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JOINT BRIEFING TO MEMBERS OF THE EUROPEAN PARLIAMENT

In preparation for the

European Parliament Hearing on Rights Relating to Personality, in Particular in Relation to Defamation, in the Context of Private International Law, Particularly the Rome II Regulation

28 January 2010

PRESS FREEDOM THREATENED BY MULTIPLE LIBEL ACTIONS ACROSS EUROPE: MEDIA AND JOURNALISTS URGE MEPS TO FIND SOLUTIONS

The undersigned European organizations representing journalists, newspapers, magazines and book publishers, public and private broadcasters, would like to draw MEPs' attention to the need to discuss and assess the joint impact of the Brussels I and Rome II regulations on press freedom as guaranteed and protected in the different Member States, as well as by the Charter of Fundamental Rights of the European Union, article 11(2).

On 28 January, the Parliament will hold a hearing on which law should apply to cross border cases relating to the rights of personality in relation to defamation in the context of private international law, particularly Rome II. In advance we would like to bring our concerns to your attention

Background:

Both Brussels I and Rome II are EU *Regulations dealing with International Private Law*. They set rules to determine which Court should hear a case (Brussels I), and

which country's Law should be applied (Rome II) when there is a cross-border conflict. The international elements in matters of private law include - in the case of Brussels I - cases brought against the media for defamation and violations of privacy; whereas at present, Rome II does not apply to the media following an exemption when the EU Regulation was agreed in 2007.

However, because in all cross-border cases of defamation and privacy violations, the *jurisdiction* under Brussels I is the first matter to be settled, the absence of a rule to determine thereafter which country's *law* should apply is an issue for media companies and journalists when defending cases of defamation and violations of privacy in countries outside the place of editorial control because under Brussels I, media companies find themselves defending cases according to foreign laws, often in multiple jurisdictions such as the Shevill case¹.

The ECJ held in Shevill that as regards the assessment by the English court applying Article 5(3) of Brussels I of whether "damage" actually occurred or not, the national court should apply national rules provided that the result did not impair the effectiveness of the general objectives of the Regulation.

Furthermore the ECJ held that where a libel causes damage in several different EU Member States, the plaintiff may sue in any of the jurisdictions where the libel is published in respect of the damage suffered in that jurisdiction.

Our concerns:

Media companies and journalists need the legal certainty that when they report and publish - whether in print, on television or online, the editorial content complies with the law and any self-regulatory codes which apply in the place where the final editorial decisions are taken².

As more and more content is made available outside the country of first publication especially via the internet this legal certainty is ever more important in order to uphold the freedom of expression. The current Brussels I regulation creates the very opposite - uncertainty and disproportionate risk of law suits in multiple jurisdictions.

Therefore it is imperative that Members of the European Parliament give due consideration to the combined effects of both Brussels I and Rome II on the media with regard to the freedom of expression.

¹Case ECJ C-68/93 *Shevill and Others* [1995] ECR I-415, paragraph 19 where the claimants were established in England, France and Belgium and the alleged libel was published in a French newspaper with a small circulation in England. *The ECJ held that, in the case of a libel in the press:*

- the place where the damage occurs is the place where the publication is distributed, when the victim is known in that place (paragraph 29); and

- the place of the event giving rise to the damage takes place is the country where the newspaper was produced (paragraph 24).

² The European Parliament adopted an amendment on the Rome II Regulation which allowed to safeguard the freedom of expression in the media by defining the applicable law according to the law of the country to which the media was principally directed, or if this could not be determined, the law of the country where the editorial decision was taken. Criteria were developed to define the country to which the media was principally directed.

In summary:

- Journalists, publishers and broadcasters face an increasing risk of being sued in various European countries but also outside the EU on the grounds of violations of privacy or rights related to the personality, including defamation.
- The current European legislation harmonising which court has competence in cross-border defamation cases (article 5.3 of the Brussels convention-“Brussels I”) allows plaintiffs the choice of forum. Often this leads to cases being brought outside their home country, sometimes in multiple EU jurisdictions and outside Europe. Plaintiffs often choose to sue publishers and journalists in a particular jurisdiction solely in order to benefit from the most favorable judicial proceedings as regards (a) the choice of the forum and consequently (b) the law that will apply to that case (determined by national conflict of law rules). This inevitably encourages a plaintiff to seek redress for the local damages in multiple countries and according to different laws.
- This current combination of forum shopping and applicable law provides an unbalanced advantage to the plaintiff and therefore directly prejudices editorial independence and press freedom in the different Member States.
- Case law proves that legal actions have increased, in particular with the global rise in electronic publications and dissemination of online news on various platforms. In this area, the plaintiff can easily claim the competence of any court and applicable law since the information is accessible from any country.
- Certain jurisdictions severely punish publishers, broadcasters and journalists with high amounts of damages and litigation costs, which can put the media company at financial risk, especially small and medium sized publishers. Even though the media have at moment of publication or broadcast respected the law of their home country this fear of litigation has a chilling effect on freedom of expression, often leading to journalists self-censoring to avoid litigation. Increasing levels of libel tourism in the UK for instance, is seen as a grave threat to the freedom of expression by the media community.
- The absence of balanced solutions in the scope of the debate on Brussels I and Rome II would force publishers and broadcasters not to publish or broadcast in certain countries to avoid legal suit. This will therefore be a major step back not only for press freedom in Europe but also for access to information by citizens.

In conclusion, the undersigned media and journalists organisations urge MEPs to

address the concerns expressed in this statement and discuss the appropriate solutions that would foster a vibrant press freedom in Europe in full respect of fair balance with the right of privacy and rights related to the personality.

Contacts:

Sophie SCRIVE
ENPA - European Newspaper Publishers' Association
Square du Bastion 1A, Bte 3
B-1050, Brussels, Belgium
Tel.: +32 (0)2 551 0190
Fax: +32 (0)2 551 01 99
Email: sophie.scrive@enpa.be
www.enpa.be

Angela Mills Wade
EPC - European Publishers Council
Av. Livingstone 26, Bte 3
B-1000, Brussels, Belgium
Tel.: +32 (0)2 231 12 99
Fax: +32 (0)2 230 76 58
Email: angela.mills@wade.uk.net
www.epceurope.org

Nicola Frank
EBU - European Broadcasting Union
Rue Wiertz 50
B-1050 Brussels
Tel: +32 (0)2 286 91 15
Email: frank@ebu.ch
www.ebu.ch

Pamela Morinière
IFJ-EFJ - International/European Federation of Journalists
Résidence Palace
Rue de la loi 155
1040 Brussels
Tel: 00 32 2 235 22 16
Fax: 00 32 2 235 22 19
Email : pamela.moriniere@ifj.org
www.ifj.org

Ingrid de Ribaucourt
FAEP - European Federation of Magazine Publishers
Square du Bastion 1A
B-1050, Brussels, Belgium
Tel : +32 (0)2 536 06 06
Fax : +32 (0)2 536 06 01
Email : ingrid.deribaucourt@faep.org
www.faep.org

Maxim Hauk
Rue Joseph II, 9-13
1000 Brussels
Belgium
T: +32 2 738 7611
F: +32 2 735 41 72
Email: mh@acte.be
www.acte.be

FEP Aisbl
31 rue Montoyer, box 8
1000 Brussels
TEL +32 2 770.11.10
FAX +32 2 771.20.71
email: info@fep-fee.eu
www.fep-fee.eu