the claimant, in the courts of either of these places.¹³ The Court of Justice has been reluctant to extend the notion of the place where the damage occurred beyond the place where the initial damage was incurred so as to allow the claimant to sue where any incidental or consequential damage has been suffered.¹⁴

Rome I

23. The Rome Convention on the law applicable to contractual obligations ("Rome I") was agreed by Member States in 1980. It lays down uniform rules to determine the law applicable to contractual obligations¹⁵ in the

¹² [2001] OJ L 12/1.

¹³ Case 21/76 *Bier v Mines de potasse d'Alsace* [1976] ECR 1735. The case involved cross-border pollution arising from the discharge of saline waste into the Rhine in France, which caused damage to a horticulturalist in the Netherlands.

¹⁴ Case C-220/88 *Dumez France and Tracoba* [1990] ECR I-49, Case C-364/93 *Marinari* [1995] ECR I-2719. See also the recent opinion of Advocate General Léger in Case C-168/02, *Rudolf Kronhofer v Marianne Maier and Others*. 15 January 2004.

¹⁵ The material scope of the Convention is limited in Article 1. It does not apply to questions involving the status or legal capacity of natural persons; contractual obligations relating to wills, matrimonial property

Union. Under Rome I, parties may agree on which law (which need not be the law of a Member State) is to be the law applicable to the contract and may change that choice of law at any time. The Convention, however, places certain restrictions on the choice of applicable law and also determines which law is applicable if no choice is made by the parties. In that event, the contract is governed by the law of the country with which it is most closely connected (usually the law of the place of habitual residence or place of central administration or the principal place of business of the party responsible for performing the contract). Special rules apply to contracts concerning immovable property, contracts concerning the transport of goods, consumer contracts and employment contracts. Rome I was implemented in the United Kingdom by the Contracts (Applicable Law) Act 1990.

24. In January 2003 the Commission published a Green Paper¹⁶ canvassing views on whether to convert Rome I into a Community Regulation and, if it is to be converted, whether any and, if so, what changes of substance should be made to it.

Outline of the present proposal

Scope

25. The material scope of the Rome II proposal is set out in **Article 1**. The Regulation applies to non-contractual obligations in “civil and commercial matters”, a term which is to be understood in the same sense as in the Brussels I Regulation. The Regulation would therefore not apply to revenue, customs or administrative matters. Article 1(2) specifically excludes non-contractual obligations arising out of family relationships, matrimonial property regimes and succession, obligations under negotiable instruments, the personal liability of officers and members for the debts of a corporate and incorporated body, the personal liability of persons carrying out a statutory audit, the liability of settlors, trustees and beneficiaries of a trust, and, finally, non-contractual obligations arising out of nuclear damage.
26. The approach taken by the Commission in the Regulation is to divide non-contractual obligations into two major categories, those that arise out of a tort or delict and those that do not. The latter category would include quasi-delictual or quasi-contractual obligations, including, in particular, unjust enrichment and *negotiorum gestio* (agency without authority).

Universality

27. Article 2 provides that the Regulation is to have universal application so the uniform conflict rules laid down in the Regulation can designate the law of an EU Member State or of a third country. Rome II is not restricted to cross border or intra Community disputes. Its rules would apply and could lead to

rights or other family relationships; obligations arising under negotiable instruments (bills of exchange, cheques, promissory notes, etc.); arbitration agreements and agreements on the choice of court; questions governed by the law of companies and other corporate and unincorporated bodies; the question of whether an agent is able to bind a principal to a third party (or an organ to bind a company or body corporate or unincorporated); the constitution of trusts and questions relating to their organisation; evidence and procedure; contracts of insurance which cover risks situated in the territories of the Member States (re-insurance contracts are covered).

¹⁶ Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation. COM (2002) 654 final.

the application of Californian law in a case before a United Kingdom court brought by an American claiming damages for a traffic accident caused by a United Kingdom citizen when driving on holiday in California.

The basic rule

28. **Article 3** lays down the general rules for determining the law applicable to non-contractual obligations arising out of a tort or delict. The law applicable is to be the law of the country in which the damage arises or is likely to arise irrespective of the country in which the event giving rise to the damage occurred or of the country or countries in which indirect consequences of that event arise. There are two exceptions to the general rule. Article 3(2) contains a special rule that where the person claimed to be liable and the person who has allegedly sustained damage are habitually resident in the same country, the law of that country would be applicable. Article 3(3) contains a more general exception. Where it is clear from all the circumstances of the case that the non-contractual obligation is manifestly more closely connected with another country, the law of that other country should apply.

Special rules

29. The general rule in Article 3 is displaced by particular rules which apply in the case of product liability (Article 4), unfair competition (Article 5), privacy and the rights relating to personality (Article 6), violation of the environment (Article 7) and the infringement of intellectual property rights (Article 8).

Product liability

30. Product liability is a matter on which there is already a substantial degree of harmonisation as a result of the Product Liability Directive¹⁷ of 1985. But Member States' laws still contain differences, not least because the Directive permits certain options and covers only certain types of damage. **Article 4** requires the law applying to a product liability claim to be the law of the country in which the person sustaining the damage is habitually resident, unless the defendant can show that the product was marketed in that country without his consent. In the latter case the applicable law would be that of the habitual residence of the defendant, however, Article 3(2) (habitual residence) and (3) (general exception clause) would also apply.

Unfair competition

31. Under **Article 5** in an action arising out of an act of unfair competition the applicable law would be the law of the country "where competitive relations or the collective interests of consumers are or are likely to be directly and substantially affected". Unfair competition is not defined but the Commission's Explanatory Memorandum would suggest that it is intended to cover both traditional Continental unfair competition (*i.e.* misleading advertising, enticement away of a competitor's staff, boycotts and passing off) and also actions for breach of "modern competition law" such as Articles 81 and 82 of the EC Treaty.

¹⁷ Directive 85/374/EEC on liability for defective products.

Privacy and defamation

32. **Article 6** deals with ‘violations of privacy and rights relating to the personality’ (for example, defamation actions). The Commission originally proposed that the laws of a victim’s habitual residence should be applied but that proposition was subject to extensive criticism during the consultation exercise. Article 6 now proposes that law applicable to violations of privacy and rights relating to the personality should be determined in accordance with the rules in Article 3 (that is the law of the place where the direct damage is sustained) unless the parties reside in the same State or the dispute is more closely connected with another country. But where the application of that law would be contrary to the fundamental principles of the forum as regards freedom of expression and information the applicable law would be the domestic law of the court. Article 6(2) provides for the law of the habitual residence of the broadcaster or publisher to apply in relation to any right to reply or “equivalent measures”.

Environmental damage

33. As regards the “violation of the environment”, **Article 7** provides that the applicable law should again be determined by the general rule in Article 3 unless the claimant “prefers to base his claim on the law of the country in which the event giving rise to damage occurred”. The victim of environmental damage would therefore be able to choose which applicable law would be more favourable to him. The Commission’s explanation is that relying only on Article 3 would mean that a victim in a low protection country would not enjoy the higher level of protection available in neighbouring countries, and that this could give the polluter an incentive to carry out his operations at the border so as to discharge toxic substances into a river and enjoy the benefits of the laxer rules of the victim’s country.

Intellectual property rights

34. Article 8 contains a special rule relating to the infringement of intellectual property rights. According to Recital 14 the term intellectual property rights means copyright, related rights, *sui generis* rights for the protection of databases and industrial property rights. The applicable law will be the law of the country in which protection is sought. This rule, which the Commission explains derives from the nineteenth century version of the Berne and Paris Conventions, enables each country to apply its own law to enforcement of an intellectual right which may be validly asserted in that country.

Other non-contractual obligations

35. The approach taken by the Commission in the Regulation is to divide non-contractual obligations into two major categories, those arising out of a tort or delict (to be governed by Articles 3 to 8 described above) and those that do not. The latter category would include quasi-delictual or quasi-contractual obligations, including in particular unjust enrichment and agency without authority (*negotiorum gestio*). **Article 9** lays down five rules which seek, without using too technical expressions or terminology, to cover all the types of action falling within this second category. Article 9(6) provides that all non-contractual obligations in relation to intellectual property are to be governed by the rule in Article 8 (described above).

Common rules

36. **Section 3** of the draft Regulation sets out rules common to tort or delict cases as well as those arising from other non-contractual obligations. **Article 10** provides that the parties must be allowed after the dispute has arisen to choose the law applicable to the non-contractual obligation. This would not be allowed for intellectual property disputes, where the rule in Article 8 would apply.
37. **Article 11** describes the scope of the law applicable to non-contractual obligations and confers a very wide function on the applicable law. In addition to dealing with the conditions and extent of liability, the applicable law (determined in accordance with the rules set out in Articles 3 to 9) will govern the availability and quantum of damages, measures to prevent or terminate injury or damage, liability for acts of a third party and prescription and limitation.
38. **Article 12** is based on a similar rule in Rome I. Article 12 provides for effect to be given to the mandatory rules of another country with which the situation is closely connected if and in so far as under the law of that country the mandatory rules would be applied whatever the law applicable to the non-contractual obligation. Article 12(2) makes clear that nothing in the Regulation restricts the application of the mandatory rules of the forum State.
39. **Article 13** requires the forum court to take account of the rules of safety and conduct in force at the place and time of the relevant event. This rule is based on corresponding Articles in the Hague Conventions on traffic accidents and product liability. Article 13 recognises the fact that the actors must abide by the rules of safety and conduct (for example, the road traffic rules) in force in the country in which they operate, irrespective of the law applicable to the civil consequences of their acts.
40. **Article 14** provides for the right of a person injured by another to take direct action against that other person's insurer to be governed by the law applicable to the non-contractual obligation, or the law applicable to the insurance contract, at the option of the claimant. The purpose of this rule is to limit the choice of law to the two systems which the insurer might expect to be applied.
41. **Articles 15 and 16** have precedents in Articles 13 and 9 of Rome I. They provide rules on the choice of law relating to subrogation arrangements and rights of contribution, and on the formal validity of any unilateral act intended to have legal effect. **Article 17** (burden of proof) also corresponds to a provision in Rome I. It provides that the applicable law would also determine the burden of proof, including the existence and effect of presumptions. The applicable law would therefore displace the *lex fori* which would normally apply to procedural rules.
42. **Article 18** provides for seabed installations, ships and aircraft to be treated as being the territory of a State. **Article 19** provides for the principal establishment of a legal person to be treated as its habitual residence for the purposes of the Regulation.
43. **Article 20** excludes *renvoi*, and so excludes from the applicable law the private international law rules of that law. **Article 21** applies to Member States in which more than one legal system coexists, such as the United

Kingdom. Article 21(2) provides that such a State need not apply the Regulation to conflicts solely between such systems.

Public policy

44. **Article 22** preserves the public policy of the forum. The application of any rule of the law specified by the Regulation may be refused if its application would be “manifestly incompatible with the public policy (*ordre public*) of the forum”.

Relationship with other Community law provisions

45. **Article 23** preserves the application of choice of law rules in specific Community instruments and provides that the Regulation does not prejudice the application of specific Community measures.

Non-compensatory damages

46. **Article 24**, entitled Non-compensatory damages, would prevent the court, in application of the Regulation (that is in all cases except domestic cases), awarding non-compensatory damages, such as exemplary or punitive damages. Such damages are declared to be contrary to Community public policy. In this respect, the Regulation purports to harmonise substantive law rules of Member States as opposed to conflict of laws rules.
47. Finally, **Article 25** permits Member States to continue to apply choice of law rules in international conventions to which they are party at the time of the adoption of the Regulation. **Article 26** will contain a list of those conventions.

CHAPTER 3: EXAMINATION OF THE PROPOSAL

The need for Rome II

48. When we began our consideration of the written comments submitted to us we were struck immediately by the large body and weight of opinion querying the need for the Regulation. We received very little evidence that the Regulation is either necessary or desirable. This matches, in large part, the response given to the Commission when it published its 2002 draft. Establishing a genuine need for the Regulation is a matter of crucial legal, political and practical importance. Accordingly we explored this issue in detail with the representatives of Commission and with other witnesses in the oral evidence sessions.
49. In considering whether the Regulation is necessary it is helpful to separate three questions. The first is the *vires* point. Is the Regulation within the competence of the Community, given the foundation for that competence has to be Article 61 of the EC Treaty? The second question, assuming that there is competence as a matter of law, is whether the enactment of the Regulation is actually something that it is worthwhile for the Community/the Union to do. The difficulties and practical problems produced by the current unharmonised arrangements of Member States must be compared with the practical problems likely to arise under the new Regulation, if adopted in the terms proposed. Third, is the proposal consistent with the principles of subsidiarity and proportionality?

Vires—the competence issue

50. The Commission's proposal is brought forward under Article 61(c) of the Treaty, which enables the Council to adopt measures in the field of judicial cooperation in civil matters as provided for in Article 65. That Article refers to "measures in the field of judicial co-operation in civil matters having cross-border implications" to be taken "in so far as necessary for the proper functioning of the internal market". Such measures may include "promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction".

Article 65

Measures in the field of judicial co-operation in civil matters having cross-border implications, to be taken in accordance with Article 67 and in so far as necessary for the proper functioning of the internal market, shall include:

- (b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.

51. In the recitals to the Regulation the Commission seeks to justify the measure on the basis that "the proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law and the free movement of judgments, for the rule of conflict of laws in the Member States to designate the same national law irrespective of the country of the court in which an action is brought". The recitals to the Regulation also state; "Only uniform rules applied irrespective

of the law they designate can avert the risk of distortions of competition between Community litigants”.¹⁸

Predictability and legal certainty

52. The Commission’s Explanatory Memorandum argues that harmonising private international law rules can help to develop a European area of justice. Although virtually all Member States give pride of place to the *lex loci delicti commissi* rule¹⁹, there are variations as regards the way this rule is applied in cross-border torts/delicts. It is argued that replacing the national systems of law by a single set of uniform rules would represent considerable progress for business and the general public in terms of certainty, would promote the proper functioning of the internal market, and would also aid out of court settlements. There might also be costs savings: the proposal would allow the parties to confine themselves to studying a single set of conflict of laws rules, thus reducing the cost of litigation and boosting the foreseeability of solutions and certainty as to the law.²⁰
53. The Commercial Bar Association (COMBAR) believed that in a Union of 25 members there would be a very wide potential divergence of rules governing choice of law for non-contractual obligations. There would be a benefit in having standardisation (Q 217). The Government also saw some merit in the predictability argument. Lord Filkin, Parliamentary Under Secretary of State at the Department for Constitutional Affairs, said: “We accept that in theory there are advantages of increased predictability of outcome for cases which fall within the scope of such an instrument. Clearly, the greater legal certainty that could flow from harmonised rules of choice of law would mean that the cost of access to justice for an individual or an enterprise could be reduced as a result of not having to research the relative merits or demerits of taking action in different jurisdictions according to the benefits that might accrue to the claimant as a result of that decision” (Q 291).
54. There was, however, substantial concern, expressed by many of our witnesses, that the Regulation, if adopted in its present form, would introduce uncertainty. The scope of the Regulation, applicable to all “non-contractual obligations in civil and commercial matters”, was unclear. Key terms in the Regulation, such as “damage” in Article 3, were undefined and would likely have to be developed by the European Court of Justice over time following references from national courts. The introduction of special rules (Articles 4 to 8) for certain subject matter, such as environmental or unfair competition, raised problems of characterisation and also lessened predictability. (We develop these points more fully when considering Articles 3 to 9). Mr Fentiman (Reader in Private International Law, University of Cambridge) said: “To adopt such an instrument is to an extent to sign a blank cheque. It is also a recipe for litigation. There is perhaps some irony that the present proposal may be driven by a desire for certainty yet the form of the rules tends to ensure that certainty is absent” (p 114).

¹⁸ Recitals paras 4 and 6.

¹⁹ The law of the place where the act was committed.

²⁰ Commission’s Explanatory Memorandum pp 5–6.

Recognition of judgments

55. The Commission also contends that the Regulation would facilitate the enforcement of judgments across the Union. Facilitation of the mutual recognition of judgments (by the envisaged reduction and ultimate abolition of intermediate measures) requires a degree of mutual trust between Member States which is not conceivable if their courts do not apply the same conflict of laws rule in the same situation.²¹ Mr Tenreiro, for the Commission, believed that introducing common choice of law rules would increase confidence between the courts in the Member States (Q 23).
56. We consider the argument to be misconceived. Sir Peter North (Jesus College, Oxford) said: “The argument would be that you would not get uniformity of approach across the Member States, because they were being required to enforce judgments where the determination of the applicable law was not uniform across the Member States. Therefore, that was an inhibition, if you like, in the proper regime for free movement of judgments. I have to say, I do not think that argument is valid. I do not think it inhibits full faith and credit in relation to judgments across the Community” (Q 90). Further, as Mr Fentiman pointed out, the relevant Community rules concerning recognition (the Brussels I Regulation) stipulate that one Member State cannot refuse to recognise a judgment originating in another Member State merely because it disapproves of the choice of law rules on which the judgment was based.²² Mr Fentiman said: “Indeed, if anything, the existing rules concerning the recognition of judgments make harmonisation in choice of law unnecessary—by ensuring that all judgments are effective irrespective of the choice of law rules employed” (p 110). **We agree.**

Distortion of competition

57. The Commission contends that the application of differing conflict rules by courts in different Member States could provoke a distortion of competition, and such a distortion could encourage forum-shopping²³. Mr Tenreiro, for the Commission, explained how competition might be distorted: “for exactly the same kind of companies which are involved in the same kind of business and sharing the same risks they could at the end of the day, in the same kind of torts, have completely different laws being applied to them just because of the different courts being seised and each court applying a different connecting rule and a different substantive law” (Q 8).
58. The argument concerning distortion of competition again has implications for transaction costs. If industry and those advising it know that whichever national court is seised of a matter it will apply the same choice of law rule (that is the rule(s) set out in the Regulation) this will save costs and that saving will benefit all those competing in the relevant market. Nonetheless the Commission’s standpoint appears to be a theoretical one and we received no evidence or quantification of the likely effects on competition or on savings. We doubt whether they would be great. Substantial differences would remain. For example, the only law that would be the same would be the conflicts rule. The substance of the applicable law would not necessarily be same, unless there was harmonisation of civil law across the Union. We

²¹ Commission’s Explanatory Memorandum section 2.2, p 7.

²² See Article 36 of the Brussels Convention.

²³ Commission’s Explanatory Memorandum section 2.2, p 7.

find the whole argument somewhat academic and divorced from the real world of commerce and civil litigation.

59. The Hon Mr Justice Lawrence Collins (Sir Lawrence Collins) considered the Commission’s arguments unconvincing. He said: “There must be very few cases in which the choice of forum is determined by the conflict rules of the competing fora. Normally the choice of forum is dictated by the convenience or cost to the plaintiff. Nor would uniform conflict rules for non-contractual obligations reduce the cost of litigation or strengthen certainty. The parties will still require advice in cross-border cases as to how the very flexible rules will be applied in practice. Nor is it easy to see how in practice harmonisation of these conflict rules will promote settlements” (p 46).

Particular case of defamation

60. The Newspaper Society and other media organisations questioned in particular the competence of the Community to bring forward this proposal in respect of defamation, privacy and related actions, given its limited legal competence over media content. In their view the Commission had failed to demonstrate, or to produce any evidence to establish, that harmonisation of the conflict of laws rules relating to privacy and defamation was “necessary” for the promotion of the internal market. In Mr Brett’s 25 years (Times Newspapers) and Mr Del Medico’s 38 years (the BBC) experience as media lawyers they had not had a serious problem over the applicable law in a defamation or privacy action (Q 154, 164). And even if it were “necessary” to do so, Articles 3 and 6 of the Draft Regulation would, in the view of media interests, damage, not promote the Internal Market. Mr Brett thought it possible that The Times might challenge the *vires* of Rome II as a preliminary point if sued, for example under French privacy laws, made applicable by Rome II rules (Q 181).

Political content—precedents

61. The Commission argued that the decision whether something was “necessary” for the purpose of Article 65 involved “a political content and a margin of appreciation” (Q 14). Mr Tenreiro for the Commission pointed out that Article 65 had been accepted for introducing conflicts rules on jurisdiction and recognition of judgments in divorce cases (the Brussels II Regulation) and that the United Kingdom government had expressed its satisfaction with the Article as the base for the power to do that. So, he argued, why was it not going to be good enough for harmonising conflicts rules for non-contractual obligations? The Government, however, rejected the notion that the Brussels II Regulation could be a precedent for Rome II. Brussels II was justified by the need to ensure the free movement of persons within the Community (Q 286).

The political mandate

62. Recitals 2 and 3 of the draft Regulation refer to the Vienna Action Plan 1998 and the Tampere Summit 1999. In 1998 the Council and Commission adopted an Action Plan on how best to implement the provisions of the Amsterdam Treaty on an area of freedom, security and justice.²⁴ That

²⁴ [1999] OJ C 19/1.

required, within two years, “drawing up a legal instrument on the law applicable to non-contractual obligations”.²⁵ It is notable that the Action Plan, while it proposes concrete action going beyond a feasibility study, does not speak of the adoption of any such instrument. Arguably the Commission discharged the obligation under the Action Plan when it published its draft in 2002.

63. Following the Tampere Summit, in November 2000 the Council of Ministers adopted a Programme of measures to implement the principle of mutual recognition in civil and commercial matters. This is also cited by the Commission as part of the political mandate for Rome II. It quotes the programme as saying that harmonisation of conflict of laws measures are measures that “actually do help facilitate the implementation of the principle” of mutual recognition. This has to be read in context. In its introduction, the Programme states that it contains measures that concern the recognition and enforcement of decisions and that the Programme should not prejudice other work, particularly with regard to the conflict of laws. But the Programme itself does not refer to or include Rome II. An examination of the Programme reveals no express reference to non contractual obligations or to choice of law rules, though there is a brief reference to “conflict-of-law rules” in the context of the mutual recognition principle.²⁶
64. Certainly Lord Filkin did not give the impression that the Government was bound by any political mandate. He believed, however, that the Government had been successful at Tampere in limiting the extent of Union action to the exclusion of the harmonisation of substantive civil law (Q 301). **We conclude that there is no strong political mandate for the current instrument.**

The missing link

65. The Commission describes Rome II as “the necessary adjunct to the harmonisation already achieved by the ‘Brussels I’ Regulation as regards the rules governing the international jurisdiction of the courts and the mutual recognition of judgments”²⁷ And in his evidence on behalf of the Commission, Mr Tenreiro described Rome II as the ‘missing link (Q 1). But our witnesses were not convinced by this. Mr Dickinson (Solicitor Advocate and Consultant to Clifford Chance) thought that the ‘missing link’ reference “simply begs the question about whether harmonisation in this field is necessary and would advance the objectives in the internal market” (Q 216). And as Mr Fentiman said, simple neatness or a desire for completeness is not enough. The proposal must stand or fall on its own merits (p 110). **We agree.**

Conclusions on *vires*

66. We share the doubts expressed by a number of witnesses as whether the legal base (Article 61) proposed by the Commission is adequate to support the

²⁵ Action Plan, para 40 (b).

²⁶ Under heading B of the Programme, “Measures Ancillary to Mutual Recognition”, there is a section 3, “Improving judicial cooperation on civil matters in general”. The final sentence of this section states: “Lastly, implementation of the mutual recognition principle may be facilitated through harmonisation of conflict-of-law rules”.

²⁷ Commission’s Explanatory Memorandum para 2.2.

proposed Regulation. It is noteworthy that the Government not only accepts that there are issues concerning the Treaty base, but have raised the issue in negotiations in the Council and have delayed taking a final view on the question of *vires* until they have had the opportunity to consider the advice sought from the Council's Legal Service. The fact that Rome II is a Regulation, will be directly applicable, and will be adopted by qualified majority voting focuses attention more acutely on the issue. The Regulation could be adopted and come into effect against the wishes of the Government and without any mandate from the United Kingdom Parliament.

67. The legislative power on which the Commission relies is expressly tied to the internal market, defined in the EC Treaty as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty" (Article 14(2)). Under Article 65, which governs the use of Article 61, the measure must be "necessary for the proper functioning of the internal market". That limitation cannot be disregarded. Though this important limitation would be removed under the draft Constitutional Treaty (Article III-170), Member States have not yet given the Union lawmakers general power to legislate to create an area of freedom security and justice. Any measure under Articles 61 and 65 has to be justified by reference to the internal market and in particular one or more of its four freedoms.
68. The Commission suggested that the Brussels II Regulation (laying down rules for jurisdiction in matrimonial cases) was a helpful precedent. Member States, including the United Kingdom, had accepted in that case that Article 65 provided a sufficient Treaty base. Therefore, they argued, the notion of internal market had to be read in a wide context. But Brussels II is different. Member States were satisfied that there was a sufficient connection with the functioning of the internal market because the Regulation would aid the free movement of people. A similar argument cannot be constructed to justify Rome II. There is no explanation in the Commission's text as to how the proposal would facilitate the exercise of any of the four freedoms on which the internal market is based.
69. What the Brussels II Regulation may show is that determining what is "necessary" may involve some element of discretion on the part of the lawmakers. Clearly there is no absolute standard—the Commission does not have to show that the internal market could not exist or would collapse without the Regulation. Lord Filkin said that he would not be surprised if the Council and Parliament adopted a wide interpretation of necessity (Q 285). But it cannot be a question simply of what the Council and the Parliament consider desirable at the time. There must, we believe, be a real and substantial connection between the proposed measure and the internal market. The initial burden is on the Commission to demonstrate this. If the Regulation is adopted, the Council and Parliament will share the responsibility of defending the legal base before the Court of Justice if challenged.
70. Articles 2 and 25 of the draft Regulation raise particular problems. While we consider each in detail below it is necessary to say something about them in the present context. Article 2 provides that the Regulation is to have universal application. Rome II is not restricted to cross border or intra Community disputes. The Regulation would apply in a case where all the circumstances giving rise to the action occurred outside the Union. Its rules

could lead to the application of the law of a third State. One might ask why the choice of law rules in the Regulation should apply, for example, to a traffic accident in the USA where the defendant is domiciled in England. What connection does the traffic accident and the resultant civil litigation have with the functioning of the internal market? We do not believe that the mere fact that a party may be sued in a Member State or that the circumstances of the case may involve an EU citizen is sufficient to give the Union legislative competence to determine the relevant conflict rule and, consequently, remove domestic legislative competence. Some connection or relationship between the matter and the functioning of the internal market must be established.

71. A separate issue relates to Article 25, which prohibits as a matter of “Community public policy” non-compensatory damages, including exemplary or punitive damages. The effect of this rule is to bring about a partial harmonisation of Member States substantive rules on damages in tort cases. Article 25 is not a conflicts rule. We find no express authority for such a harmonising in Articles 61 and 65 for the harmonisation of substantive civil law, including rules on damages, and the Commission has made no special case justifying the use of those Articles for such a harmonising measure.
72. The express reference to conflict of laws rules in Article 65 does not exclude the possibility of some measure of harmonisation in this area and we can see that an internal market case might be made out not only for contractual obligations but possibly also, as Sir Peter North said, for quasi-contract and restitution (Q 95). But no such case has yet been made out. **For the reasons set out above, we believe that the Regulation raises a serious question of *vires*.** The Government are right to pay the closest regard to the Treaty base. **We urge both the Council and the Parliament to give the most careful consideration to the issue.** In so doing they might recall the standard which has recently been set: “The Commission will provide a clear and comprehensive justification for the legal basis for each proposal”.²⁸ It will be clear from what we have said above that we do not consider that this standard has been met, if indeed it is capable of being met, for this proposal. **The Commission has not shown a convincing case of “necessity” within the meaning of Article 65. Further, on any construction of Articles 61 and 65 of the EC Treaty there must be the most serious doubts that the proposal can have universal application and can be used to harmonise substantive rules of damages (Articles 2 and 24 respectively).**

The practical need

73. We sought the views of industry and commerce, as well as those of legal practitioners handling international litigation, on whether there is genuine need for the Regulation.
74. We have received no evidence that serious practical problems exist and that any divergence between Member State choice of law rules is operating as a disincentive to businesses taking decisions to conduct cross-border activity. Indeed when, in 2002, the Commission consulted on the earlier draft, the large majority of those representing industry queried the necessity for a Regulation. The Trade Marks Patents and Designs Federation (TMPDF)

²⁸ Inter-Institutional Agreement on Better Regulation. Doc 12175/03, 23 September 2003.

said that the Commission had not identified any problem specific to disputes concerning intellectual property which required legislative intervention (p 131). There was some degree of support, mainly it seems from the German and Austrian business sector, and in particular their insurance and financial services industry (Q 12). Some have criticised the Commission for not making the response of industry clear in its Explanatory Memorandum to the present draft Regulation. We asked the CBI whether in the light of the new/revised text it had changed its mind. The response was that it was not clear to the CBI that the present state of the law in Member States created a single market problem which could be solved by the proposal. The policy objectives, and reasoning as to why Rome II would achieve these objectives, were also not clear. In addition the CBI did not understand how the Regulation would assist in the Commission's target of less and better regulation (p 97).

75. The lawyers, too, doubted the need for the Regulation. Sir Lawrence Collins said that "practical problems involving torts/delicts in the international context arise very rarely. Reported cases are not a very reliable guide, but to the extent that they are a guide, then they show how rarely conflict of laws problems arise in the context of choice of law (although they arise more frequently in the context of jurisdiction). The Law Commission consultations revealed that insurers have generally settled claims in this area without significant difficulty" (p 46). Mr Dickinson said "In my experience, commercial parties generally focus on the enforcement of contractual obligations in cross-border situations. If they do address the prospect of non-contractual liability, the existing Member State choice of law rules (at least in relation to tortious claims, the principal category of liability) are sufficiently clear to allow them to take advice to allocate and manage the risks accordingly" (p 54).
76. **There is no evidence of which we are aware that there are such problems in the application of the Member States' conflicts rules in this area as require the introduction of a Community measure. The justification provided by the Commission in its Explanatory Memorandum is unconvincing and fails to pay due regard to the views of industry, commerce, the media and legal practitioners. We invite the Council and the Parliament to look critically at the question whether there is a real practical need for the Regulation.**

Subsidiarity and proportionality

77. Paragraph 9 of the Protocol on the Application of the principles of Subsidiarity and Proportionality states: "Without prejudice to its right of initiative, the Commission should: –except in cases of particular urgency or confidentiality, consult widely before proposing legislation and, wherever possible, publish consultation documents ...". The Commission did not publish a Green Paper. It is true that it published a draft text and invited comments. But the text was not supported by a paper explaining and analysing the practical problems. The Commission also held an oral hearing at which interested parties could hear and respond to the Commission. The Government accepted that the Commission could have done better by publishing a Green Paper (Q 290). **We agree.**
78. This is a controversial proposal. Even if the Commission did not know at the outset that that was so it should quickly have realised it when faced with the

criticisms that came from industry. Its preparatory procedure or lack of it cannot therefore go without comment. **It seems to us that there has been a failure on the part of the Commission adequately to comply with the Protocol on Subsidiarity and Proportionality.**

Better Regulation

79. We also note that the Commission's proposal would not meet the standards now set in the Inter-Institutional Agreement on Better Regulation. That requires the Commission to provide "a clear and comprehensive justification for the legal basis used for each proposal"²⁹. In its explanatory memoranda the Commission must give "an account of the scope and the results of the prior consultation and the impact analysis that it has undertaken".³⁰ **We invite the European Parliament to call on the Commission to produce such a justification of the legal basis as well as an account of its 2002 consultation.**

Opt in—opt out

80. The United Kingdom has opted in to the Rome II negotiations. It need not have done so. Rome II falls within those matters in Title IV of the EC Treaty in respect of which the United Kingdom is not bound but has the right to opt in under the Protocol annexed to the Treaty of Amsterdam.³¹ Lord Filkin explained that the decision to opt in was in line with the Government's general policy on Part IV of the EC Treaty, namely, to participate in all measures except border controls.³² The Government believed that the project was likely to go ahead (it was "part of the journey of travel of the Union" (*sic*)) and that it was better to be part of the negotiations and seek to influence them. There was also an advantage in being "a player to ensure that we keep the whole venture away from the harmonisation of substantive law" (QQ 302-3).
81. **We do not find the Government's reasons for opting in compelling.** It is surprising that Ministers did not give far greater weight to the evidence of industry, legal practitioners and academics given to the Commission at the time of its earlier consultation exercise. The belief that securing agreement on conflict rules in tort and other non-contractual obligations may deter or stifle the call for action at Union level on substantive law may also be unduly optimistic, as the Commission's aspirations on Contract law clearly show. Also of concern is the fact that the decision to opt in was apparently taken at a time when the Government themselves had doubts about the *vires* of the proposal and when they did not know or appreciate the full implications of that decision in the event that the United Kingdom were to find itself in a minority at the end of the negotiations. The Minister was inclined to think that the United Kingdom could opt out if it did not like the result of the negotiations. But he has later clarified the position. Having once opted in there is no right to opt out. But were the United Kingdom to be a critical

²⁹ Doc 12175/03 at para 14. Ratification of the Agreement did not take place until 16 December 2003, though political level agreement had been reached on June 3.

³⁰ *Ibid*, at para 15.

³¹ Protocol on the position of the United Kingdom and Ireland.

³² Reply of Mr Straw (then Home Secretary) to Mr Maclean MP. Hansard 12 March 1999, vol 327 col 380–382 WA.

part of a blocking minority of Member States opposing the adoption of the Regulation the Council could, after a reasonable time, adopt the measure without United Kingdom participation.³³ **In these circumstances the decision to opt in was a remarkably bold one.**

82. Having opted in there is now no turning back. The Government must now work to secure the best result. As Mr Dickinson said, it is “in the interests of the legal profession and business in the UK that the Government should participate fully in the legislative process, with a view to debating the need for this piece of legislation and ensuring that any measure which may be adopted by the Council and the Parliament does not unduly disrupt business, or unnecessarily create opportunities for satellite litigation” (p 55). **We agree.**

The scope of the proposal

83. The material scope of the proposal is set out in Article 1. The Regulation applies to non-contractual obligations in “civil and commercial matters”, a term which is to be understood in the same sense as in the Brussels I Regulation. The Regulation would not therefore apply to revenue, customs or administrative matters. Article 1(2) also specifically excludes non-contractual obligations arising out of family relationships, matrimonial property regimes and succession, obligations under negotiable instruments, the personal liability of officers and members for the debts of a corporate and incorporated body, the personal liability of persons carrying out a statutory audit, the liability of settlors, trustees and beneficiaries of a trust, and, finally, non-contractual obligations arising out of nuclear damage.

Article 1—Material scope

1. This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters.

It shall not apply to revenue, customs or administrative matters.

2. The following are excluded from the scope of this Regulation:

- a) non-contractual obligations arising out of family relationships and relationships deemed to be equivalent, including maintenance obligations;
- b) non-contractual obligations arising out of matrimonial property regimes and successions;
- c) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;
- d) the personal legal liability of officers and members as such for the debts of a company or firm or other body corporate or incorporate, and the personal legal liability of persons responsible for carrying out the statutory audits of accounting documents;
- e) non-contractual obligations among the settlors (*sic*), trustees and beneficiaries of a trust;
- f) non-contractual obligations arising out of nuclear damage.

3. For the purposes of this Regulation, “Member State” means any Member State other than [the United Kingdom, Ireland or] Denmark.

³³ Letter dated 15 March 2004 from Lord Filkin to the Committee, printed at pp 86–87.

84. Our attention was drawn by the Law Society and the City of London Law Society to possible problems in applying the exclusions listed in Article 1(2) (pp 98, 120). We do not comment on these in detail but there are two matters to which we would draw special attention.

Liability of Auditors

85. Article 1(2)(d) would exclude from the Regulation “the personal legal liability of persons responsible for carrying out the statutory audits of accounting documents”. The Commission’s Explanatory Memorandum contends that such liability is inseparable from company law. Were this exception to be widely construed there might, for example, be two different choice of law regimes that would apply if a purchaser of a company were to bring claims both against the vendor’s financial advisers and against the group’s auditors in respect of misleading statements in the company’s audited accounts. There might also be cases where different laws would apply to parallel claims against other advisers to the company, such as solicitors or stockbrokers (pp 51, 98). **Consideration therefore needs to be given to whether the exclusion of auditors’ liability in Article 1(2)(d) should be limited, perhaps, to liability to the company and its members.**

Trusts

86. Article 1(2)(e) excludes “non-contractual obligations among the settlors, trustees and beneficiaries of a trust”. The wording is similar to that to be found in the Rome I Convention. It is unclear how far the exclusion in Article 1(2)(e) is intended to go. At first glance it would exclude obligations arising in the context of constructive or resulting trusts. Practitioners expressed concern for the potential implications for fraud claims (p 98). On the other hand, Mr Fentiman queried the extent to which Article 1(2)(e) would preclude the rules in Article 9 (discussed below) applying to claims arising from a resulting or constructive trust, or a trust beneficiary’s claims against a third party (p 118). The Commission’s Explanatory Memorandum simply states that “trusts are a *sui generis* institution and should be excluded from the scope of this Regulation”. This might suggest a wide construction should be given to the exclusion in Article 1(2)(e). But the Commission later adds: “These being exceptions, the exclusions will have to be interpreted strictly”.³⁴ **The nature and extent of the exclusion in Article 1(2)(e) needs to be clarified.**

Universal application

87. Article 2 provides that the Regulation is to have universal application. In this respect the proposal is similar to that in Rome I.³⁵ The uniform conflicts rules laid down in the Regulation could lead to the designation of the law of any country, including the law of a non-EU country, as the applicable law. The rules are not restricted to situations involving some cross-border or other connection with Union and Member States. The Regulation would not, however, lay down internal conflicts rules for the United Kingdom. Article

³⁴ Commission’s Explanatory Memorandum, p 9.

³⁵ Article 2 of Rome I provides: “Any law specified by this Convention shall be applied whether or not it is the law of a Contracting State”.

21(2) provides that a State within which different territorial units have their own rules of law in respect of non-contractual obligations shall not be bound to apply the Regulation to conflicts solely between the laws of such units. The Government has explained its position on Article 21(2). Whether the Private International Law (Miscellaneous Provisions) Act 1995 would be retained for Anglo-Scottish cases when, if the Regulation were adopted in its present form, it would not apply to, for example, Anglo-American cases would be a matter for the Scottish Executive/Parliament and the Government/UK Parliament to decide.

Article 2—Universal application

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

88. The Commission's Explanatory Memorandum suggests that a distinction between intra-Community and extra-Community cases is meaningless. There should be equal treatment for Community litigants 'even in situations that are not purely intra-Community'. Mr Fentiman considered this to be a highly tendentious argument: "It surely cannot be accepted that (in effect) all cases before the courts of Member States are to be regarded as having internal market implications. To say so undermines the purpose of Article 65" (p 113). Mr Fentiman also challenged the Commission's argument that the universal scope of Rome II was justifiable by reference to the broad scope of the Brussels I Regulation. He said: "But this is simplistic and seriously misleading. The scope of the Brussels I Regulation is highly controversial. Whether for example it regulates cases where a court having jurisdiction under the Regulation is asked to decline to exercise jurisdiction in favour of a non-Member State has occasioned much debate—and is currently before the Court of Justice"³⁶ (p 113).
89. The principal issue raised by Article 2 is one of *vires*. As already mentioned, it is extremely doubtful whether the apparent world-wide scope for the Regulation envisaged by Article 2 complies with the requirement in Article 65 EC under which measures taken under that Article must be necessary for the proper functioning of the internal market. A number of witnesses nonetheless took the view that if there were going to be a Regulation, it would make sense that it should have universal application. Otherwise each Member State would potentially have two regimes of conflicts rules for non-contractual obligations, one for European Union cases (somehow defined) and a second for other international cases. Sir Lawrence Collins put the argument thus: "For [the Regulation] to be limited to cases arising in [Member] States would not only be very difficult (and perhaps impossible) to formulate with the requisite degree of precision, but would also introduce further enormous complications into an area of law which requires comprehensible simplification" (p 47).
90. While the principal issue raised by Article 2 is one of *vires*, Article 2 also has serious implications for the freedom and ability of the United Kingdom to participate in international discussions about the conflict of laws. Were, for example, the Hague Conference on Private International Law³⁷ to begin

³⁶ Case C-281/02, *Owusu v. Jackson*. Pending.

³⁷ The Hague Conference is an intergovernmental organization, the purpose of which is to work for the progressive unification of the rules of private international law.

work on a matter falling within the scope of the Regulation, then it would be the Community, in the form of the Commission, who would assume the negotiating role on behalf of all the Member States in that international forum.

91. While the Community's ability to conduct external relations is restricted, as a matter of law, to those areas where it has competence (exclusive or shared), Member States' freedom of action is limited where and to the extent that the Community has competence.³⁸ Member States may not enter into agreements between themselves or with third States on the same subject matter. Where the transfer of competence is partial, because the Treaty expressly preserves Member States' competence (for example, Article 174(4) TEC) or the internal rules do not occupy the whole field, then the Community and the Member States share competence. Both will be parties to the international agreement, commonly referred to as a "mixed agreement".
92. Internal and external competence are therefore directly related. Were the draft Regulation to be restricted to the internal market and cross-border situations then a Member State would retain the competence to determine what rules should apply, for example to a traffic accident in the US where the applicant/claimant is domiciled in that State. The Member State might adopt the same rule as in the Regulation, but that would be its decision, on the merits and in exercise of its sovereign powers. Further, because both the Community and the Member State would have competence in the field both would be able to sit at the international negotiating table were a multilateral/global measure to be proposed for choice of law rules for non-contractual obligations. The precise extent of Community competence is therefore a matter of some concern in the present context.
93. **We conclude that Article 2 should be deleted.** There is, however, a good argument that there should be one set of rules to apply to all cases. This would be simpler and perhaps more conducive to legal certainty. But the decision whether to extend the rules in the Regulation to cases not having a Community element should for both legal (*vires*) and policy (external competence) reasons be one for each Member State.
94. Deletion of Article 2 would undoubtedly pose a challenge for the draftsman. The scope of the Regulation will need to be defined. It would be necessary therefore to identify the factors which would connect a case to the Community and, in order to bring the measure within the scope of Article 65, relate to the functioning of the internal market. It would clearly not be enough that one of the parties is an EU citizen. The cause of action would have to have substantial cross-border elements or effects.

³⁸ The Community's competence to conclude international agreements arises from two sources: (i) express provisions in the Treaty (such Articles 111, 133, 155, 174 and 181 TEC); and, (ii) the jurisprudence of the European Court of Justice (the Court). The Court has held that external competence may flow from other provisions of the Treaty and measures adopted within the framework of those provisions. The existence of "internal rules" or of unexercised Treaty powers to adopt such rules confers external competence to the Community. Article 11(2) of the draft Constitutional Treaty seeks to consolidate the law on exclusive external competence.

The basic rule

95. Article 3 lays down the general rules for determining the law applicable to non-contractual obligations arising out of a tort or delict. The law applicable is to be the law of the country in which the damage arises or is likely to arise irrespective of the country in which the event giving rise to the damage occurred or of the country or countries in which indirect consequences of that arise. Article 3(2) and (3) provide two exceptions to the general rule. Article 3(2) contains a special rule that where the person claimed to be liable and the person who has allegedly sustained damage are habitually resident in the same country, the law of that country will be applicable. Article 3(3) contains a more general exception. Where it is clear from all the circumstances of the case that the non-contractual obligation is manifestly more closely connected with another country, the law of that other country shall apply.

Article 3—General rule

1. The law applicable to a non-contractual obligation shall be the law of the country in which the damage arises or is likely to arise, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event arise.
 2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country when the damage occurs, the non-contractual obligation shall be governed by the law of that country.
 3. Notwithstanding paragraphs 1 and 2, where it is clear from all the circumstances of the case that the non-contractual obligation is manifestly more closely connected with another country, the law of that other country shall apply. A manifestly closer connection with another country may be based in particular on a pre-existing relationship between the parties, such as a contract that is closely connected with the non-contractual obligation in question.
96. Witnesses generally noted that Article 3 was not so different from the rules in sections 11 and 12 of the Private International Law (Miscellaneous Provisions) Act 1995. In Sir Lawrence Collins' view, both had the effect that if the wrongful act and the damage occurred in one country the law of that country would normally apply, but that if the wrongful act and the damage occurred in different countries normally the law of the place of damage would apply. The rules of displacement, Articles 3(2) and (3), were also similar. There was, however, a difference in that the 1995 Act provided for the law governing issues, whereas the approach of the Regulation was about the law applicable to an obligation. Although in most cases that would not make a practical difference, an issue-based rule was, in Sir Lawrence's view, far preferable to a tort-based rule (Q 229).
97. Article 3 would, if it applied to claims against publishers and broadcasters, remove their ability to claim the benefit of the so-called double actionability rule. When considering the changes to be made by the 1995 Act, Parliament accepted that the double actionability rule was necessary for the proper protection of press freedom and freedom of expression. We examine (at paras 111–129 below) the particular implications of Rome II for the media.

98. Several suggestions were made as to how Article 3 might be improved. Drs Crawford and Carruthers (University of Glasgow) pointed to the difficulty caused by the use of the word “damage” which in English and Scots law may cover (i) the wrongful act or omission; or (ii) the consequential loss (p 102). Mr Adrian Briggs, St Edmund Hall, Oxford, asked what was the difference between primary damage and ‘indirect consequential damage’. Direct harm might, for example, be done to indirect victims (so injury to an agent might cause loss to a principal; killing a partner would bereave the other spouse; killing a child might cause nervous shock to someone who watched or heard). Mr Briggs accepted that in many cases the “indirect” victim would also be in the country where the “direct” victim sustained the loss, and the same law would govern his or her separate claim. But where this was not so, was the bereavement of a claimant, or the sustaining of nervous shock, an indirect consequence of the event giving rise to the damage, or was it a separate and independent, and equally direct, assault on that second (but not secondary) victim (p 95)?
99. A number of witnesses drew attention to the cases where damage occurs, or is likely to occur in more than one Member State. In its Explanatory Memorandum the Commission has acknowledged that there is an issue here and, referring to a German law concept, *Mosaikbetrachtung*, has said that “the laws of all the countries concerned will have to be applied on a distributive basis”.³⁹ Mr Dickinson thought that it would have been helpful to have an explanation within the Regulation (Q 234). There were, however, differing views as to whether the Regulation should do so. Mr Briggs thought that problem was probably insoluble, and was not better addressed in existing English law (p 95). The Government were generally content with Article 3 in this respect but acknowledged that complicated situations could arise. Further, defamation was a case where reliance on Article 3 might not suffice and a particular rule might be needed (QQ 334-5).
100. The object of the proposal is to provide certainty where certainty may not presently exist. It is therefore most important that the Regulation (which will be directly applicable and not capable of any clarification or refinement in implementing legislation) should be as clearly drafted as possible. It should not become a recipe for riches for lawyers. Accordingly **we recommend that Article 3 should define what is meant by “damage” and make clear the distinction between “damage” and “indirect consequential damage”**.

The special rules

101. The general rule in Article 3 is displaced by particular rules which apply in the case of product liability (Article 4), unfair competition (Article 5), privacy and the rights relating to personality (Article 6), violation of the environment (Article 7) and the infringement of intellectual property rights (Article 8). Both Sir Peter North and Sir Lawrence Collins doubted the need for the special rules. Sir Lawrence said: “My view is that although they to some extent differ from the general rule in Article 3, they could all be left to Article 3, in particular those that go significantly beyond Article 3 can do so in a way which is not, in my judgment, justified” (Q 241).

³⁹ Commission’s Explanatory Memorandum p 11.

102. Our starting point has been to ask what justification there can be for having any special rules in the Regulation. A strong case needs to be made for taking something out of the general rules in Article 3. It needs to be shown for each of the special rules proposed in Articles 4 to 8 that Article 3 would not produce a satisfactory result. We are pleased to note that the Government also take this view (Q 336) and we urge them to continue, in the ongoing negotiations, to maintain a critical approach to the question of special rules. **There should be as few special rules as possible.**

Product liability

103. Product liability is a matter on which there is already a substantial degree of harmonisation as a result of Directive 85/374/EEC on liability for defective products. The Directive imposes strict liability (the claimant does not have to prove negligence or other fault) on producers for death, injury, loss or damage to property caused by defective products. The Directive covers consumer products and products used at a place of work.⁴⁰ But Member States' laws still contain differences, not least because the Directive permits certain options and covers only certain types of damage.

Article 4—Product liability

Without prejudice to Article 3(2) and (3), the law applicable to a non-contractual obligation arising out of damage or a risk of damage caused by a defective product shall be that of the country in which the person sustaining the damage is habitually resident, unless the person claimed to be liable can show that the product was marketed in that country without his consent, in which case the applicable law shall be that of the country in which the person claimed to be liable is habitually resident.

104. Article 4 of the Regulation requires the law applying to a product liability claim to be the law of the country in which the person sustaining the damage is habitually resident, unless the defendant can show that the product was marketed in that country without his consent. In the latter case the applicable law would be that of the habitual residence of the defendant. However, Article 3(2) (habitual residence) and (3) (general exception clause) would also apply.
105. A number of witnesses, including the Government, queried whether the proposed special rule for product liability case was in fact necessary. Article 4 appears to have been drawn up with the private/individual consumer in mind but its scope is not limited to consumer claims. Sir Peter North doubted whether the rule proposed was needed or justifiable for business to business transactions (Q 110). Sir Lawrence Collins thought that Article 4 was unnecessary and would create an undesirable disparity between choice of law rules and jurisdictional rules. Jurisdiction would be based on the place of damage under Article 5(3) of the Brussels Regulation, but liability might depend on the place of habitual residence of the person injured (p 47). Mr Dickinson could see an argument for a specific rule in product liability cases because of mobility of products and the fact that the damage might occur in a location that was unforeseeable and had no real connection with the

⁴⁰ [1985] OJ L 210/29. Directive 99/34/EC [199] OJ L 141/20 extends the scope of strict product liability to unprocessed primary agricultural products (crops, livestock and fish).

defective nature of the product. But whether Article 4 was the right solution to that difficulty needed further consideration (Q 251).

106. **We do not believe that a case has been made for a special rule on product liability.** Rome II would not solve the sort of problems in the application of the Product Liability Directive described by the Commission. **If additional consumer protection is needed (and we do not rule that out) then that is a matter to be addressed in the context of the Directive.**

Competition law

107. Under Article 5 in an action arising out of an act of unfair competition the applicable law would be the law of the country “where competitive relations or the collective interests of consumers are or are likely to be directly and substantially affected”. Unfair competition has no definite meaning in common law countries and is not defined in the draft Regulation. The Commission’s Explanatory Memorandum suggests that it is intended to cover both traditional Continental unfair competition (that is, misleading advertising, enticement away of a competitor’s staff, boycotts and passing off) and also actions for breach of “modern competition law” such as Articles 81 and 82 of the EC Treaty.

Article 5—Unfair competition

1. The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are or are likely to be directly and substantially affected.
2. Where an act of unfair competition affects exclusively the interests of a specific competitor, Article 3(2) and (3) shall apply.

108. Professor Morse (King’s College London) said that the scope of the concept of “unfair competition” was unclear for a system like English law which protects against unfair competition through particular torts, some of which are referred to in the Commission’s Explanatory Memorandum, but which may also be torts applied in contexts which do not relate to unfair competition. This might be the case with some of the economic torts. It would be necessary to decide whether the particular claim fell within Article 3 or Article 5 (p 126). We note that unfair competition issues may also arise in conjunction with infringement of intellectual property rights. The Trade Marks Patents and Designs Federation questioned where actions for breach of confidence fell, into Article 5, 6 or 9 (p 133). The Commercial Bar Association shared the concerns that Article 5 would give rise to problems of characterisation (Q 244). Sir Lawrence Collins expressed concern that Article 5 might be an encouragement to claims based on United States law being brought here (Q 246).
109. There seemed little support for Article 5 among our witnesses. Doubts were expressed as to what Article 5 added to the general rule in Article 3 and witnesses had serious concerns as to the classification issues which it would raise. So far in the negotiations the Government has taken the position that Article 5 should be deleted (Q 337). **We urge them to maintain that line. Article 5 appears to be unnecessary.** In substance, the rule in Article 5 is not very different from the general rule in Article 3(1). The retention of

Article 5 is almost certain to give rise to unnecessary problems of classification.

Privacy and defamation

110. Article 6 deals with violations of privacy and rights relating to the personality (such as defamation actions). It has important implications for the press and broadcasting media. They have made strong representations to the Commission, the Government and ourselves, and have pointed to the problems to which Article 6 would give rise, especially in relation to publishing on the internet, and to the implications for freedom of expression as protected under Article 10 of the European Convention on Human Rights.⁴¹
111. There is general agreement or acceptance by witnesses that a special rule is needed. This is not surprising. A special rule applies in our own law. When the Private International Law (Miscellaneous Provisions) Act 1995 abolished the double actionability rule, the old common law rule relating to actions in this country on torts which are governed by foreign law, defamation was excluded. Section 13 of the Act retains double actionability (and the exceptions to the rule) for defamation claims. This exception responds to the perceived threat to freedom of expression which could result if a foreign law were to govern liability in the United Kingdom where the publisher may have an available defence under domestic law.
112. The Commission's initial study of the rules in the Member States showed a degree of diversity in choice of law rules applied and also considerable uncertainty as to what the law was. The Commission originally proposed that the law of a victim's habitual residence should be applied. That suffered extensive criticism during the consultation exercise.
113. Article 6 now proposes that the law applicable to violations of privacy and rights relating to the personality should be determined in accordance with the rules in Article 3 (that is the law of the place where the direct damage is sustained) unless the parties reside in the same State or the dispute is more closely connected with another country. But where the application of the law so determined would be contrary to the fundamental principles of the forum as regards freedom of expression and information the *lex fori* would be the applicable law. Article 6(2) provides for the law of the habitual residence of the broadcaster or publisher to apply in relation to any right to reply or "equivalent measures". The Commission accepts that the law applicable by virtue of Article 6(1) might not be satisfactory for settling the question whether and in what conditions the victim can oblige the publisher to issue a corrected version of the defamatory statement and exercise a right of reply.

⁴¹ Article 10 states: (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 6—Violations of privacy and rights relating to the personality

1. The law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality shall be the law of the forum where the application of the law designated by Article 3 would be contrary to the fundamental principles of the forum as regards freedom of expression and information.
2. The law applicable to the right of reply or equivalent measures shall be the law of the country in which the broadcaster or publisher has its habitual residence.

114. The Commission believed that its revised Article 6 would accommodate the concerns of the media (Q 48). That was not the view of the media. We were told that there is widespread disagreement with the proposal across the European media (Q 209). The Newspaper Society said: “Enactment of the revised draft of the proposed Rome II Regulation would create an unworkable and uncertain legal regime, damaging to the UK media industry. Its provisions relating to defamation, privacy and related actions would create a chilling effect upon freedom of expression, affecting any private individual or contributor, as well as any commercial publisher or broadcaster. Despite the attempted revision by the Commission, the proposal would increase the vulnerability and exposure of the media as well as individual publishers to complex and costly legal action, under a multitude of overseas laws, including those alien to the UK or any Member State of the EU, under a regime so uncertain and unpredictable that it will be impossible to guard against legal claims”. The European associations representing broadcasters and publishers of national, regional and local newspapers, magazines and books across Europe have explained to the Commission and European Parliament why the proposal must not be enacted in its current form. UK publishers and broadcasters have actively supported these pan-European representations (p 31).
115. Certainly the Regulation would change the law in the United Kingdom. Under Rome II double actionability would go. The broad effect would be to apply the law of the claimant’s country unless the application of that law would be contrary to the fundamental principles of United Kingdom law (Article 6(1)) or manifestly incompatible with the public policy of the United Kingdom (Article 22). The reference to “fundamental principles of the forum” raises problems. Witnesses considered that it might be difficult to identify what were “fundamental principles”, particularly in the absence of a written constitution. In the United Kingdom Article 10 ECHR might well be regarded as such a principle, by virtue of the Human Rights Act. But, as the Newspaper Society said, whether “fundamental principles” would include, in defamation cases, the defences of fair comment, absolute and qualified privilege was uncertain (Q 191).
116. ARTICLE 19, Global Campaign for Free Expression, argued that if Article 6(1) was to remain then the burden should be on the claimant in a defamation action to show that the law applied pursuant to Article 3 was not contrary to the fundamental principles of the forum as regards freedom of expression and information, rather than on the defendant to show that the Article 3 law was contrary to such principles (p 90).

Internet publication

117. Particular concern was expressed that the Regulation did not sufficiently recognise the unique characteristics of communication by Internet. A key feature of the Internet is that when a person uploads material to a website, that material is available for download anywhere in the world. The global nature of the internet has thus increased the legal risks for publishers. A statement in a newspaper here if also published on the net, as most national and regional newspapers are, raises the spectre of claims being brought anywhere the statement (web page) is accessed/down-loaded and therefore “published” for defamation purposes. Anyone publishing on the Internet is at risk of potential liability for defamation, libel and related offences in jurisdictions far removed from the ones in which they live and publish, even where those defamation laws fail to meet international standards of respect for freedom of expression.⁴² This is also an issue for internet service providers (ISPs) who, because of the role they play in holding and/or disseminating the material, may be treated as “secondary publishers”.
118. Some witnesses argued that the draft Regulation was incompatible with the E-Commerce Directive and would undermine the principle of ‘home country control’ enshrined in that Directive. It is unclear how far the E-Commerce Directive takes internet publication outside the scope of the Regulation—we consider the compatibility of Rome II and the Directive at paras 157–162 below. From the practical standpoint of newspaper and other publishers, Rome II would, it was said, lead to arbitrary results and have the effect of subjecting to wholly different national legal regimes the same material published at the same time by the same publisher. Mr Brett (Times Newspapers) said: “We believe that the current Rome II proposals run counter to the E-Commerce Directive and will subject the same article to two different legal systems depending whether it is on-line or off-line. This cannot make any sense and will lead to confusion and uncertainty in this area of law. This will vastly increase legal costs and have a profound chilling effect on serious investigative journalism” (p 36).
119. Reuters spoke of the benefits of on line publishing: “one of the most positive contributions of the Internet Age has been to allow everyone in society to become electronic publishers—from the high school magazine to the web site of a parliamentarian. Such small-scale “publishers” should not have to face the legal uncertainties, exposures and risks of the Commission’s proposals. They should be able to publish in the confidence that, provided they operate according to their domestic law, “they should be OK” (p 130).

A single publication rule

120. A related but separate issue, on which publication on the Internet has focussed attention, is the rule, under our domestic law, that a cause of action accrues each time a libel is disseminated. Where a newspaper or other publication is placed on an online archive, there will be a new cause of action

⁴² ARTICLE 19, para 4.1. The Commission’s Explanatory Memorandum makes clear that, for defamation actions, the damage arises, as a general matter, in the jurisdiction in which the allegedly defamatory material has been distributed. The Commission refers to *Fiona Shevill v Presse Alliance* [1995] ECR I-415 and (1996) 3 All ER 929 (the latter decided on a reference from the House of Lords for clarification of the meaning of Article 5(3) of the Brussels Convention). The European Court held that the meaning of “the place where the harmful event occurred”, in the context of defamation actions, includes any Member State in which an allegedly defamatory publication is distributed.

whenever [and wherever] it is accessed. Mr Brett, for Times Newspapers, said: “the U.K. has manifestly failed to protect on-line publications from never-ending liability, *i.e.*, no “single publication rule” in this country or effective limitation period for database publications. This makes a non-sense of the usual one-year limitation period in the Defamation Act 1996. The United States has cured this anomaly by the introduction of a “single publication” rule but this has not happened in the UK” (p 35). Sir Lawrence Collins believed that a single publication rule might work well in a federal state such as the US but doubted if it would be acceptable in the current Union (Q 252). **We acknowledge that a single publication rule is probably not negotiable even assuming that there were the *vires* in the Treaty to impose such a rule on the Union.**

A country of origin rule

121. The media argued that if there were to be a Regulation (their views on the *vires* issue are set out in para 60 above) the area of defamation, privacy and related rights should be excluded from the scope of the draft Regulation. If there were no such exclusion, then a “country of origin” rule should apply (Q 210). That would not necessarily be the place where the publication took place. It would be the place of the editorial seat, *i.e.* where the person making the decisions about publication sits (Q 203).
122. The Media Law Resource Center argued that there should be a predictable choice of law rule that allowed publishers to comply with the defamation laws of a single country (p 124). The Periodical Publishers Association said that a “country of origin” approach “would afford comprehensible protection for potential victims and would provide legal certainty for publishers”. Such an approach would avoid discriminating between print media and online and broadcast media (which operate under country of origin rules, as provided by the Electronic Commerce Directive, the Television Without Frontiers Directive, the Cable and Satellite Directive and the Data Protection Directive respectively) (p 34).
123. But Sir Lawrence Collins doubted whether a country of origin rule would be acceptable in the United Kingdom, for example, if somebody here were to be defamed here by an Italian newspaper (Q 256).
124. ARTICLE 19, Global Campaign for Free Expression, recommended that, in Internet-based defamation cases, the applicable law should be the law of the country in which the Internet publisher uploads the allegedly defamatory material or, alternatively, the law of the country where the publisher is established. Such a rule would, in ARTICLE 19’s view, be warranted on the basis of the EU’s commitment to protecting freedom of expression (p 9).
125. The Government were concerned to ensure that any rule in this sensitive area did not operate to restrict freedom of expression in the United Kingdom. Article 3 was not satisfactory and a special rule was needed. Lord Filkin thought that Article 6 was a move in the right direction but did not provide a sufficient solution to the problem (Q 341). The Minister also recognised that there might be some advantages of a country of origin rule, though it might also have the disadvantage of increasing the number of legal actions against UK publishers in the courts of other Member States (Q 345). This is because the Regulation would enable the foreign court to apply the English measure of damages generally perceived to be favourable to claimants.

Conclusions on Article 6

126. There is little doubt that a special rule is needed for defamation and privacy cases. A free press is an important safeguard of democracy. Freedom of expression is a fundamental right set out in both the European Convention on Human Rights and in the EU Charter of Fundamental Rights. So also is the right to respect for private and family life.
127. It should be acknowledged that the Commission has made a positive effort to accommodate the media's concerns and, in the revised Article 6, has come close to producing a double actionability rule. The basic rule in Article 3 would produce a fair result for hard copy publications in a single Member State. The problem arises where publication is alleged to have taken place, and therefore damage to have occurred, in more than one Member State. This is a potential problem for any publication on the Internet. The Regulation would not lead to one applicable law in all cases and the media witnesses do not think that the Article 6 reference back to the law of the forum would provide an adequate safeguard. The Government also has doubts about the suitability of the rule in Article 6. We share those concerns.
128. The media favours a country of origin rule, by which they mean that the applicable law would be the law of the place where the editorial control over publication was exercised. A country of origin rule would have certain advantages, notably simplicity and certainty. It would point to one law. It would not require the amalgam which Article 6 presently envisages. To adopt a country of origin rule would also accord with, though not necessarily in all cases replicate, the host country/place of establishment regimes found in the E-Commerce and other Single Market measures. A country of origin rule would encourage enterprise, education and the widest dissemination of knowledge, information and opinion.
129. We recognise, however, that such a rule would cut across the general scheme of the Regulation, which favours the law either of the place where the damage occurs or the habitual residence of the victim. And it is not difficult to imagine situations where many of the facts of a case are closer to one of those laws than the place where the editorial control is sited. A country of origin rule would also seem to entrust to the law of the publisher rather than the law system of the victim the striking of the balance between the competing interests of the media in freedom of expression and of the victim in rights to privacy. But it should be recalled that all Member States are parties to the ECHR and that freedom of expression cannot ride roughshod over rights to privacy. Finally, it should be noted that a country of origin rule is not without risk for publishers, including those in the United Kingdom. A country of origin rule would have the effect of exporting our law. UK publishers might be sued in any other Member State and UK law, including its damages rules, would apply.
130. **We recommend, on balance, that Article 6 be replaced by a country of origin rule.**

Environmental damage

131. As regards the "violation of the environment", Article 7 provides that the applicable law should again be determined by the general rule in Article 3 unless the claimant "prefers to base his claim on the law of the country in which the event giving rise to damage occurred". The victim of

environmental damage could therefore choose which applicable law would be more favourable to him. The Commission's explanation is that if Article 3 were uniformly applicable, a victim in a country whose law gave only a low level of protection would not enjoy the higher level of protection available in neighbouring countries, and that this could give an operator an incentive to establish his facilities at the border so as to discharge toxic substances into a river and enjoy the benefits of the neighbouring country's laxer rules.

Article 7—Violation of the environment

The law applicable to a non-contractual obligation arising out of a violation of the environment shall be the law determined by the application of Article 3(1), unless the person sustaining damage prefers to base his claim on the law of the country in which the event giving rise to the damage occurred.

132. In Mr Dickinson's view, Article 7 was objectionable on a number of grounds. Giving the claimant a choice of the law applicable to his claim would run counter to the objective of achieving predictability. The general rule (Article 3) appeared to be adequate in the case of environmental damage, enabling a person who claims to have suffered injury or damage as a result of an environmental incident to claim according to the law of the place where he or his property was situated at the relevant time. Mr Dickinson believed that Article 7 "was motivated less by the desire to promote the internal market but rather by the desire to punish the polluter. It is more in the nature of a substantive provision". Rome II was not the place to harmonise Member State rules so as to protect victims of pollution. That should be for an instrument in the field of environmental liability under the relevant provisions of the Treaty (Q 251).
133. Other witnesses were also critical of Article 7 for the uncertainty that it might bring and the added problem of classification. Professor Morse said: "The scope of Article 7 is most unclear. "Violation of the environment" suggests some incident causing large-scale environmental damage rather than, for example, nuisance causing damage to property in a more limited way. Is that what is intended?" (p 127). Article 7 was another provision the need for which the Government was examining critically. They acknowledged that it could give rise to uncertainty (Q 336).
134. It is for consideration whether a special conflicts rule is needed for environmental damage claims. We share the views of many of our witnesses. Article 7, as drafted, would seem to create problems. It would add uncertainty and lead to classification problems. Article 3 appears to be sufficient to achieve what is wanted. Accordingly we do not see the need for a special rule for the environment. **We recommend that Article 7 should be deleted. If, however, Article 7 is to remain it should make clear, possibly by reference to the Environmental Liability Directive,⁴³ to what environmental damage/violations it relates.**

⁴³ In January 2002 the Commission brought forward a proposal for an Environmental Liability Directive. (The proposed Directive has been the subject of extensive scrutiny by Sub-Committee D (Agriculture and Environment)). It has proven to be controversial and only most recently, following the conciliation procedure, has it been agreed by both the Council of Ministers and the European Parliament. Environmental damage includes damage to species and natural habitats protected at EU level under the 1992 Habitats and 1979 Birds Directives (Directives 92/43/EEC and 79/409/EEC), to waters covered by the 2000 Water Framework Directive (Directive 2000/60/EC), as well as land contamination which causes significant risk of harming human health. Such damage would be prevented or alternatively remedied through a system of environmental liability. Subject to certain exceptions, the operator who either threatens

Intellectual property rights

135. Article 8 contains a special rule relating to the infringement of intellectual property rights. According to Recital 14 the term intellectual property rights means copyright, related rights, *sui generis* right for the protection of databases and industrial property rights. The applicable law would be the law of the country for which protection is sought. This rule, which the Commission explains derives from the nineteenth century version of the Berne and Paris Conventions, would enable each country to apply its own law to the enforcement of an intellectual property right which could be validly asserted in that country.

Article 8—Infringement of intellectual property rights

1. The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is sought.
2. In the case of a non-contractual obligation arising from an infringement of a unitary Community industrial property right, the relevant Community instrument shall apply. For any question that is not governed by that instrument, the applicable law shall be the law of the Member State in which the act of infringement is committed.

136. Sir Lawrence Collins believed that Article 8 (infringement of intellectual property rights) ignored the difficulties in intellectual property law which had been “extensively discussed” (p 47). Mr Fentiman was also critical of Article 8. He doubted whether the special rule being proposed was better than the general rules in Article 3. He had two further fundamental objections. First, infringement of intellectual property rights should not be addressed on their own: “there is a persuasive argument that choice of law in intellectual property requires a holistic approach, in which issues relating to the ownership and transfer of intellectual property are addressed in addition to the question of infringement”. Second, the problem of choice of law in intellectual property was a matter of much current debate, both as to the distinctive conceptual issues concerning intellectual property rights and the uncertain implications of existing international conventions. There were also important economic and policy dimensions to the debate. In Mr Fentiman’s view, the adoption of the *lex protectionis* without qualification was not, as the Commission suggested, to take an unexceptionable position (p 118). The TMPDF believed that Article 8 could make matters more uncertain and complex than they were at present. Rome II should therefore not cover intellectual property (IP). If it were to do so, Article 8 needed clarification and some revision in order to be appropriate for all types of IP dispute (p 131).

137. We recognise that there may well be a case for a special rule because of the territorial nature of the rights involved. The inclusion of a special rule (or indeed any rule) is, however, controversial. In its Explanatory Memorandum

of causes environmental damage will, in accordance with the “polluter pays” principle, be liable to bear the costs associated with implementing either preventative or remedial measures. The parties potentially liable for the costs of preventing or remedying the environmental damage are the operators of certain risky or potentially risky activities listed in an Annex to the Directive. These activities include releasing heavy metals into water or into the air, installations producing dangerous chemicals, landfill sites and incineration plants. Other economic operators may also be liable for the costs of preventing or remedying damage to protected species and natural habitats, but only where they are found to be at fault or negligent.

the Commission states that the treatment of intellectual property was one that “came in for intense debate” during the Commission’s consultations.⁴⁴ The inclusion of Article 8 raises two main problems. The first is its relationship with Article 5: unfair competition issues may also arise in conjunction with infringement of intellectual property rights. The second is whether Article 8 as drafted would provide the appropriate rule. **We therefore invite the Government to give further consideration to Article 8 and in particular to consider whether in the light of the views of our witnesses intellectual property rights should be excluded from the scope of Rome II.**

Other non-contractual obligations

138. As mentioned above the Commission has divided non-contractual obligations into two broad types, those arising out of a tort or delict (to be governed by Articles 3 to 8 described above) and those arising out of an act other than a tort or delict (including payment of amounts wrongly received, unjust enrichment and actions performed without due authority in connection with the affairs of another person (*negotiorum gestio*). Article 9 lays down five rules which seek to cover all the types of action falling within this second category. Article 9(6) excludes all non-contractual obligations “in the field of intellectual property”, which are to be governed by the rule in Article 8 (described above).

Article 9—Determination of the applicable law

1. If a non-contractual obligation arising out of an act other than a tort or delict concerns a relationship previously existing between the parties, such as a contract closely connected with the non-contractual obligation, it shall be governed by the law that governs that relationship.
2. Without prejudice to paragraph 1, where the parties have their habitual residence in the same country when the event giving rise to the damage occurs, the law applicable to the non-contractual obligation shall be the law of that country.
3. Without prejudice to paragraphs 1 and 2, a non-contractual obligation arising out of unjust enrichment shall be governed by the law of the country in which the enrichment takes place.
4. Without prejudice to paragraphs 1 and 2, the law applicable to a non-contractual obligation arising out of actions performed without due authority in connection with the affairs of another person shall be the law of the country in which the beneficiary has his habitual residence at the time of the unauthorised action. However, where a non-contractual obligation arising out of actions performed without due authority in connection with the affairs of another person relates to the physical protection of a person or of specific tangible property, the law applicable shall be the law of the country in which the beneficiary or property was situated at the time of the unauthorised action.
5. Notwithstanding paragraphs 1, 2, 3 and 4, where it is clear from all the circumstances of the case that the non-contractual obligation is manifestly more closely connected with another country, the law of that other country shall apply.
6. Notwithstanding the present Article, all non-contractual obligations in the field of intellectual property shall be governed by Article 8.

⁴⁴ Commission’s Explanatory Memorandum, p 20.

139. The Commission's Explanatory Memorandum suggests the text is intended to address two principal cases, unjust enrichment and agency without authority.⁴⁵ But, as COMBAR pointed out, there are non-contractual obligations that do not fit into either category (p 49). Mr Dickinson described Article 9 as "a hotchpotch of rules, which collectively are neither obviously appropriate or exhaustive" (p 53).
140. In Sir Lawrence Collins' view, Article 9 broadly reflected the consensus reached in the United Kingdom on choice of law in restitutionary claims. But this was an area which was difficult (particularly with regard to the determination of the place of enrichment in complex financial matters) and fast developing. Sir Lawrence was therefore doubtful whether the law should be codified at this stage (p 47). Professor Morse also believed that it would be undesirable for the Regulation to include non-contractual obligations arising out of an act other than a tort or delict (restitution): "It would be premature to crystallise this area in a European instrument" (p 126). Mr Fentiman argued similarly, drawing particular attention to the differences in approaches, especially between common law and civil law systems, to restitutionary claims across the Union (p 112). More generally, Mr Fentiman believed that Article 9 would do little to solve the problems of interpretation and characterisation that may arise in different Member States (p 118).
141. The Commission's Explanatory Memorandum explains that the rules in Article 9 had been prepared without using technical terminology.⁴⁶ Witnesses did not consider this necessarily to be a virtue. Professor Morse said: "I make no comments on the text of Article 9 except to say that the explanation in the Commission's Explanatory Memorandum is comparatively brief, rather general, and perhaps unduly optimistic as to the difficulties involved. I suspect it will be very difficult to apply Article 9 uniformly across the Union and very difficult to devise satisfactory autonomous interpretations of its terminology even at the level of the European Court" (p 126). Concern was expressed by a number of witnesses that Article 9 might spawn much costly litigation.
142. Two solutions have been suggested to the problems raised by Article 9. One is that Article 9 should be reformulated so as to address some of the difficulties that have been mentioned. The other is that it should simply be removed and that the Regulation should be left to cover only tort and delictual claims. Witnesses held differing views. Some thought that the Regulation should be comprehensive, others that it should be restricted to claims in tort or delict. There were a number of detailed suggestions as to how the present text might be improved if the Article were retained.
143. The Government expressed a clear preference for the deletion of Article 9. If that could not be achieved, the Article should be restricted to clearly defined areas where there was consensus on what the choice of law rule should be. The Government were not inclined to favour some form of general default provision. Such a provision would leave uncertain the scope of Article 9 and might in the event be too vague to be useful. Professor Beaumont, for the Government, was concerned that the rule might be "nothing more than a

⁴⁵ Professor Beaumont explained that the Commission had restricted the rules to three specific situations; relational restitution in paragraph 1; unjust enrichment in paragraph 3 and *negotiorum gestio* in paragraph 4 (Q 357).

⁴⁶ Commission's Explanatory Memorandum p. 21.

non rule, a proper law rule or a close connection rule which does not actually tell you anything until the judges give us some insight”. It might not be any improvement on the present position (Q 357).

144. We note the very serious doubts expressed as to whether it is sensible for the Regulation to deal with non-contractual obligations other than tort or delict given the rather embryonic state of the development of the law in this area. We are not persuaded by the argument that the Regulation should be comprehensive, not least because liabilities in tort and, for example, restitution are conceptually quite distinct. For the Regulation to extend to and to provide sufficiently clear rules to deal with all “non-contractual obligations” is far too ambitious. We therefore agree with the Government that **Article 9 should be deleted. If, however, it does remain its scope must be more clearly defined.**

Article 12 (overriding mandatory rules)

145. Article 12 is based on a similar rule in Rome I. Article 12 provides for effect to be given to the mandatory rules of another country with which the situation is closely connected and in so far as under the law of that country the mandatory rules would be applied whatever the law applicable to the non-contractual obligation. Article 12(2) makes clear that nothing in the Regulation restricts the application of the mandatory rules of the forum State.

Article 12—Overriding mandatory rules

1. Where the law of a specific third country is applicable by virtue of this Regulation, effect may be given to the mandatory rules of another country with which the situation is closely connected, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the non-contractual obligation. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.
2. Nothing in this Regulation shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.

146. Article 12 derives from Article 7 of Rome I. The Giuliano Lagarde Report,⁴⁷ the official commentary on Rome I, notes that the principle that national courts can give effect under certain conditions to mandatory provisions other than those applicable to the contract by virtue of the choice of the parties or by virtue of a subsidiary connecting factor, has been recognized for several years both in legal writings and in practice in certain of a number of Contracting States and elsewhere. The Report adds; “it must be frankly recognized that no clear indication in favour of the principle in question seems discernible in the English cases ...”. A reservation of a right not to apply Article 7(1) was included in Rome I (Article 22) and the United Kingdom and certain other Member States have opted out of its provisions.⁴⁸ The Government’ view was that the introduction of Article 7(1) into United

⁴⁷ The Report is expressly referred to in section 3(3) of the Contracts (Applicable Law) Act 1990 as a document which our courts may consider in ascertaining the meaning or effect of any provision of the Convention.

⁴⁸ Section 2(2) of the Contracts (Applicable Law) Act 1990 disapplies Article 7(1) of the Convention.

Kingdom law would “detract from the principles of certainty and uniformity which the Convention otherwise seeks to promote”.⁴⁹ A number of our witnesses noted, with regret, that the Regulation contained no provision for an opt out from Article 12(1). **We draw this to the attention of the Government and invite them to consider the desirability of the inclusion of Article 12(1) and, if it remains, whether the Regulation should contain express provision for Member States to derogate from Article 12(1).**

Article 14—rights against insurers

147. Article 14 provides for the right of a person to take direct action against an insurer to be governed by the law applicable to the non-contractual obligation, or the law applicable to the insurance contract, at the option of the claimant. The purpose of this rule is to limit the choice of law to the two systems which the insurer might expect to be applied.

Article 14—Direct action against the insurer of the person liable

The right of persons who have suffered damage to take direct action against the insurer of the person claimed to be liable shall be governed by the law applicable to the non-contractual obligation unless the person who has suffered damage prefers to base his claims on the law applicable to the insurance contract.

148. The effect of the first part of Article 14 appears at first sight to be to allow an injured party to bring a direct action in England against the wrongdoer’s insurer, jurisdiction being assumed under the insurance jurisdictional provisions of the Brussels Regulation (Article 11), with the court applying, at the option of the claimant, the law governing the non-contractual obligation, that is the place of the damage, rather than the law governing the contract of insurance. Under English law the issue of direct liability would generally depend on the law governing the contract of insurance. That law is relegated to second place by Article 14. It should be noted that the Fourth Motor Insurance Directive also accords a statutory right for a “visiting victim” to make a direct claim against the insurer.⁵⁰
149. We asked what justification there was for giving one party, but not others, the right to choose the applicable law. Sir Peter North suggested that if the applicable law were to be selected in such way it could lead to considerable uncertainty in terms of dispute resolution. It was one thing to provide multiple bases of jurisdiction, quite another to provide multiple applicable

⁴⁹ 513 HL Official Report (4th series) col 1258, 12 December 1989.

⁵⁰ The Fourth Motor Insurance Directive (Directive 2000/26/EC of the European Parliament and of the Council of 16 May 2000 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Council Directives 73/239/EEC and 88/357/EEC [2000] OL 181/65) is intended to establish an efficient mechanism for quick settlement of claims where the accident takes place outside the victim’s Member State of residence. The Directive requires motor insurers to appoint representatives in each Member State, other than their state of authorisation, to handle claims by persons who suffer loss or injury in a motor accident abroad. Each Member State must establish or approve an information centre to keep a register of information covering all insured vehicles normally based in that particular State. It also creates a direct right of action against insurers. The Directive also requires that each Member State establish or approve a compensation body responsible for providing compensation to victims in certain circumstances. The Directive was implemented in the United Kingdom by the Financial Services and Markets Act 2000 (Fourth Motor Insurance Directive) Regulations 2002 (SI 2002/2706), The Fourth Motor Insurance Directive Instrument 2002 (FSA 2002/74) and the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensations Boards) Regulations 2003 (SI 2003/37).

laws on the same issue (p 21). Mr Fentiman considered that it was “inapt that the Regulation should seek to regulate a victim’s claim against an insurer pursuant to a policy providing for third party liability”. In English law this was not perceived as a choice of law issue for tort purposes. Mr Fentiman proposed that Article 14 should be deleted, or made subject to the possibility of a reservation by Member States (p 113). But the Association of British Insurers appeared prepared to accept Article 14 provided it did not confer any new rights on the injured party to bring a claim against the insurer (p 94).

150. The Government did not accept that the Commission had made out a case for Article 14. First, it was difficult to understand why giving one party a unilateral choice about applicable law struck a reasonable balance, as the Commission claimed. Rather, it seemed to favour one party to the litigation over the other. Second, in terms of promoting international predictability, giving one party a unilateral choice of applicable law would place the other party in a more unpredictable situation (Q 364). We share the concerns of the Government and other witnesses. **We are not persuaded that the Regulation needs to make provision for direct actions against insurers. Certainly the matter requires further consideration and consultation with the insurance industry.** Article 14, as drafted, would make secondary the contractual obligations of the insurer and could, at the option of the claimant, allow a wider application of direct claims than exists at present.

Protecting human rights—Public policy of the forum

151. Article 22 preserves the public policy of the forum. It permits the court to disapply rules of foreign law where their application would be “manifestly incompatible with the public policy (*ordre public*) of the forum”. What is the scope of this provision?

Article 22—Public policy of the forum

The application of a rule of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (“*ordre public*”) of the forum.

152. In a joint submission, the AIRE Centre, JUSTICE and Redress drew attention to problems the Regulation might have in relation to reparation claims of victims of torture and other violation of human rights. The effect of the rule in Article 3 might be that the law of the country where a victim was tortured was the applicable law. That law might not recognise civil liability for torture or other violation of human rights or provide adequate relief (for example, as regards heads or measure of damages). The AIRE Centre, JUSTICE and Redress noted that Article 6 would provide an exception to the general rule under Article 3 where an application of that rule would be contrary to the fundamental principles of the forum as regards freedom of expression and information. But there was no such similar exception for cases where an application of the general rule would be contrary to the fundamental principles of the forum as regards human rights including reparation for torture (p 88).
153. Sir Lawrence Collins believed that Article 22 should suffice to deal with the concerns expressed. If an English court had jurisdiction over someone who was alleged to have been guilty of torture, torture being contrary to various

international Conventions, there was, in Sir Lawrence’s view, no doubt that the English court would refuse on public policy grounds to apply a foreign law under which the conduct in question was lawful. If the foreign law gave the claimant inadequate redress by domestic standards that also might be contrary to public policy (Q 278).

154. The Government, too, believed that the public policy of the forum, and possibly Article 12(2) (mandatory rules of forum), would come to the aid of the victim in the circumstances described by the AIRE Centre, JUSTICE and Redress. Professor Beaumont explained: “The way in which private commercial lawyers on the Continent particularly like to deal with this is by a combination of public policy and mandatory rules. It is a systematic approach and they regard it as the positive application of the law through public policy and the negative disapplication through public policy. So they would say that the combination of Article 12 and Article 22 would deal with this kind of case” (Q 371).
155. **We are content that Articles 12(2) and 22 would give the courts sufficient discretion to apply the law of the forum to reparation claims made by victims of torture or other violations of human rights in the circumstances envisaged by the AIRE Centre, JUSTICE and Redress.**

Relationship with other Community instruments

156. Article 23 preserves the application of choice of law rules in specific Community instruments and also provides that the Regulation does not prejudice the application of specific Community measures. In its Explanatory Memorandum the Commission states that Article 23(2) refers to the specific principles of the internal market commonly known as the “mutual recognition” and “home-country control” principles.

Article 23—Relationship with other provisions of Community law

1. This Regulation shall not prejudice the application of provisions contained in the Treaties establishing the European Communities or in acts of the institutions of the European Communities which:

—in relation to particular matters, lay down choice of law rules relating to non-contractual obligations; or

—lay down rules which apply irrespective of the national law governing the non-contractual obligation in question by virtue of this Regulation; or

—prevent application of a provision or provisions of the law of the forum or of the law designated by this Regulation.

2. This regulation shall not prejudice the application of Community instruments which, in relation to particular matters and in areas coordinated by such instruments, subject the supply of services or goods to the laws of the Member State where the service-provider is established and, in the area coordinated, allow restrictions on freedom to provide services or goods originating in another Member State only in limited circumstances.

157. A number of witnesses pointed out the potential importance of Article 23 both as regards existing measures, such as the E-Commerce Directive, and other proposals currently under discussion. The CBI said: “The Directive on Unfair Commercial Practices contains an Internal Market clause (Article 4)

which provides for mutual recognition and country of origin principles. The same point arises in the existing E-Commerce directive. The CBI fully supports this approach, which will help to provide necessary legal certainty. It is an essential element of the UCP proposal and we would not wish to see it diluted in any way. Nor would we wish to see ambiguity caused to the operation of the E-Commerce directive, which we see as central to the creation of a single market” (p 97).

158. There is, however, some uncertainty surrounding the relationship between the Regulation and the E-Commerce Directive.⁵¹ The Directive adopts for the purpose of the regulation of electronic commerce a home State/country of origin rule—information society services should be supervised at the source of the activity. But it is unclear to what extent the E-Commerce Directive contains choice of law rules.⁵² On implementing the Directive the DTI commented that “the Directive as a whole does not make clear whether the role of private international law is retained or superseded”.⁵³
159. Professor Reed (Queen Mary College, London) expressed concern that the proposed Regulation, and in particular the principle of universality set out in Article 2, could have the effect of removing the protection given by the E-Commerce Directive⁵⁴ and raised the possibility that non-EU regulations could be enforced against EU-established on line information providers via civil actions. Where the choice of law rules provided by the Regulation would lead to the application of the law of a Member State, then the information provider would have the protection of the Directive which would have been implemented in that Member State. But if the Regulation led to the application of the law of a non EU country then the Directive would not apply except to the extent that it could be argued that the Directive (and the immunity given by Article 14) was a rule of *ordre public* to which the court might have regard pursuant to Article 22 of the Regulation. Professor Reed considered the prospect of success of such an argument to be uncertain (p 129).
160. As mentioned above we take the view that the Regulation cannot and should not have universal application. Limiting the scope of the Regulation should remove, or at least greatly diminish, the problem described by Professor Reed.
161. As to the precise extent and effect of the E-Commerce Directive, the Government’s judgement was that the present negotiations were not the place to raise the question. Mr Parker, for the Government, explained: “What we feel is that although there are undoubted difficulties with the true construction of the E-Commerce Directive, the broad assessment is that it would not be appropriate to re-open any aspect of the E-Commerce

⁵¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] OJ L 178/1. The Directive has been implemented in the United Kingdom by the Electronic Commerce (EC Directive) Regulations SI 2002/2013.

⁵² Article 1(4) states: “This Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts”. Recital 23 adds: “Provisions of the applicable law designated by rules of private international law must not restrict the freedom to provide information society services”.

⁵³ Department of Trade and Industry, A Guide for Business to the Electronic Commerce (EC Directive) Regulations 2003, July 2002, para 4.8.

⁵⁴ Under Articles 12-14 of the E-Commerce Directive, certain intermediaries, such as Internet Service Providers (ISPs), are given a wide immunity from liability claims.

Directive in these negotiations. They were difficult negotiations, they represented a delicate balance of interests, and the assessment is that it would be better to let the E-Commerce Directive settle down and in due course have its uncertainties resolved by judicial decision rather than re-opening it now” (Q 354).

162. On the more general question of the relationship between the Regulation and the Directive the Government believed that Article 23 was intended to safeguard the provisions of the E-Commerce Directive. They accepted that the wording of Article 23 might be improved to this end.⁵⁵ **We agree.**

Non-compensatory damages

163. Article 24, entitled Non-compensatory damages, is especially noteworthy. It would prevent a national court, in cases falling within the scope of the Regulation, awarding non-compensatory damages, such as exemplary or punitive damages. Article 24 would, where English law was the applicable law, appear to prevent the application of English rules on exemplary damages. Such damages are declared to be contrary to Community public policy.

Article 24—Non-compensatory damages

The application of a provision of the law designated by this Regulation which has the effect of causing non-compensatory damages, such as exemplary or punitive damages, to be awarded shall be contrary to Community public policy.

164. The first point to note is that Article 24 moves away from dealing simply with conflict of laws/choice of law rules, and addresses an aspect of the substantive law applicable in tortious and other actions. Article 24 would effect a harmonisation of part of the substantive law of damages. Drs Crawford and Carruthers described Article 24 as “a prime example of the phenomenon of creeping EU aggrandisement” (p 106). As mentioned above, **we do not believe that the Community has the *vires* to do this under Articles 61 and 65 of the EC Treaty.**
165. As drafted, Article 24 would, where English law was the applicable law, appear to prevent the application of English rules on exemplary damages as well as outlawing a range of other non-compensatory remedies. All this would be done in the name of “Community public policy”. A number of witnesses queried this term. Mr Briggs said: “I do not see what “Community public policy” is. Public policies are national, not Community, and it strikes me as very undesirable indeed that there should be any encouragement for a “Community public policy” to put down roots. If the Commission wants a special rule, let it make it in clear and precise terms, without any reference to public policy” (p 96).
166. The European Scrutiny Committee in the House of Commons asked the Government whether they considered it appropriate for Article 24 to provide for a Community public policy, when in private international law public policy has traditionally been a matter for States and, second, whether they were content with the general disapplication of normal rules providing for non-compensatory damages.

⁵⁵ See the amendment to Article 23(2) proposed by Professor Reed, at para 4.6.

167. Lord Filkin replied: “This provision inflexibly disapplies all rules providing for non-compensatory damage by reference to ‘Community public policy’. I am grateful to the Committee for raising this matter which I consider would be more appropriately dealt with under the general discretionary rule on the application of the public policy of the forum contained in Article 22. Under English law the issue of the non-compensatory nature of the damages to be awarded is regarded as a matter of substance, rather than procedure, which properly falls to be determined under the general choice of law rules. On this basis it should, like other aspects of the applicable law, be subject to Article 22. The equivalent provision in the Rome I (Article 16) is in the same terms and also refers to ‘the public policy of the forum’. The official report on Rome I by Professors Giuliano and Lagarde makes clear that this concept includes, but is not confined to, Community public policy.⁵⁶ I believe that the same result should in substance be reflected in the Regulation and accordingly that [the] instrument should not create either a rule of Community public policy or a rule which would inflexibly prohibit the award of non-compensatory damages”.⁵⁷
168. **We agree.** First, there are various circumstances where under English law exemplary or punitive damages are awarded; for example, where officials exceed their statutory powers when entering private premises deliberately, or where a newspaper deliberately publishes a false libel in order to boost circulation. These are two well-known cases, both rooted in domestic public policy. Article 24 would apparently outlaw such awards as being contrary to Community public policy. **We see no justification for prohibiting such damages in a case with international elements, whilst allowing the award of such damages in a purely domestic case.**
169. Second, the statement in the Commission’s Explanatory Memorandum that “Non-compensatory damages serve a punitive or deterrent function” is plainly wrong. The term could cover certain other well-established, and less controversial, types of relief. As Mr Virgo (Downing College, Cambridge) explained, for hundreds of years English law has recognised that where a defendant has profited from the commission of a wrong, one remedy which should be available is to transfer to the victim any benefit obtained by the wrongdoer. In some cases the profit gained might equate with the loss suffered by the claimant, but in other cases the gain might exceed that loss. The chief example of such a remedy is the account of profits, available whenever the defendant has committed an equitable wrong, such as a breach of fiduciary duty or breach of confidence. Similar remedies are also available where the defendant has committed a tort. Mr Virgo said that these remedies were not exemplary or punitive damages, but neither were they compensatory remedies. That they should be caught by Article 24 was, Mr Virgo said, “patently unacceptable”. Such remedies had an important function and were fundamentally different from exemplary and punitive damages. Mr Virgo saw no reason of policy why restitution and disgorgement remedies should not continue to be awarded (p 135). **We agree.**

⁵⁶ The commentary (the so-called Giuliano Lagarde Report) to Article 16 (“Ordre public”) of the Rome I Convention states: “Article 16 provides that it is the public policy of the forum which must be offended by the application of the specified law. It goes without saying that this expression includes Community public policy, which has become an integral part of the public policy (“*ordre public*”) of the Member States of the European Community”.

⁵⁷ House of Commons European Scrutiny Committee. Seventh Report of Session 2003-04. HC 42-vii.

170. The Commission has offered no explanation as to why it is unacceptable as a matter of Community public policy that the courts of the Member States should be able to make awards such as an account of profits or damages based on the gain that the wrongdoer has made out of his wrongdoing rather than on the loss that has been caused to the claimant. We doubt whether the Commission intends to outlaw such remedies. **Were Article 24 to remain, it should be made clear whether “non-compensatory damages” is restricted to “exemplary or punitive damages” and precisely to what sorts of “non-compensatory damages” it relates. But we think the Article to be objectionable in principle and unnecessary. It should go.**

CHAPTER 4: EUROPEAN PARLIAMENT'S PROPOSED AMENDMENTS

171. As mentioned above (paragraph 12) Diana Wallis MEP kindly let us have sight of the draft Report she has prepared for the European Parliament's Committee on Legal Affairs and the Internal Market. This is an important document, setting out draft amendments to the text of the Regulation, which will form the basis for deliberations of that Committee before the matter is referred for discussion and decision by the Parliament in plenary. While we have not had the opportunity to take evidence on the Report and are very conscious that its text may change as it is discussed in the Committee, we offer the following comments on what we consider to be the most important changes being put forward; namely—
- (i) deletion of all the special rules except Article 6 (Privacy and defamation) and Article 8 (Intellectual property);
 - (ii) revision of Article 3(2), to provide for the displacement of the basic rule in Article 3(1) where “the non-contractual obligation is manifestly more closely connected with another country”;
 - (iii) deletion of the rules in Article 9 dealing with non-contractual obligations other than tort or delict, reliance being placed on the basic rule in Article 3 and an amended Article 10.

Special rules

172. The Report proposes the deletion of all the special rules except Article 6 (Defamation and privacy) and Article 8 (Intellectual property). The deletion of Article 4 (Product liability), Article 5 (Unfair competition) and Article 7 (Violation of the environment) is welcome and accords with our own recommendations. Article 8, however, remains and is amended to bring it more closely into line with the Berne Convention. Article 8 would be the only true exception because, as we will explain below, the new Article 6 is only a variant of Article 3.

Article 3—the new displacement rule

173. The basic rule in Article 3(1) (place where the damage occurs) is retained, though amended to refer to the place where damage “occurs” rather than “arises”. Such amendment does not in our view remove the need for the Regulation to define “damage”, as we have recommended above (paragraph 100).
174. A new Article 3(2) would provide for the displacement of the basic rule in Article 3(1) where “the non-contractual obligation is manifestly more closely connected with another country”. There follows a list of factors which may be taken into account in determining whether an obligation has a manifestly closer connection with a country other than that where the damage occurs. The stated intention of this new approach is to provide flexibility and to enable the forum court to depart from the basic rule where the rule in Article 3(1) might be inappropriate.
175. In broad terms the approach is similar to that in the Private International Law (Miscellaneous Provisions) Act 1995. The principal difference is that the 1995 Act does not apply generally to non-contractual obligations but is

restricted to tort and delict. Whether the approach is suitable for all non-contractual obligations (excepting those arising from an infringement of intellectual property rights—Article 8) needs the most careful consideration. For the reasons given above (see paragraphs 136 to 137) we are not persuaded that the Regulation should extend beyond tort and delict. The Government appeared to share that view and will no doubt want to consult further and take expert advice as to the potential implications of extending Article 3 to all non-contractual obligations.

176. The list of “factors” set out in Article 3(2) is different and longer than its counterpart in the 1995 Act. It identifies some factors with precision, though some uncertainty remains. Most of the factors listed in Article 3(2) appear to be derived from the present text: factor (a), habitual residence of the parties, derives from Articles 3(2) and 9(2) of the Commission’s text; factor (b), pre-existing relationship, from Articles 3(3) and 9(1); factor (c), country where goods or services are marketed, in part from Article 4; and factor (e), place of unjust enrichment, from Article 9(3). Factors (d), (f) and (g) are new. The significance of (d), existing contract of insurance, is unclear. So is its relationship with Article 14 (Direct action against insurer), where the law governing the contract is relegated into a secondary position. No explanation is given as to what relationship there is, if any, between factor (e) expectations of the parties and Article 10 (Freedom of choice). Exactly what sort of issue factor (g), “the need for certainty and uniformity”, is intended to address is also unclear, the lack of clarity being unfortunate bearing in mind that the essential purpose of the Regulation is to provide certainty and uniformity by the designation of common rules. Finally, it should be noted, first, that the list is not exhaustive and, second, that the draft does not rule out the possibility that more than one factor may be relevant in a particular case.
177. The new approach may be less friendly to the victim than the Commission’s text. It may also encourage litigation for although the proposal has the benefit of flexibility it has little to commend it in terms of certainty and predictability. Where the Commission gives the victim a choice, for example, as regards product liability claims (Article 4) the new approach requires the forum court to decide, no doubt having heard the arguments of the parties. The burden will lie on the party, whether claimant or defendant, wishing to displace the basic rule in Article 3(1) to show that another law would in the particular circumstances be “manifestly more closely connected” with the non-contractual obligation in question.

Article 6—defamation

178. The Draft Report proposes that Article 6 be amended so that law applicable to violations of privacy or of rights relating to the personality should be determined in accordance with the rules in Article 3 or, where it is clear from all the circumstances that the non-contractual obligation is more closely connected with another country, the law of that other country. It proposes that “a manifestly closer connection” may be deemed to exist with the country of publication or broadcast having regard to factors such as the number of sales per Member State as a proportion of total sales, audience figures, language of publication and the audience to which the publication is principally directed”.

179. Article 6 would thus be recast as a variant of the amended Article 3. The basic rule remains, as in Article 3, that the law of the place where the damage occurs will govern. The burden would be on the defendant publisher or broadcaster to displace the basic rule. We note that the new draft uses the words “*may be deemed*” (emphasis added). The publisher, if it wishes to displace the place of damage rule, will have to produce evidence identifying the “country of publication” (apparently to be determined by sales/audience figures) and then seek to persuade the forum court that that country’s law was “more closely connected” with the obligation in question.
180. This is not a country of origin rule—defined by reference to the place where the editorial control over publication is exercised. Nor would the new rule necessarily lead to the same result as the E-Commerce Directive (that is the home State). Indeed, though there are rules in the Regulation aimed at safeguarding the provisions of the Directive (Article 23), the reference to the Internet in the proposed amendment to Article 6 may cast doubt on the effects of the Directive.
181. The draft claims that the new rule will “make for more legal certainty for publishers and result in a straightforward rule applying to all publications”. But whether it is better than the existing rule is [certainly] debatable. One uncertainty (what are “fundamental rules” of the law of the forum?) has been replaced by another. We wonder how easily and often a court would be prepared to depart from the basic rule in Article 3. The possibility of alternative governing laws will inevitably open up the possibility for legal argument.

Other non-contractual obligations

182. The draft Report’s approach to Article 9 is quite radical. Whether given the diversity and complexity of the issues involved it is appropriate to roll all non-contractual obligations into Article 3 requires the most thorough and careful consideration. Some assistance in the choice of law decision may be given by the listed factors, particularly factors (a), (b) and (e). We invite the Government to consult experts and other interested parties.

Conclusion

183. The Rapporteur’s text is an innovative approach which demands closer consideration than we have been able to give it—we did not receive the document until we had finished taking evidence on the Commission’s text. We are concerned, however, that in the attempt to be both comprehensive and flexible greater uncertainty may be created. We remain to be convinced that there is a problem to which Rome II is the solution.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

184. The Regulation raises a serious question of *vires*. The Commission has not shown a convincing case of “necessity” within the meaning of Article 65 TEC. Further, on any construction of Articles 61 and 65 of the EC Treaty there must be the most serious doubts that the proposal can have universal application and can be used to harmonise substantive rules of damages (Articles 2 and 24 respectively). We urge both the Council and the Parliament to give the most careful consideration to the issue (paragraph 72).
185. There is no evidence of which we are aware that there are such problems in the application of the Member States’ conflicts rules in this area as require the introduction of a Community measure. The justification provided by the Commission in its Explanatory Memorandum is unconvincing and fails to pay due regard to the views of industry, commerce, the media and legal practitioners. We invite the Council and the Parliament to look critically at the question whether there is a real practical need for the Regulation (paragraph 76).
186. There has been a failure on the part of the Commission adequately to comply with the Protocol on Subsidiarity and Proportionality (paragraph 78).
187. The Commission’s proposal would not meet the standards now set in the Inter-Institutional Agreement on Better Regulation. We invite the European Parliament to call on the Commission to produce a justification of the legal basis as well as an account of its 2002 consultation (paragraph 79).
188. We do not find the Government’s reasons for having opted in compelling. We have some doubts whether Ministers at the time of opting in fully understood the implications of the Protocol for measures adopted by qualified majority voting (paragraph 81).
189. Consideration needs to be given to whether the exclusion of auditors’ liability in Article 1(2)(d) should be limited, perhaps to auditors’ liability to the company and its members (paragraph 85).
190. The nature and extent of the exclusion in Article 1(2)(e) (trusts) needs to be clarified (paragraph 86).
191. Article 2 (Universal application) should be deleted. The scope of the Regulation would then need to be defined. It will be necessary therefore to identify the factors which would connect a case to the Community and, in order to bring the regulation within the scope of Article 65 TEC, the factors that relate to the functioning of the internal market (paragraphs 93 and 94).
192. Article 3 should define what is meant by “damage” and make clear the distinction between “damage” and “indirect consequential damage” (paragraph 100).
193. There should be as few special rules as possible (paragraph 102).
194. We do not believe that a case has been made for a special rule on product liability (Article 4). If additional consumer protection is needed (and we do not rule that out) then that is a matter to be addressed in the context of the Product Liability Directive (paragraph 106).

195. Article 5 (Unfair competition) appears to be unnecessary. The retention of Article 5 is almost certain to give rise to unnecessary problems of classification (paragraph 109).
196. It would be preferable for Article 6 (Defamation and privacy) to prescribe a country of origin rule (paragraph 130).
197. Article 7 should be deleted. If Article 7 is to remain it should make clear, possibly by reference to the Environmental Liability Directive, to what environmental damage/violations it relates (paragraph 134).
198. We invite the Government to give further consideration to Article 8 (Intellectual property) and in particular to consider whether in the light of the views of our witnesses intellectual property rights should be excluded from the scope of Rome II (paragraph 137).
199. Article 9 (Non-contractual obligations other than tort or delict) should be deleted. If it remains its scope must be more clearly defined (paragraph 144).
200. We invite the Government to consider the desirability of the inclusion of Article 12(1) (Mandatory rules) and, if it remains, whether the Regulation should contain express provision for Member States to derogate from Article 12(1) (paragraph 146).
201. We are not persuaded that the Regulation needs to make provision for direct actions against insurers (Article 14). Certainly the matter requires further consideration, including consultation with the insurance industry (paragraph 150).
202. Some redrafting of Article 23 (Relationship with other provisions of Community law) may be necessary to safeguard the E-Commerce Directive (paragraph 162).
203. Article 24 is *ultra vires* Articles 61 and 65 TEC. Were Article 24 to remain, it should be made clear whether “non-compensatory damages” is restricted to “exemplary or punitive damages” and precisely to what sorts of “non-compensatory damages” it relates (paragraphs 164 and 170).

Recommendation to the House

204. The Committee considers that the Rome II Regulation raises important questions to which the attention of the House should be drawn and makes this Report to the House for information.

APPENDIX 1: SUB-COMMITTEE E (LAW AND INSTITUTIONS)

The members of the Sub-Committee which conducted this inquiry were:

Lord Brennan

Lord Clinton-Davis

Lord Denham

Lord Grabiner

Lord Henley

Lord Mayhew of Twysden

Lord Neill of Bladen

Lord Scott of Foscote (Chairman)

Baroness Thomas of Walliswood

Lord Thomson of Monifieth

APPENDIX 2: LIST OF WITNESSES

The following witnesses gave evidence. Those marked * gave oral evidence.

The AIRE Centre, JUSTICE and REDRESS

ARTICLE 19 (Global Campaign for Free Expression)

The Association of British Insurers (ABI)

* Professor Paul Beaumont, University of Aberdeen

* Mr William Blair QC, the Commercial Bar Association (COMBAR)

* Mr Alastair Brett, Times Newspapers Limited

Adrian Briggs, St Edmund Hall, Oxford

CBI

The City of London Law Society

* The Hon Mr Justice Lawrence Collins LLD FBA (Sir Lawrence Collins)

Dr E B Crawford and Dr J M Carruthers, School of Law,
University of Glasgow

* Mr Glenn Del Medico, BBC

* Mr Andrew Dickinson, Solicitor and consultant to Clifford Chance

Richard Fentiman, Reader in Private International Law,
University of Cambridge

* Lord Filkin CBE, Parliamentary Under-Secretary of State,
Department for Constitutional Affairs

* Ms Claudia Hahn, The European Commission

* Ms Clare Hoban, Periodical Publishers Association

The Law Society

The Law Society of Scotland

Media Law Resource Center (The “MLRC”)

* Ms Louise Miller, Head of Private International Law Branch,
Scottish Executive Justice Department

Professor Robin (CGJ) Morse, School of Law, King’s College London

* Sir Peter North CBE QC DCL FBA, Principal of Jesus College, Oxford

* Mr Oliver Parker, Legal Adviser on Private International Law Matters,
Department for Constitutional Affairs

* Ms Santha Rasaiah, The Newspaper Society

Professor Chris Reed, University of London

REUTERS

* Mr Mario Tenreiro, The European Commission

Trade Marks Patents and Designs Federation (TMPDF)

Graham Virgo, Reader in English Law at the University of Cambridge

APPENDIX 3: RELEVANT REPORTS FROM THE SELECT COMMITTEE AND SESSION 2002-03 REPORTS PREPARED BY SUB-COMMITTEE E

Relevant Reports from the Select Committee

Review of Scrutiny of European Legislation (1st Report session 2002-03, HL Paper 15)

The Draft Constitutional Treaty (41st Report session 2002-03, HL Paper 169)

Annual Report 2003 (44th Report session 2002-03, HL Paper 19)

Correspondence with Ministers (49th Report session 2002-03, HL Paper 196)

The Commission's Annual Work Programme (50th Report session 2002-03, HL Paper 200)

The Future Role of the European Court of Justice (6th Report session 2003-04, HL Paper 47)

Session 2002-2003 Reports prepared by Sub-Committee E

The Future Status of the EU Charter of Fundamental Rights (6th Report, HL Paper 48)

The Future of Europe: Constitutional Treaty—Draft Articles 1–16 (9th Report, HL Paper 61)

The Future of Europe: Constitutional Treaty—Draft Articles 24-33 (12th Report, HL Paper 71)

The Future of Europe: Constitutional Treaty—Draft Article 31 and Draft Articles from Part 2 (Freedom, Security and Justice) (16th Report, HL Paper 81)

The Future of Europe: Constitutional Treaty—Draft Articles 43–46 (Union Membership) and General and Final Provisions (18th Report, HL Paper 93)

The Future of Europe: Constitutional Treaty—Articles 33–37 (The Democratic Life of the Union) (22nd Report, HL Paper 106)

If At First You Don't Succeed ... Takeover Bids Again (28th Report, HL Paper 128)

Reforming Comitology (31st Report, HL Paper 135)

The Proposed Framework Decision on Racism and Xenophobia—an Update (32nd Report, HL Paper 136)

EU/US Agreements on Extradition and Mutual Legal Assistance (38th Report, HL Paper 153)

Evidence by Lord Filkin CBE on the Proposed Council Directive Defining Refugee Status and Those In Need of International Protection (43rd Report, HL Paper 173)