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REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

on the application of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II Regulation)

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1.1 Scope of Rome II (Chapter I)

The **material scope of Rome II** covers non-contractual obligations that have arisen or are likely to arise in cross-border civil and commercial matters (Art. 1(1) and 2(1) Rome II). As an autonomous notion of EU law, the concept of 'non-contractual obligations' should be construed independently of definitions in national laws. As confirmed in *ERGO*[1], its interpretation needs to take into account the aim of consistency between the application of the Rome II and Rome I Regulations[2] as well as with the Brussels Ia Regulation. In addition to *ERGO* and subsequent case-law on Rome II[3], further clarifications as to the interpretation of the notion of 'matters relating to tort, delict or quasi-delict' can be found in the extensive case law on the Brussels Ia Regulation.

Overall, most stakeholders consulted in the context of the 2021 Study considered that Art. 1, 2 and 3 of Rome II work well. Nevertheless, the 2021 Study gives an account of specific areas where case law does not exist yet and where uncertainty about the characterization of specific claims as contractual or non-contractual has been raised in the doctrine[4]. In addition, the 2021 Study also reported that the interpretation of certain exclusions from scope remains to be clarified[5].

MS likewise reported that they were mostly not aware of application problems in relation to Art. 1, 2 and 3 of Rome II. Two MS pointed out that it is unclear whether other non-contractual and non-tort cases, which are not specifically included in Chapter III of Rome II (such as public promise or promise of indemnity), are excluded from Rome II. As regards exclusions from scope, a couple of MS indicated residual uncertainties as to the application of Rome II to prospectus liability and questioned the delimitation of Art. 1(2)(d) in specific cases[6]. Nevertheless, it was argued that these uncertainties should be resolved by case law.

Hence, the application of Chapter I of Rome II is generally unproblematic.

Nevertheless, as elaborated in the main report, the existence of the exclusion from the scope for 'non-contractual obligations arising out of violations of privacy and rights relating to

[1] See Section 4 on case law.
[2] The term 'non-contractual' in Rome II has been defined negatively and it encompasses damage claims that cannot be classified as 'contractual' (*i.e.* situations in which in essence there is an obligation freely assumed by one party towards another).
[3] *Verein für Konsumenteninformation*; *BMA Nederland*, etc. See Section 4.
[4] This includes the classification of: (i) an offering or announcement of a promotional prize; (ii) liability of an expert for an opinion vis-a-vis persons who have not themselves concluded a contract with the expert; (iii) protective effects of a contract in favour of third parties; (iv) claims under property law; or (v) claims for refunds based on an act of specific public power, e.g. in cases where the state takes responsibility for remedying environmental damage but imposes the cost of doing so on a private party.
[5] This applies specifically to letters (c) and (d) of Article 1(2).
[6] For instance, whether the lit.(d) applies to the liability of officers and members of a company in situations, such as the damage caused by a misuse of the company form leading to a piercing of the corporate veil. Similar concerns had also been raised in the 2021 Study.

personality, including defamation' has been subject to consistent criticism from various sources.

1.2 Non-contractual obligations arising out of tort or delict (Chapter II)

1.2.1. General rule (Art. 4)

On Art. 4(1) of Rome II and the issue of indirect victims, some questions were resolved by the CJEU in *Lazar*[7], which held that, where family members of the victim of a road accident had not themselves been present at the scene of the accident, the country of damage in respect of their own claim as indirect victims (e.g. for immaterial damage due to the death of a close relative) is the country where the accident took place, not that in which those family members were themselves resident.

Opinion is divided on whether Art. 4(2) of Rome II (law of joint habitual residence of the person claimed to be liable and the person sustaining damage) can be applied in the case of multi-party torts in which only some of the victims are habitually resident in the same country as some of the persons claimed to be liable. Some MS in the 2023 Questionnaire took the view that this provision was perfectly capable of being applied without any problems, other MS opined that it should be applied only if all parties were habitually resident in the same country and two MS opted for an intermediate position that would apply the provision even in cases in which not all parties had the same habitual residence, with any resulting anomalies being corrected by resort to the displacement clause in Art. 4(3) of Rome II.

Finally, difficulties were reported with applying Art. 4 to financial market torts and determining the place of damage in these cases. This is further elaborated in the main report.

1.2.2. Other torts and delicts (Art. 5 to 9)

- On **product liability** (Art. 5), the issues identified by the 2021 Study were marginal and largely academic[8]. Views diverge on how to interpret the term 'product' in Art. 5(1), first sub-paragraph, especially when a comparison is made with the language of the second sub-paragraph, where reference is made to the 'the product, or a product of the same type'. The question is whether the term 'product' in the first sub-paragraph also refers to (i) a product, which is not the very same item as the defective product in question but belongs to the same issue or series of the manufacturer and shows therefore only minor differences (e.g. in marking or packaging); or (ii) any product of the same type.

- On **unfair competition** (Art. 6), the CJEU clarified in *VKI v Amazon* that 'unfair competition' covers the use of unfair terms inserted into general terms and conditions. In addition, the 'country in which the collective interests of consumers are affected' is the country of residence of the consumers to whom the undertaking directs its activities and whose interests are defended by the relevant consumer protection association by means of the action in question. The scope of Art. 6(3) of Rome II (acts restricting free

[7] See Section 4.

[8] One debate regarded which law applies if none of the conditions of Art. 5(1) sentence 1 lit. (a), (b) or (c) of Rome II are met.

competition) raised some limited academic discussion in three MS as reported in the 2021 Study[9].

- On **environmental damage** (Art. 7), the 2021 Study noted that Art. 7 of Rome II has not caused major problems and the areas of uncertainty identified are mostly academic, including (i) the interaction of Art. 7 with Art. 17 and the effect of foreign authorisations on the liability of the polluter[10], (ii) its analogous application where the country where the harmful event occurred and the one of the event giving rise to the damage apply conflicting conditions for environmental permits, (iii) the determination of the place of the decision causing the environmental damage and (iv) the notion of environmental damage in cases of corporate abuses against human rights.

- As concerns non-contractual obligations arising out of an **infringement of intellectual property ('IP') rights** (Art. 8), Rome II provides for the application of the law of the country for which protection is claimed (*lex loci protectionis*). Since IP infringements often have a cross-border dimension and high financial value, this provision is applied rather frequently. This remains true even though numerous international conventions[11] and specialised EU regulations[12] exist in the area of IP rights and prevail over Rome II for those aspects that are regulated in these instruments.

  Generally speaking, the rules in Art. 8 and 13 of Rome II are considered suitable. Nevertheless, several specific concerns have been raised.

  For instance, it was reported that the application of the *lex loci protectionis* rule was complicated in cases where IP infringement happens simultaneously in several countries, especially in case of IP infringements on the Internet. Content placed on the Internet can usually be accessed from any country and may thus possibly infringe IP law in any country. A simultaneous application of all those national laws may in turn be necessary in a single proceeding. This issue seems to be particularly pertinent with respect to copyright, since copyright does not require prior registration to receive protection in most countries. This 'mosaic' approach of Rome II to the determination of the applicable law follows from the territorial nature of IP rights. Nevertheless, having to apply numerous national laws in a single procedure was flagged as

[9] RO and BE doctrine questioned whether the 'mosaic approach' should be adopted when markets of multiple countries are affected by unfair market practices. SI doctrine questioned whether Art. 6(3) applies to all acts restricting free competition or if Recital 23 of Rome II restricts its application to acts prohibited in the Treaty on the Functioning of the EU. See the 2021 Study.

[10] One MS in the 2023 Questionnaire argued that a choice of law in favour of the law of a country where the damage occurred should not prevent a court seised in the place where the event giving rise to the damage occurred to take into account the rules of safety and conduct of its own legal system (esp. in cases where the chosen national law does not prohibit certain potentially dangerous environmental activities).

[11] In particular the Berne and Paris Conventions. A debate exists nevertheless as to the extent to which these conventions include rules which would prevail over the rules on applicable law in Rome II.

[12] For instance, the European Trademark Regulation (Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, OJ L 154, 16.6.2017, p. 1–99) or the Community Design Regulation (Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, OJ L 3, 5.1.2002, p. 1–24).

problematic both in the 2021 Study[13], by several MS and in the context of a study commissioned by the European Parliament[14], especially as concerns copyright. Against this background, adjustments were suggested by several experts to the general *lex loci protectionis* rule with a view to address the specificity of ubiquitous infringement of copyright on the internet[15],[16]. In this regard, doctrine in some MS also questioned whether it should be possible to choose the law applicable to IP infringements (esp. in cases of online infringement), contrary to the current rule in Art. 8(3) Rome II[17].

In addition, several other minor application difficulties were reported which could possibly be sufficiently addressed by additional text in a recital. First, uncertainty seems to remain as to what rights are covered under 'IP rights', despite the non-exhaustive list in recital 26. It was suggested to further clarify whether for instance geographical indications and protected designations or origin, trade secrets and undisclosed knowhow are covered. Second, an issue of some uncertainty has been raised on the demarcation between Art. 6 on unfair competition and acts restricting free competition and Art. 8 (e.g. cases involving comparative advertising, a company's reputation, trade secrets, 'slavish imitations', or a practice of invoking non-existing IP rights to weaken the competitor). Third, differences of views exist concerning the law applicable to IP-related questions such as ownership or the existence and reach of an IP right. Some consider that Rome II should apply to these aspects, while others argue that these are preliminary questions that are assessed under international conventions, national conflict-of-laws rules or Rome I Regulation[18].

Finally, as concerns Art. 8(2) of Rome II it seems that the *Nintendo* and *Acacia* CJEU case law[19] have usefully clarified the application of Rome II to unitary community IP rights.

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[13] P. 36.

[14] Study on Cross-border Enforcement of Intellectual Property Rights in the EU. 2021, p. 57, 58.

[15] See e.g. the CLIP Principles proposing an applicable law rule for ubiquitous infringements of IP rights, which would be based on the closest connection with the infringement.

[16] See e.g. p. 241, 242 of the 2021 Study for references to solutions on how the application of virtually all laws of the world can be avoided in cases of IP infringements on the Internet, and for the academic debate whether the principle of universality (according to which the law of the first publication or nationality of the author governs the protection of the work world-wide) should be favoured as opposed to the principle of territoriality (under which copyright protection depends on the country in which protection is sought).

[17] See e.g. p. 154 of the 2021 Study.

[18] See Section 4, *WEAREONE.WORLD*, pending.

[19] See Section 4 for details.
Nintendo concerned those aspects of unitary community IP rights that are not governed by EU IP regulations. The CJEU ruled that Rome II can apply to determine the national law applicable to those aspects. In those cases, the 'country in which the act of infringement was committed' referred to in Art. 8(2) of Rome II is the country where the event giving rise to the damage occurred, and not the countries where the damage occurred. In cases where an entity supposedly carries out various acts of infringement in various Member States, the 'event giving rise to the damage' must not be interpreted by reference to each alleged act of infringement but should instead be determined by making an overall assessment of the defendant's conduct.
In contrast, as the CJEU ruled in *Acacia*, where the court is seised to rule on the infringement of the unitary IP right only within the territory of its MS, Art. 8(2) Rome II can be interpreted as the law of the MS where the court is located.
However, one MS pointed out in the 2023 Questionnaire that the precise interpretation of Art. 8(2) Rome II is not yet settled in the judicial practice and another MS reported that the overall assessment of defendant's conduct (as

- On **industrial action** (Art.9), the 2021 Study reported only a potential need to clarify whether Art. 9 applies to third persons not directly connected to the strike and what is to be considered '*the country where the action is to be, or has been, taken*' if the action occurs in a virtual place.

In conclusion, while on the application of the provisions on product liability or industrial action there are no significant issues, for other torts, such as unfair competition, environmental damage, or IP infringements some issues have been raised.

1.3 Unjust enrichment, *negotiorum gestio*, *culpa in contrahendo* (Chapter III)

There is general agreement that the provisions of Chapter III of Rome II work well and no significant issues were brought up concerning their practical application. The consensus is that any outstanding questions can be clarified by case law.

1.4 Freedom of choice (Chapter IV)

There has been little recourse to the possibility offered by Rome II to choose the applicable law before or after the non-contractual obligation has arisen. Exceptions to this principle exist where there was a pre-existing contract in which the parties had chosen also to regulate the law applicable among others to non-contractual obligations arising out of the performance of the contract. Furthermore, in MS in which a court will not apply a foreign law unless that is pleaded by one of the parties, the parties may effectively make such an agreement by simply not invoking a foreign law.

1.5 Common rules (Chapter V)

No problems were reported by any MS on Article 15 (scope). By contrast, the 2021 Study indicated some issues with determining the extent to which that article applies to the powers of the courts to assess damages, in particular in personal injury cases in which damages payable under the applicable law might be at variance with those payable according to the law of the country in which the victim is resident and in which he may require care. This would be particularly problematic where for example the country of injury is a low-cost country which applies fixed tariffs for particular types of injury.

On Article 16, overriding mandatory provisions (OMPs) no MS identified a problem. Several referred to *Da Silva Martins* in which the CJEU defined the concept narrowly. As one MS pointed out, it is perfectly clear that Article 16 only permits OMPs of the forum to be applied. This is corroborated by the legislative history of Rome II in that the Commission had proposed to allow OMPs of countries other than the forum to be applied in limited circumstances, but this suggestion was deleted in the course of the legislative process. Nevertheless, the 2021 Study indicated that some stakeholders disputed this proposition and, in addition, advocated that a definition of OMPs be inserted in Rome II, as is the case with the Rome I Regulation.

necessary under the *Nintendo* case law for determining the country in which the act of infringement was committed) may prove difficult.

On Article 18 (direct action against insurers) most MS indicated that there were no problems of application except possibly better coordination with Section 3 of Chapter II of the Brussels Ia Regulation which governs jurisdiction in matters relating to insurance.

In conclusion, no major issues were identified in relation to this chapter.

1.6 Other provisions and final provisions (Chapters VI and VII)

On the issue of coordination between Rome II and closely related instruments such as the Rome I and Brussels Ia Regulations, most MS indicated that there was no major problem. However, some were of the view that it was inconvenient to have the choice of law regime for obligations in two separate instruments – Rome I and Rome II[20].

Some MS indicated that there was a lack of clarity as to the relationship between Rome II and the e-Commerce Directive. This point is corroborated by the 2021 Study which indicates that in certain MS there is a dispute as to whether that Directive contains a hidden conflict rule although the CJEU confirmed that in *eDate/Martinez* that this is not the case. Nevertheless, the prohibition on restriction to the freedom to provide information society services, pursuant to Recital 23 of the e-Commerce Directive, may have an impact on the application of the substantive law designated by the conflict of law rules of the forum.

2. TRAFFIC ACCIDENTS AND ROME II

Increasing cross-border traffic and transport lead to growing numbers of traffic accidents that have an international element. The scope of Rome II includes the law applicable to non-contractual obligations arising out of traffic accidents with an international element and this is arguably the practically most relevant area of the application of its rules. The harmonisation of the conflict-of-law rules for torts related to traffic accidents thus considerably increases legal certainty (not only) for the victims of traffic accidents.

Nevertheless, specific concerns have arisen in this area – first, the interaction of Rome II with the 1971 HCCH Convention; second, the problems arising from the differences in Member States' laws concerning the compensation for traffic accidents, in particular the different levels of compensation and the different rules on limitation periods. It should nevertheless be noted that the problems related to differences in Member States' laws stem from the lack of harmonisation of the substantive and procedural rules in the area rather than from the Rome II and its conflict-of-laws regime.

2.1 The interaction of Rome II with the 1971 HCCH Convention

Article 28(1) of Rome II allows the Member States which are parties to the 1971 HCCH Convention on the law applicable to traffic accidents[21] to continue to apply that instrument[22]. Consequently, there are two conflict of laws regimes in place for claims arising from cross-

[20] It was argued that merging Rome I and Rome II into one legislation dealing with applicable law to both contractual and non-contractual obligations would facilitate the application of the rules.

[21] Convention of the Hague Conference on Private International Law of 4 May 1971 on the Law Applicable to Traffic Accidents.

[22] 13 Member States (AT, BE, HR, CZ, FR, LV, LT, LU, NL, PL, SK, SI, ES) are Contracting Parties to the 1971 HCCH Convention.

border traffic accidents. This dualism compromises the objective of Rome II of creating certainty as to the law applicable.

For instance, while both Rome II and the 1971 HCCH Convention contain the same general rule for determining the applicable law – the law of the country where the accident occurred – they diverge when it comes to the exceptions to the general rule. In this respect, Art. 4(2) of Rome II provides that where both the person claimed to be liable and the victim have their habitual residence in the same country, the law of that country shall apply. By contrast, the 1971 HCCH Convention, provides for the application of the law of the country of registration of the vehicle or vehicles involved in some cases. Where several vehicles are involved in the accident, the law of the state of registration only applies if all vehicles are registered in the same country. Rome II and the 1971 HCCH Convention also diverge when it comes to party autonomy: Art. 14 of Rome II allows the parties to an accident to choose the applicable law, whereas the 1971 HCCH Convention does not have a comparable provision.

The very existence of the Convention undermines legal certainty and predictability and may lead to forum shopping[23]. Given that the law on compensation for damages differs considerably within the EU, the question which law applies to a claim resulting from a cross-border traffic accident may have significant impact on the outcome of a case. As a result, the law applicable to claims arising out of the traffic accident will in certain – albeit limited numbers of – cases differ, depending on the court seised of the case.

The present situation has been seen as undesirable both in the 2021 Study[24], in academic literature, by Member States[25] and by the European Parliament[26]. Nevertheless, already during the negotiations of Rome II, it proved difficult to find a suitable solution to this situation. It did not seem feasible to require either those Member States that are parties to the 1971 HCCH Convention to denounce the Convention or those which are not parties to the Convention to accede to it, particularly because its rules are generally perceived as less modern and efficient than those of Rome II. Remaining options suggested by both practitioners and national experts consulted in the 2021 Study could consist e.g. in amending the provision to include specific guidance on the interplay between Rome II and other international instruments (in particular

[23] It was pointed out in the 2021 Study and by Member States in the 2023 Questionnaire that Member States' courts frequently fail to apply the 1971 HCCH Convention – for instance since they overlook its existence or its precedence over Rome II, or since they assume that it only applies if there is no connection to a Member States other than the forum, or since Rome II includes a relevant rule, while the Convention does not (such as on overriding mandatory provisions or subrogation).

[24] 40% of the respondents from Contracting Parties to the 1971 HCCH Convention answered that issues emerged from the interplay between Rome II and the Convention, in particular that the applicability of the 1971 HCCH Convention is sometimes overlooked.

[25] In the 2023 Questionnaire, some MS mentioned practical issues with the application of the two different rules on the law applicable to non-contractual claims arising out of traffic accidents. One MS suggested that a possible solution could be to revise Article 28 of Rome II to the effect that the Member States that are parties to the 1971 HCCH Convention apply it only where the non-contractual legal relationship arising from a traffic accident involves non-EU Member States that are party to the Convention. In other cases, Rome II would apply.

[26] European Parliament resolution 2015/2087(INL) of 4 July 2017 with recommendations to the Commission on limitation periods for traffic accidents noted that the continued existence in the EU of two parallel regimes governing the law applicable in traffic accident cases depending on the country where the claim is brought, namely either the 1971 HCCH Convention or Rome II, which combined with the choice of forum possibilities under the Brussels Ia Regulationhttps://www.europarl.europa.eu/doceo/document/TA-8-2017-0281_EN.html, creates legal uncertainty and complexity as well as potential opportunities for forum shopping.

the relevant Hague Conventions), with explicit referral to the instruments in question. Another option could consist in pursuing a revision of the 1971 HCCH Convention in the context of the Hague Conference on Private International Law.

2.2 Differences in Member States' laws on limitation periods for claims arising from traffic accidents

Claims for compensation for victims of traffic accidents – as all other civil claims – can be pursued within time limits prescribed by the national laws of Member States. In cross-border cases, in accordance with Articles 4 and 15(h) of Rome II, the applicable time-limits for bringing a claim are determined, in principle, by the law of the State where the accident occurred[27]. This rule has increased legal certainty. However, national substantive laws on limitation periods differ[28]. These differences may give rise to undesirable consequences for the victims of accidents in cross-border litigation and create obstacles for injured individuals trying to assert their rights in a Member State other than their own, particularly if the applicable law is less favourable than the law of their Member State.

The problems created by the divergence of national limitation and prescription periods for victims of cross-border road traffic accidents were highlighted in 2007 and 2017 **resolutions of the European Parliament**[29].

A study launched by the Commission in 2008 ('Study on road traffic accidents'), presented in more detail in Section 2, described the state of play at the time and developed certain policy options for improving the situation.

On the basis of this study, **public consultations** were carried out by the Commission in 2009 and **2012**. In general, the answers received usually reflected the interests of the respondents. Member States and the representatives of the insurance industry perceived the practical occurrence of cross-border traffic accident cases which failed due to the expiration of the limitation period as minimal or hardly measurable and hence saw no real pressure to act. They held that in most cases victims acted promptly (in due time). By contrast, organisations protecting the interests of victims (like road safety associations, bars which include personal injury lawyers as members) regarded the divergences in the national limitation and prescription periods for victims of road traffic accidents as significant and provided examples where differences between national limitation periods left victims uncompensated.

There was general agreement that it would be helpful to improve the provision of information on the current legal situation. Therefore, the Commission has made available country fiches describing the national limitation periods for each Member State on the e-Justice Portal. The

[27] Article 15(h) Rome II provides that the law applicable to non-contractual obligations shall govern *the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation*.

[28] The laws on limitation periods differ e.g. as concerns the length of the period, events or circumstances determining when it starts to run, circumstances resulting in the interruption or suspension of running of limitation periods, courts' discretion to extend them.

[29] Resolution of the European Parliament 2006/2014(INI) of 1 February 2007 with recommendations for the Commission on limitation periods in cross-border disputes involving injuries and fatal accidents; and Resolution of the European Parliament 2015/2087(INL) of 4 July 2017 with recommendations to the Commission on limitation periods for traffic accidents, accompanied by 2016 European Added Value Assessment report on Limitation periods for road traffic accidents.

country fiches are developed and regularly updated through the European Judicial Network in Civil and Commercial Matters. They are an important step to improve the situation through enhanced information. They can contribute significantly to avoiding undesirable consequences for the victims of accidents in cross-border cases, which may be caused by the differences between national substantive laws on limitation and prescription periods.

Finally, it must be borne in mind that limitation periods for traffic accident cases cannot be seen in isolation. They are part of the more general law on limitation and prescription which is embedded in the civil and procedural law of the national legal systems[30].

2.3 Differences in levels of compensation for claims arising from traffic accidents in the EU

Already the Study on road traffic accidents provided detailed account of the important differences in national laws as regards compensation levels for victims of traffic accidents, leading to significantly different calculations of compensation for damages caused to victims. This may lead to a victim of a road traffic accident being undercompensated where the law of the place of the accident (applicable by virtue of Art. 4(1) of Rome II) has rigid rules[31] on the upper level of awardable damages (for example loss of earnings, conversion of a dwelling for a victim who has become paraplegic or provision of long term care) that may be adequate for victims resident in that country but insufficient for victims resident in a higher cost country.[32] This point is acknowledged in Recital 33 of Rome II which states that, in such a situation, the court seised should take into account all the relevant circumstances of the victim, including the actual losses and costs of after-care and medical attention. However, this recital cannot be interpreted to override the wording of Art. 4(1) where there is a conflict.

3. APPLICATION OF FOREIGN LAW

3.1 Origin of the issue

The issue of the application of foreign law is of horizontal nature as it arises with respect to all EU private international instruments including rules on applicable law. It is thus not specific to Rome II. Nevertheless, the issue of applying foreign law was raised during the negotiations of Rome II as this Regulation was the first EU instrument that included rules of applicable law.

As a result, the Rome II Regulation included an obligation that the European Commission conducts a study '*on the effects of the way in which foreign law is treated in the different jurisdictions and on the extent to which courts of the Member States apply foreign law in practice pursuant to this Regulation'*. As a result, the Commission published a **Study on the application of foreign law** in 2011. This study is summarised in Section 2.

[30] As there is usually no distinct rule on limitation period for traffic accidents in Member States' legal systems but rather a general rule on limitation for all torts, harmonising only those limitations for traffic accidents could be unsystematic.

[31] Approaches in judicial practice differ where the *lex causae* merely contains guidelines. Compare *Wall v Mutuelle de Poitiers Assurances 2014 EWCA Civ 138* (Guidelines sent to judges in France on damages should at least be taken into account where the *lex causae* is French) with *Kelly v Groupama 2012 IEHC 177* (holding that the same guidelines are merely practice and should thus be discounted since practice is a matter for the *lex fori*).

[32] See for example *Scales v Motor Insurer's Bureau [2020] EWHC 1747* in which the judge applied Spanish law, which contained fixed rules on quantum, despite conceding that it left the claimant under compensated.

Besides the 2011 Study on the application of foreign law, also the 2021 Study on Rome II and 2023 Questionnaire dealt with the topic of how foreign law is ascertained and applied in practice pursuant to Rome II. In the context of the 2021 Study, 49% of the consulted stakeholders noted courts' difficulties in ascertaining the content of foreign law. The replies of MS also pointed to practical problems with ascertaining and applying foreign law.

In particular, the **2021 Study** registered some reluctance from the courts to apply foreign law, particularly the law of a non-EU MS, as two experts reported marginal cases where the courts seemingly tried to avoid the application of foreign law by applying the escape clause to establish a closer connection with the law of the forum.

Procedural divergences exist between MS, as foreign law is either considered a question of law or fact, leading to differences specifically in the roles of judges, parties and experts. Many participants in the 2021 Study highlighted the inadequacy of expertise, linguistic barriers, the length of processes for ascertaining foreign law, particularly where the information provided through national bodies or foreign jurisdictions consist in the mere reproduction of legal texts, without any background information or illustration of how those texts are normally understood and applied in practice. On the other hand, expert opinions that provide such additional elements of understanding require time, and the costs are borne by the parties. A MS where foreign law is considered a question of law reported difficulties for the judges to ascertain the content by experts as a means of evidence because expert evidence can only be provided on matters of fact. The establishment of foreign law, including the extent of its application 'as the foreign judge would do', was identified among matters that could be classed as procedural.

3.2 Question of law or question of fact

In most MS the court determines the content of foreign law on its own initiative and that law is to be applied as it is interpreted where it was adopted. In one MS an option is expressly provided for in the civil procedural code to identify the content and meaning of foreign law through the taking of evidence, otherwise permitted only for facts. In another MS, the burden of proof relating to the content of foreign law is shared between the court and the parties[33]. Only in two MS[34] the content and application of foreign law must be proven by the interested party, on which the burden of finding an expert and proving the content of foreign law lies. This means that if foreign law is not proven, national law will apply.

3.3 Information about foreign law

At the EU level, the e-Justice Portal and the European Judicial Network in civil and commercial matters are valuable tools for accessing information on foreign laws. The e-Justice Portal provides a centralized platform offering legal information and resources, while the European Judicial Network facilitates direct communication and cooperation between judicial and other authorities and contact points in different EU countries, helping practitioners obtain accurate and up-to-date legal information across borders.

[33] The court may avail itself of its powers and may order, even of its own motion, the taking of all evidence that it considers necessary or, where the application of a foreign law is at issue, it may order the party concerned to provide proof of its content.
[34] MT and ES

In most MS courts may request information from the ministers of justice, other bodies, experts, or institutions of comparative law.

The parties are also allowed or can be invited to submit public or private documents on the content of the law. As far as is reasonable, the parties must cooperate, especially if they can access sources of knowledge on the foreign legal system without difficulty. They may help identify foreign law by submitting their own, private expert opinions. However, the court is not bound by those submissions, and it must assess private expert opinions.

The means of communication provided for by the European Convention on Information on Foreign Law (London Convention), signed in London on 7 June 1968, are also used by MS, although some observed that the results received from other contracting parties are often unsatisfactory and the process is time-consuming. During a meeting of European Judicial Network in civil and commercial matters in 2023, it was observed that traffic accidents are the most frequent cases where courts use the London Convention because it allows to ask for the case law of another MS, especially in relation to immaterial damages.

Other sources of information derive from letters rogatory, desk research or online legal sources, liaison magistrates or informal requests to knowledgeable persons or institutions. Some courts reported difficulties finding suitable experts who can supply opinions, whereas practitioners found obtaining expert opinions costly and time-consuming. In one M S, as a rule, the courts rely on the opinions of the specialised ministries of MS, while for third countries, they tend to place this burden on the parties, who then usually rely on expert opinions provided by professors, lawyers, notaries, etc.

3.4 Problems and solutions from the practice

Experience from practice shows that, if identifying the foreign law involves a high (financial) burden, the parties may also use the option of a subsequent choice of law under Article 14(2) of the Rome II Regulation, in some cases after conciliation. Two MS have solved the problem of unknown foreign law by providing that if the content of the foreign law is impossible to determine or cannot be established within a reasonable time, national law shall apply. In another MS, the parties may also waive the application of foreign law in favour of national law where the conflict-of-law rule referring to foreign law is not mandatory, as is the case where the parties include a choice-of-law clause in their contract.

In relation to traffic accidents, one MS reported a case where a court decided not to follow the findings of the legal expert it had itself appointed in the country in which the accident occurred. Another MS provides that the party referring to the foreign law shall submit to the court a translation of the text into the official language certified in accordance with the specified procedures.

3.5 Suggestions concerning the application of foreign law

The application of foreign law is not unique to private international law legislation, nor is it specific to Rome II. Although challenges in applying foreign law are recognized, they do not warrant a revision of Rome II. Instead, efforts should focus on facilitating the application of foreign law by courts and legal practitioners through various means.

At the EU level, these can include in particular information on the e-Justice Portal and cooperation through the European Judicial Network in civil and commercial matters. Accordingly, in the 2023 Questionnaire, one MS suggested publishing on the European e-Justice Portal an overview for each country of the main sources of tort law for the most common category of case in district court practice – road traffic accidents with an international element. In addition, a database of foreign law experts with an indication of the country and language skills was also suggested useful after careful weighing of costs and benefits. Another MS proposed creating a dedicated search tool to allow each judge to independently search for the translated foreign legislation.

4. BUSINESS AND HUMAN RIGHTS ('BHR')

Rome II does not contain specific rules on the law applicable to human rights violations by EU-based companies directly operating or having subsidiaries or suppliers in third countries. In such cases, where a dispute is brought before a court in the EU, that court must apply the general rule, *i.e.* the law of the country where the damage occurred[35]. It is thus possible that the law applicable will be the law of a third country with weak regulatory standards.

In the past, there was support, esp. among stakeholders and academics, for special rules tailored to the specificities of corporate human rights abuses[36]. The most prominent suggestion consisted of adding a conflict-of-laws provision specific to human rights abuses, modelled on Art. 7 of Rome II on environmental damage, which would give the person seeking compensation the choice between the law applicable under Art. 4 and the law of the country in which the event giving rise to the damage occurred[37]. Since human rights abuses are often closely intertwined with environmental damages and in the light of the emergence of the right to a healthy environment in international human rights law, a diverging regime regarding applicable law between human rights and environmental damages may be considered outdated and create unnecessary hurdles in access to justice for victims.

In addition, besides the law modelled on Art. 7 of Rome II, a few other approaches were proposed by academia and stakeholders – some based on targeted amendments, some requiring no legislative changes to Rome II[38].

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[35] Contrary to the Brussels Ia Regulation, Art. 4 of Rome II expressly excludes as relevant the place where the event giving rise to the damage occurred, which may be in EU MS, at least in some cases.

[36] The 2021 Study, p. 732, 734.

[37] In this respect, see the 2021 Study, p. 735.
See further Report by the European Parliament proposing, among others, a special choice of law provision for civil claims on alleged BHR abuses, allowing the victim to choose between the *lex loci damni*, the *lex loci delicti commissi* and the law of the place where the defendant company is domiciled.
See further Report by the EU Fundamental Rights Agency, suggesting as connecting factors for BHR abuses both the law of the country where the harm occurred or the law where the event giving rise to damage occurred.
See further the Recommendation of the European Group for Private International Law (GEDIP/EGPIL), suggesting that the plaintiffs may choose the law of the country in which the event giving rise to the damage occurred and that Art. 17 cannot be invoked by the defendants to exonerate or limit their liability.

[38] Other suggestions included e.g. using a mechanism similar to Art. 26 of Rome II (public policy) but specifically adapted to human rights abuses, or allowing courts to consider its domestic rules of safety and conduct even if foreign law applies. It was also recommended that MS make use of overriding mandatory provisions and public policy exception provided for by Rome II more routinely in the context of BHR.

The recently adopted Directive on Corporate Sustainability Due Diligence ('CSDD Directive') targets these issues as it requires companies, among others, to ensure via due diligence obligations that appropriate measures are taken to identify and assess, prevent, mitigate, bring to an end and minimise the extent of adverse human rights and environmental impacts arising from their own operations or those of their subsidiaries and, where related to their value chains ('chains of activities'), those of their business partners. Companies failing to comply with their due diligence obligations may be held liable for damages caused to a natural or legal person that in turn has a right to be fully compensated for the damage, in accordance with national law.

Neither Rome II nor the CSDD Directive contain a special conflict-of-law rule for BHR cases. The general rules of Rome II thus apply in principle with the possible consequence that the law of a third country with insufficient protection standards would apply. However, the CSDD Directive, which has a limited personal scope[39], classifies the national provisions transposing its Article 29 on the civil liability of companies and the right to full compensation as overriding mandatory provisions.

Following the adoption of the CSDD Directive including the above-described rule on overriding mandatory provisions, MS appear hesitant as to the desirability of a specific mechanism for BHR abuses in Rome II. They largely advocated implementing the CSDD Directive first before further regulating the area. Some MS voiced reservations on the value added of a special rule or even potentially harmful consequences in terms of law shopping, others suggested that the existing rules of Rome II may be sufficient to address BHR violations, notably the provisions on overriding mandatory provisions or public policy or the application of rules of safety and conduct relating to the law of the place of the event giving rise to the damage under Art. 17 in conjunction with recital 34 of Rome II.

[39] It applies only to EU companies and parent companies above a certain number of employees and worldwide net turnover and to non-EU companies and parent companies above a certain EU net turnover (see Art. 2 of the CSDD Directive). In addition, the overriding mandatory character of the provisions implementing Art. 29 on civil liability does not cover all the items that fall under the material scope of the applicable law according to Art. 15 of Rome II.

SECTION 2 - STUDIES

To inform the preparation of this application report, a **comprehensive study on the application of the Rome II Regulation in the period of 2010 to 2020** was commissioned by the European Commission and conducted by the British Institute of International (BIICL) and Comparative Law and Civic Consulting[40]. The study, published in 2021, included a legal analysis and assessment of the practical experience and problems of interpretation in the application of the Rome II Regulation for the period 2010-2020 and conducted a special consideration with respect to certain special areas, such as artificial intelligence, business and human rights and strategic lawsuit against public participation (SLAPP). The Study also provides an update of the areas already covered by the three previous studies.

In addition, Article 30 of the Rome II Regulation required studies on certain specific matters. In this context, the Commission conducted the following **three studies**:

1) a study on compensation of victims of cross-border road traffic accidents in the EU – published in 2009[41];
2) a study on the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality – published in 2009[42]; and
3) a study on the application of foreign law by courts of the Member States – published in 2011[43].

These studies, while concluded soon after the adoption of Rome II, are summarised in this report for information and comprehensiveness.

1. 2021 STUDY

In preparation of this application report, the European Commission commissioned a study with the British Institute of International and Comparative Law in 2019 to gain up-to-date analysis on the application of Rome II.

This study ('2021 Study') included in particular:

- analysis of CJEU decisions, relevant studies and main literature on Rome II;
- reports analysing case law, doctrine and legal issues related to Rome II per each Member State;

[40] Study on the Rome II Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations - Publications Office of the EU (europa.eu).
[41] 2009 study by Demolin, Brulard, Barthelemy – Hoche - Compensation of Victims of Cross-border Road Traffic Accidents in the EU: Comparison of National Practices, Analysis of Problems and Evaluation of Options for Improving the Position of Cross-border Victims.
[42] 2009 study by MainStrat, Comparative Study on the Situation in the 27 EU Countries as regards the Law Applicable to Non-Contractual Obligations Arising out of Violations of Privacy and Rights Relating to Personality.
[43] 2011 study by Swiss Institute of Comparative Law on the Application of Foreign Law in Civil Matters in the EU Member States and Its Perspectives For the Future.

- qualitative interviews with over 100 experts and online survey distributed amongst stakeholders with relevant experience[44].

It specifically focused on three areas, which were: Artificial Intelligence (AI), strategic litigation against public participation (SLAPP) and business and human rights.

The legal analysis and assessment of the practical experiences and problems of interpretation in the application of Rome II was limited to the period from 2010 to 2020.

1.1 The results of the 2021 Study

The overall assessment of the 2021 Study was that Rome II has worked well in practice[45]. This conclusion is also somewhat confirmed by the relatively small number of references for preliminary ruling on the interpretation of Rome II received by the CJEU.

Nevertheless, some room for improvement was identified, especially with respect to the general rule (Art. 4) and the material scope (Art. 1)[46] but also with the concept of 'non-contractual obligations' (Art 2), product liability (Art. 5), unfair competition and acts restricting free competition (Art. 6), environmental damage (Art. 7), freedom of choice (Art. 14), scope of the law applicable (Art. 15) and overriding mandatory provisions (Art. 16). A summary of the main uncertainties or issues linked to the application of each of the Articles can be found on p. 8 to 10 of the 2021 Study.

In relation to the areas covered by the previous studies and specifically regarding the exclusion of **privacy and personality rights** (including defamation), the 2021 Study concluded that the exclusion under Art. 1(2) lit. (g) of non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation, is considered problematic. 66% of the respondents were of the opinion that the sector of defamation and privacy needed a common set of EU choice of law rules, to improve compatibility with the Brussels I bis Regulation, to address the risks of forum shopping, and to support legal certainty and predictability. National experts expressed the need for a rule (encompassing the issue of SLAPPs) in Rome II designating the law of the victim's habitual residence, without prejudice to Art. 14.

With respect to **SLAPPs** (Strategic Lawsuits against Public Participation), the 2021 Study described how claims in tort for defamation are used as SLAPPs. It described how the exclusion from the scope of Rome II for defamation influences this phenomenon, leading to the risk of forum and law shopping. It recommended that defamation, including outside of the context of SLAPPs, should be covered by Rome II.

With respect to **artificial intelligence**, the 2021 Study took stock of the new challenges that may arise where AI systems are involved in creating non-contractual obligations (e.g. as a result of a damage caused by those systems). Nevertheless, the 2021 Study also noted the sparsity of case law in the area and a low response rate on this subject from experts participating in the

[44] In total, 102 respondents participated to the survey. Stakeholders comprise: 57 academics, 28 lawyers, 6 judges, 1 business representative. 10 categorising themselves as "other", including stakeholders with multiple professions (academic/lawyer, senior law clerk, arbitrator, consultant).
[45] See p. 720 of the 2021 Study.
[46] Respectively 29% and 28% of consulted experts and stakeholders.

study. It concluded that the future application of Rome II to AI cases depends in part upon how substantive legal systems will develop in response to AI.

With respect to **business and human rights,** the 2021 Study analysed the issues linked to transnational cases involving human rights abuses and the application of Rome II in these cases. It presented several possible solutions proposed by academia and stakeholders to addressing those human rights abuses – whether in the context of an amendment to Rome II or through other means.

On **traffic accident cases**, 72% of the respondents considered that Rome II lays down an effective set of rules to regulate personal injury claims, in particular road traffic accidents, while 28% would prefer special rules. Amongst those who have been involved in cases where Rome II has been applied to personal injury claims, a higher proportion (33%) called for special rules. On the impact of the application of the 1971 HCCH Convention on the law applicable to traffic accidents on legal certainty, experts and practitioners indicated that the applicability of the 1971 HCCH Convention is frequently overlooked, arguing that the parallel system creates a risk of forum shopping and negatively impacts legal certainty. Suggestions for improvement included the introduction of special conflict-of-laws rules in certain areas such as indirect victims, multi-vehicle accidents, damage assessment for long-term health problems, interests, insurance, limitation periods.

On the **application of foreign law**, 49% of the consulted stakeholders noted courts' difficulties in ascertaining the content of foreign law. The Study concluded that procedural divergence exists between the Member States, specifically in the roles of judges, parties, experts, and national organisations, and regarding the status of foreign law (law or fact). Among the general issues identified are the additional time and costs pertaining to the ascertainment of foreign law, and the potential inaccuracy of application. Some respondents and national experts suggest the need for a European-level institute and/or an improved system of communication between Member State courts to enhance the understanding of the content of foreign law and speed up court proceedings.

2. STUDY ON APPLICATION OF FOREIGN LAW

The issue of the application of foreign law is of horizontal nature and the study carried out on behalf of the Commission therefore had a broader scope than merely the law applicable to non-contractual obligations. Nevertheless, the study on application of foreign law was requested by Art. 30(1)(i) of Rome II. The results of the study conducted in line with this requirement are summarised below.

The Study on application of foreign law was concluded and published in July 2011. It covers the state of play as to 2011. As detailed in Section 1, the topic of application of foreign law was re-examined on several occasions after the completion of this study. For instance, the results of the study have been updated with the information received from the Member States who replied to the 2023 Questionnaire. Information was also collected during the meeting of the European Judicial Network in civil and commercial matters in 2023.

According to the *legal part of the study*, there are significant differences among the Member States' treatment of foreign law. Since there are no EU rules prescribing how this should be done, the harmonised conflict of laws rules receive the same treatment as national conflict of law rules. This may be problematic, particularly in case of rules aimed at giving priority to mandatory rules for the protection of certain weaker parties (such as consumers or employees);

the objective of such rules could be frustrated by the non-mandatory application of choice of law rules. In addition, in situations where the free circulation of judgments is closely linked to the application of harmonised conflict rules, such as in matters of maintenance obligations and wills and successions, the non-mandatory application of the conflict rules may undermine the mutual trust in foreign judgments.

As to the *treatment of foreign law*, around one third of the respondents openly indicated (frequently or sometimes) avoiding the application of foreign law. The main reason is the irregular access to foreign law. Other reasons are the fear of delay in or increased costs of proceedings, choice of the parties, or the advice of counsel not to resort to foreign law. Improving access to foreign law may therefore lead to an increased willingness to apply foreign law.

As regards the *means used to ascertain the content of foreign law*, official sources available on the internet are used most frequently. This is followed by national sources containing foreign law (libraries, databases). The third method of ascertaining foreign law is experts and material transmitted by foreign colleagues, which is probably the most reliable but which is often costly. The key measures of international cooperation (diplomatic channels, the European Judicial Network in civil and commercial matters and the European Convention on Information on Foreign Law) are not widely used by a majority of the respondents.

2.1. Recommendation of the Study on the Application of Foreign Law

The study contains recommendations for measures, both practical and normative, which – according to the view of the authors of the study – could improve the situation. Among others it is suggested that the role and visibility of EU-wide professional networks be strengthened; and that means be developed by which detailed and reliable information about the exact content of foreign law, as applied in practice, can be made available to legal professionals free of charge or at limited cost. The study also assumes that the access to content of foreign law would be enhanced if national rules of Member States were promulgated in at least one of the EU's three working languages. Compulsory courses on foreign law in the education and training programmes are seen by the study as an intrinsic additional element. Finally, the study considers that a legislative Union instrument could strengthen the Union *acquis*. The scope of such an instrument could be limited to the harmonised conflict rules and the content of the national law(s) which they designate. The instrument could, the study suggests, clarify, among other matters, in situations where a Union law instrument permits the parties to make a choice of law, to what extent a tacit choice in favour of the law of the forum may be made simply by none of the parties pleading the application of a foreign law. In the absence of a pre-trial choice of law or if no choice of *lex fori* is allowed by the relevant instrument, the study recommends that courts should be able to raise on its own motion the issue of the application of foreign law with the parties and invite them to make submissions on the point. As to the means of establishing the content of applicable foreign law, the study recommends retention of the principle of free choice of methods of proof and of the freedom of Member States to formulate national rules of evidence.

3. STUDY ON ROAD TRAFFIC ACCIDENTS

In 2008, a study on compensation of victims of cross-border traffic accidents ("Study on road traffic accidents") was carried out on behalf of the Commission. The results of this study have been updated with the information received from Member States that replied to the 2023 Questionnaire and the results of the discussion held at the meeting of the European Judicial Network in civil and commercial matters in 2023.

The study showed that there are important differences in national laws as regards compensation levels for victims of traffic accidents in a Member State other than the Member State of their habitual residence. These different legal regimes mean different approaches to the calculation of compensation for damages caused to victims of cross-border traffic accidents.

In addition, the study concluded that victims might also face difficulties with respect to the time-limits for claiming compensation. There may be cases where the differences in Member States' laws concerning limitation periods lead to a rejection of a claim based on the expiry of a limitation period. However, these cases are relatively rare and the complexity of the limitation periods in Member States affects equally foreign and resident victims. The study identified and assessed several policy options for improving the situation[47]. It concluded that the most appropriate solutions would be those that do not lead to overhauling the whole legal framework of Member States. Targeted solutions would better meet the needs in this case, in particular non-legislative means like provision of information.

4. STUDY ON PRIVACY

In line with Article 30(2) of Rome II, a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality ('Study on privacy') was commissioned by the European Commission.

The Study on privacy was concluded and published in May 2009. It covers the state of play as to 2008.

4.1 Mapping of the legal situation in Member States

The Study on privacy noted that the national law applicable to the right to privacy and the freedom of expression varies considerably across the Member States' laws. This was the case despite the existence of the unifying effect of the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights and related case law.

According to the Study on privacy, such divergence in Member States' substantive laws fosters the importance of uniform conflict-of law rules applicable to privacy and defamation in cross-border cases. Nevertheless, given the exclusion of non-contractual obligations arising out of violations of privacy and rights relating to personality from Rome II, there is no uniform applicable-law regime for these types of claims and there are as many rules of conflict at the EU as there are Member States.

The national conflict-of-laws rules concerning privacy and rights relating to personality were also found remarkably divergent. Most Member States did not foresee special rules of conflict for privacy and/or related matters[48]. Most national laws included, within their general rules, the law where the event giving rise to the damage occurs (*loci delicti commissi*). In general, the connecting factor of the country in which the editor is established was not used. National laws in common law countries included the double actionability rule.

While most national laws included the connecting factor of *loci delicti commissi* for determining the law applicable to the violations of privacy and personality rights, significant divergences could be found in the concrete application of this rule. This included a non-

[47] See the list on p. 48 and following of the Study on road traffic accidents.
[48] With the exception of HU, LT, BE, BG, and RO.

homogenous appearance of exceptions to the general rule, based on the residence of common nationality of the implied parties, on the limited free will, on the usual residence of the damaged party or on the existence of closer bonds with the law of a certain state. Furthermore, in cases where the violation of privacy happened as a distance delict with damages occurring simultaneously in several states, the interpretation of the general rule of *loci delicti commissi* was also divergent.

4.2 Recommendation of the Study on privacy

Acknowledging that a consensus on an appropriate conflict-of-laws rule could not be found during the negotiations of Rome II, the Study on privacy explored ways forward to overcome the blocked situation.

Notably, the results of the survey showed that the difficulty in reaching a common agreement on a unified rule of conflict did not mean that the best solution was to maintain the current situation. Vast majority of surveyed professionals in the field considered the intervention of the EU on the subject as necessary. 85% of those interviewed were in favour of the adoption of a unified rule of conflict in the EU.

It was recommended that the hypothetical connecting factor for privacy-related claims should be shaped so as not to give a preference to the protection of the right to privacy over the protection of the right to expression and of information or vice versa. None of the model conflict-of-law rules proposed by the authors of the Study on privacy had gained clear approval among the consulted experts; however, the most favoured was the one based on the general criterion of *lex loci delicti commissi*[49]. The vast majority of the surveyed experts was also in favour of allowing the damaged party to choose a law (based on the criteria of the place where the damage occurred or *locus damni*). Nevertheless, press and media associations positioned themselves clearly in favour of the criteria of the country in which the editor is established. The Study on privacy proposed that the connecting factor of *lex loci damni* could be a good starting point for the elaboration of a unified rule of conflict across the EU.

However, since during the negotiations of Rome II a consensus was not reached on any connecting factor, the study also recommended first adopting a directive that would harmonise certain substantive rules on privacy. It was proposed that this minimal material harmonisation would aim to ensure a standard of adequate protection in all Member States to those damaged by mass media and would take the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights as a reference. The Study on privacy then goes on to conclude that the adoption of a directive harmonising some aspects of material law would allow a future fruitful negotiation of a unified rule of conflict. Nevertheless, the Study also acknowledged that an EU intervention in the harmonisation of EU substantive rules on freedom of press/defamation may not be accepted by Member States, as per the limited competences of the EU in this area.

[49] The total amount of favourable feedback for this connecting factor was only 41.4% of the received answers. However, if answers given by press and media associations were excluded, the support for this criterion would have been 82%.

SECTION 3 - QUESTIONNAIRE CIRCULATED TO THE MEMBER STATES ('2023 QUESTIONNAIRE')

In September 2023, the European Commission circulated to Member States to the European Union a questionnaire on the application of the Rome II Regulation ('2023 Questionnaire').

The 2023 Questionnaire follows up on an earlier consultation of Member States in 2012[50] and on the 2021 Study which assessed the practical experience and problems of interpretation in relation to the Rome II Regulation for the period of 2010 to 2020. The 2023 Questionnaire was circulated to Member States shortly before the elaboration of this application report to ensure that the application report is based on most up-to-date information.

The questionnaire was divided into several parts:

- The first part contained questions on issues related to the application of the Regulation in general, such as whether Rome II works well, whether there are any problems with the application and what the most important cases involving the application of Rome II are.

- The second part contained questions relating to specific articles of Rome II.

- The third part focused on the application of Rome II in the context of 4 specific areas - Artificial Intelligence, Business and Human Rights, Violation of privacy and personality rights and Collective Redress.

- A final question invited respondents to make any other comments or suggestions they consider appropriate concerning Rome II.

The Commission received replies from 18 Member States.

[50] In response to this 2012 Questionnaire, the Commission received replies from 16 MS. Many of the replies at the time pointed to the lack of relevant case law and experience with the application of Rome II. This could be explained by the fact that Rome II had been in force for less than four years then. In general, the public authorities were of the opinion that Rome II had been working well and without particular problems or there had been no indications that the application of the Regulation caused considerable difficulties. Accordingly, a clear majority of the public authorities did not suggest any changes to Rome II. They were of the opinion that, due to the short period of time that Rome II had been in force and the insignificant number of cases in which the provision has been applied to that date, it was difficult and premature to suggest any further improvements or amendments.

SECTION 4 - RELEVANT CASE LAW

To date, the CJEU has rendered 11 judgments interpreting the Rome II Regulation. In addition, other CJEU decisions, especially those regarding the Rome I and Brussels Ia Regulations (or its predecessors), may also be relevant for interpreting and applying Rome II.

- **CJEU rulings on Rome II in chronological order**

Short name of the case	***Full name of the case***	***Relates to article***	***Issue at hand***	***Outcome of the case***
Homawoo	Judgment of the Court of 17 November 2011, *Deo Antoine Homawoo v GMF Assurances SA*, C-412/10, ECLI:EU:C:2011:747.	Art. 31, 32 of Rome II	The temporal application of Rome II.	Rome II applies to non-contractual obligations where the event giving rise to the damage took place after 11 January 2009.[51]
Prüller-Frey	Judgment of the Court of 9 September 2015, *Eleonore Prüller-Frey v Norbert Brodnig and Axa Versicherung AG*, C-240/14, ECLI:EU:C:2015:567.	Art. 18 of Rome II	Possibility for a victim of an air traffic accident to bring a direct action against the civil-liability insurer if this is provided for by national law.	A person who has suffered damage is entitled to bring a direct action against the insurer of the person liable to provide compensation, where such an action is provided for by the law applicable to the non-contractual obligation, regardless of the provision made by the law that the parties have chosen as the law applicable to the insurance contract.
Lazar	Judgment of the Court of 10 December 2015, *Florin Lazar v Allianz SpA*, C-350/14, ECLI:EU:C:2015:802.	Art. 4(1) of Rome II	Determination of the applicable law for indirect damages from traffic accidents.	Damage related to the death of a person in an accident which took place in the Member State of the court seised, which was sustained by the close relatives of that person who reside in another Member State, must be classified as 'indirect consequences' of that accident.[52]
ERGO	Judgment of the Court of 21 January 2016 *"ERGO Insurance" SE v "If P&C Insurance" AS and "Gjensidige Baltic" AAS v*	Art. 1, 2, 19 of Rome II	Determination of what constitutes 'contractual' and 'non-contractual' obligation in a case	The law applicable to an action for indemnity between the insurer of a tractor unit, which has compensated the victims of an accident caused by the driver of that vehicle, against the insurer of the trailer coupled to it at the time of that accident, is to be determined in accordance with Article 7 of Rome I if the rules of liability in tort, delict and quasi-delict applicable to that accident by virtue

[51] In contrast, the date on which the case was submitted to the court is not relevant.

[52] This means that claims for compensation of such indirect damage are governed by the law of the country in which the accident happened and the direct damage materialized.

	"PZU Lietuva" UAB DK, Joined Cases C-359/14 and C-475/14, ECLI:EU:C:2016:40.		involving a traffic accident and an insurance contract	of Article 4 et seq. of Rome II provide for an apportionment of the obligation to compensate for the damage. [53]
VKI v Amazon	Judgment of the Court of 28 July 2016, *Verein für Konsumenteninformation v Amazon EU Sàrl*, C-191/15, ECLI:EU:C:2016:612.	Art. 1(3) and 6(1) of Rome II	Determination of applicable law and what constitutes 'contractual' and 'non-contractual' obligation in a case involving an injunction to prevent use of certain terms in general conditions addressed to consumers, incl. choice of law	Without prejudice to Article 1(3) of Rome I and Rome II Regulations, the law applicable to an action for an injunction within the meaning of Directive 2009/22/EC on injunctions for the protection of consumers' interests directed against the use of allegedly unfair contractual terms by an undertaking established in a Member State which concludes contracts in the course of electronic commerce with consumers resident in other Member States, in particular in the State of the court seised, must be determined in accordance with Article 6(1) of Rome II Regulation, whereas the law applicable to the assessment of a particular contractual term must always be determined pursuant to Rome I Regulation, whether that assessment is made in an individual action or in a collective action.[54]
Nintendo	Judgment of the Court of 27 September 2017, *Nintendo Co. Ltd v BigBen Interactive GmbH and BigBen Interactive SA,* joined cases C-24/16 and C-25/16, ECLI:EU:C:2017:724.	Art. 8(2) of Rome II	Application of Rome II in cases where EU regulations on unitary community EP rights do not govern certain aspects related to the infringement of IP rights.	Article 8(2) of Rome II Regulation must be interpreted as meaning that the 'country in which the act of infringement was committed' within the meaning of that provision refers to the country where the event giving rise to the damage occurred[55]. Where the same defendant is accused of various acts of infringement in various Member States, the correct approach for identifying the event giving rise to the damage is not to refer to each alleged act of infringement, but to make an overall assessment of that defendant's conduct in order to determine the place where the initial act of infringement at the origin of that conduct was committed or threatened by it.
Da Silva Martins	Judgment of the Court of 31 January 2019, *Agostinho da Silva Martins v Dekra Claims Services*	Art. 16, 27 of Rome II	Determination of applicable law regarding limitation periods, Overriding mandatory provisions	1) A national provision, which provides that the limitation period for actions seeking compensation for damage resulting from an accident is three years, cannot be considered to be an overriding mandatory provision within the meaning of Article 16 of Rome II, unless, it is of such importance in the national legal order (based on the wording, general scheme, objectives and the

[53] The compensation paid to the victims by the insurer of a tractor unit which had a trailer attached arose from the insurance contract, the obligation is thus a 'contractual' one. 'Contractual obligation' means an obligation which arose from a voluntary consent. In contrast, subrogation against the insurer of the trailer is non-contractual.

[54] In determining what law should apply to a collective action for an injunction seeking to prohibit the use of allegedly unfair terms contained in the general terms and conditions of an electronic marketplace, the CJEU ruled that while the concrete contractual term itself should be assessed under Rome I Regulation, the law applicable to an action for an injunction for the protection of consumers' interests directed against the use of allegedly unfair contractual terms should be determined under the Rome II Regulation.

[55] As opposed to countries where the damage occurred.

	Portugal SA, C-149/18, ECLI:EU:C:2019:84.			context in which that provision was adopted) that it justifies a departure from the law applicable under Rome II. 2) Article 28 of Directive 2009/103/EC does not constitute a provision of EU law which lays down a conflict-of-law rule relating to non-contractual obligations, within the meaning of Article 27 of Rome II.
Acacia	Judgment of the Court of 3 March 2022 *Acacia Srl v Bayerische Motoren Werke AG*, C-421/20, ECLI:EU:C:2022:152.	Art. 8(2) of Rome II	Application of Rome II in cases where EU regulations on unitary community EP rights do not govern certain aspects related to the infringement of IP rights	The Community design courts before which an action for infringement pursuant to Article 82(5) of Regulation No 6/2002 is brought concerning acts of infringement committed or threatened within a single Member State must examine the claims supplementary to that action, seeking the award of damages, the submission of information, documents and accounts and the handing over of the infringing products with a view to their being destroyed, on the basis of the law of the Member State in which the acts allegedly infringing the Community design relied upon are committed or are threatened, which is the same, in the circumstances of an action brought pursuant to that Article 82(5), as the law of the Member State in which those courts are situated.[56]
BMA Nederland	Judgment of the Court of 10 March 2022, *ZK v BMA Braunschweigische Maschinenbauanstalt AG*, C-498/20, ECLI:EU:C:2022:173.	Art. 1(2)(d), Art. 4 of Rome II	Application of Rome II to claims of creditors of a bankrupt company towards a grandparent company of that company that rests on the liability of the grandparent company for a breach of duty of care.	The law applicable to an obligation to pay compensation by virtue of the duty of care of the grandparent company of a company declared bankrupt is, in principle, that of the country in which the latter is established, although the pre-existence of a financing agreement between those two companies, which includes a choice of court, is a circumstance capable of establishing manifestly closer connections with another country, for the purposes of Article 4(3) Rome II.[57]
FGTI	Judgment of the Court of 17 May 2023, *Fonds de Garantie des Victimes des Actes de Terrorisme et*	Art. 4(1), 15(h) and 19 of Rome II	Determination of the law application for time limitations.	The law which governs the action of a third party subrogated to the rights of an injured party against the person who caused the damage and which determines, in particular, the rules on limitation in respect of that action is, in principle, that of the country in which that damage occurs.[58]

[56] As opposed to the situation in the *Nintendo* case, in the proceedings at hand the court only rules on a possible infringement of the IP right in its territory; therefore, the 'law of the country in which the act of infringement was committed' in Art. 8(2) Rome II should be interpreted as the law of the Member State where the court is located. Any possible infringements in other countries that are not subject of the action should not be decisive in designating the applicable law.

[57] These claims are not excluded from Rome II by virtue of Art. 1(2)(d) as the duty of care constitutes an *erga omnes* obligation, rather than an intra-organisational aspect.

[58] This law determines, in particular, the rules on limitation in respect of that action.

	d'Autres Infractions (FGTI) v Victoria Seguros SA, C-264/22, ECLI:EU:C:2023:417.			
HUK-COBURG-Allgemeine Versicherung II	Judgment of the Court of 5 September 2024, *E.N.I., Y.K.I. v HUK-COBURG-Allgemeine Versicherung AG*, C-86/23, ECLI:EU:C:2024:68.	Art. 16 of Rome II	Overriding mandatory provisions.	A national provision under which compensation for non-material damage suffered by the close family members of a person who died in a road traffic accident is determined by the court on the basis of fairness cannot be regarded as an 'overriding mandatory provision', within the meaning of that article, unless, where the legal situation in question has sufficiently close links with the Member State of the forum, the court before which the case has been brought finds, on the basis of a detailed analysis of the wording, general scheme, objectives and the context in which that national provision was adopted, that respect for it is regarded as crucial in the legal order of the Member State, on the ground that it pursues an objective of safeguarding an essential public interest that cannot be achieved by the application of the law designated pursuant to Article 4 of that regulation.
Wunner	Request for a preliminary ruling, case C-77/24, pending.	Art. 1(2)(d) and Art. 4(1) of Rome II	Application of Rome II to claims for damages against an officer of a company based on tortious liability for infringement by the company of rules concerning gaming.	Question referred by national court to the CJEU: *'Must Article 1(2)(d) of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ('the Rome II Regulation') be interpreted as meaning that it also applies to claims for damages against an officer of a company which a creditor of the company bases on tortious liability for infringement of protective provisions (such as provisions of legislation on games of chance) by that officer?'* If this question is answered in the negative: *Must Article 4(1) of the abovementioned regulation be interpreted as meaning that, in the event of an action for damages based on tortious liability in respect of gaming losses suffered which is brought against an officer of a company offering online games of chance in Austria without a licence, the place where the damage occurred is determined by* *(a) the place from which the player effects credit transfers from his or her bank account to the player account maintained by the company,* *(b) the place where the company maintains the player account in which deposits from the player, winnings, losses and bonuses are entered,* *(c) the place from which the player places bets via that player account which ultimately result in a loss,*

				(d) the player's place of residence as the location of his or her claim to payment of the credit balance in his or her player account, *(e) the location of the player's main assets?*

- **Other CJEU rulings mentioned in the Rome II application report in chronological order**

Short name of the case	***Full name of the case***	***Relates to the article***	***Issue at hand***	***Outcome of the case***
eDate / Martinez	Judgment of the Court of 25 October 2011, *eDate Advertising GmbH and Others v X and Société MGN LIMITED*, C-509/09, ECLI:EU:C:2011:685. and *Martinez and Martinez*, C-161/10.	Art. 5(3) of the Brussels I Regulation	Jurisdiction in cases of defamation in an online environment	In the event of an alleged infringement of personality rights by means of content placed online on an internet website, the person who considers that his rights have been infringed has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the centre of his interests is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised.
Kolassa	Judgment of the Court of 28 January 2015, *Harald Kolassa v Barclays Bank plc*, C-375/13, ECLI:EU:C:2015:37.	Art. 5(1), 5(3) and 15(1) of the Brussels I Regulation	Jurisdiction in cases of financial market torts	In case of a tort caused by providing incorrect information in a certificate prospectus the place of investor's residence is the place where the damage has occurred if the investor suffered loss on a bank account in this country.
VEB v BP	Judgment of the Court of 12 May 2021, *Vereniging van Effectenbezitters v BP plc*, C-709/19, ECLI:EU:C:2021:377.	Art. 7(2) of the Brussels Ia Regulation	Jurisdiction in cases of financial market torts	Article 7(2) of the Brussels Ia Regulation must be interpreted as meaning that the direct occurrence in an investment account of purely financial loss resulting from investment decisions taken as a result of information which is easily accessible worldwide but inaccurate, incomplete or misleading from an international listed company does not allow the attribution of international jurisdiction, on the basis of the place of the occurrence of the damage, to a court of the Member State in which the bank or investment firm in which the account is held has its registered office, where that firm was not subject to statutory reporting obligations in that Member State.
Gtflix TV	Judgment of the Court of 21 December 2021, *Gtflix Tv v DR*, C-251/20, ECLI:EU:C:2021:1036.	Art. 7(2) of the Brussels Ia Regulation	Jurisdiction in cases of defamation in an online environment	Article 7(2) of Brussels Ia Regulation must be interpreted as meaning that a person who, considering that his or her rights have been infringed by the dissemination of disparaging comments concerning him or her on the internet, seeks not only the rectification of the information and the removal of the content placed online concerning him or her but also compensation for the damage

				resulting from that placement may claim, before the courts of each Member State in which those comments are or were accessible, compensation for the damage suffered in the Member State of the court seised, even though those courts do not have jurisdiction to rule on the application for rectification and removal.
WEAREONE.WORLD	Request for a preliminary ruling, case C 106/24, pending.	Article 1(1) of the Rome Convention 1 and Article 1(1) of the Rome I Regulation	Notion of 'contractual obligation' in relation to the ownership of copyright	Question referred by national court to the CJEU: *Should Article 1(1) of the Rome Convention 1 and Article 1(1) of the Rome I Regulation 2 be interpreted as meaning that the question of ownership of copyright in a work created in performance of an obligation under an employment or commission contract, that is, the question of who is the original owner and whether and to what extent that right is transferable to a subsequent owner, is covered by the concept of 'contractual obligations'?*