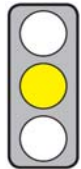


## MAIN ISSUES

**Objective of the Communication:** The action plan outlines a road map for developing a European area of freedom, security and justice.

**Parties Affected:** All EU citizens, companies and judicial, police and customs authorities.



**Pros:** (1) The creation of a harmonised European judicial area is appropriate.

(2) A voluntarily applicable EU contract law can be established in parallel to the laws in force in Member States, thus reducing political opposition to standardisation.

**Cons:** (1) The Commission fails to provide explanations regarding how and why it wishes to alter the legal instruments affected in the case of proposed changes in the law.

(2) Only comprehensive harmonisation, and not minimum standards, will strengthen the single market.

## CONTENT

### Title

**Communication COM(2010) 171** of 20 April 2010: **Delivering an area of freedom, security and justice for Europe's citizens – Action plan implementing the Stockholm Programme**

### Brief Summary

#### ► Background

- The “area of freedom, security and justice” (European judicial area) particularly covers the free movement of people, immigration, asylum, judicial cooperation in civil and commercial matters, judicial and police cooperation in criminal matters and fundamental rights.
- The European Council adopted the “Stockholm Programme” (council document 17024/09) at its meeting on 9 and 10 December 2009 on the basis of the Communication regarding an area of freedom, security and justice serving the citizen [COM(2009) 262]. The Stockholm Programme sets out the priorities for developing a European judicial area by 2014.
- The action plan is intended to implement the objectives laid down in the Stockholm Programme. It cites 354 measures and a precise timetable for this purpose. According to the Commission, the action plan is “not fixed once and for all”, enabling the Commission to react flexibly to new developments “whenever necessary” (p. 9).
- The Commission wishes to improve the quality of European legislation, implementation at national level and integration with other EU policies, to make better use of impact assessments and to provide adequate financial support for its political priorities.
- The Commission regards the European area of freedom, security and justice as a contribution to strengthening and developing “the European model of social market economy” (p. 2).

#### ► Ensuring the protection of fundamental rights

- The Commission states that the Charter of Fundamental Rights should become the “compass” for all EU laws and policies. The rights enshrined within the charter must be given full effect and be made “tangible” and “effective” (p. 3).
- Owing to rapid technological change where “information exchange knows no borders”, the Commission judges the fundamental right to data protection to be “particularly important” (p. 3). It wishes to propose a new “comprehensive” legal framework for data protection in 2010.
- Barriers preventing EU citizens from studying, working or setting up a business in a Member State other than their own should be removed. For this purpose, the Commission wishes to propose measures during 2010 for implementing the Directive on the right to free movement [2004/38/EC].

#### ► Harmonising civil law and civil procedure

- The Commission wishes to put the European judicial area at the service of citizens and businesses so as to support economic activity in the single market, ensuring a high level of consumer protection.
- The Commission believes that “minimum standards” (which it does not describe in detail) and raising awareness of different legal traditions by means of training and exchange will strengthen the confidence of businesses and citizens in the European judicial area.
- **Civil law:** In the interest of creating a single market which is as unrestricted as possible, the Commission is seeking to establish a harmonised judicial area. It also seeks to remove administrative burdens and reduce transaction costs “whenever necessary and appropriate” (p. 4). It therefore wishes to
  - publish a Communication during 2010 regarding a European contract law, which could be brought to bear as an alternative “28<sup>th</sup> law” in place of the 27 national codifications in the event of cross-border

- transactions, and to propose legislation during 2011 for a “common frame of reference”, which will establish the principles and concepts of such a law,
- amend the Directives on package travel [90/314/EEC] and on unfair business-to-consumer commercial practices [2005/29/EC] during 2011,
- propose amendments to the Directives on unit pricing [98/6/EC] and on misleading and comparative advertising [2006/114/EC] during 2011, and
- publish a Green Paper in 2014 on private international law with respect to “companies, associations and other legal persons”.
- **Civil procedure:** The Commission wishes to develop a “core of common minimum rules” (p. 23) and, to this end,
  - to propose a Regulation on the efficient enforcement of judgements with regard to the attachment of bank accounts during 2010
  - to amend the Regulation on the service of judicial and extrajudicial documents in civil and commercial matters [(EC) No. 1393/2007] during 2012
  - to amend the Regulation on insolvency proceedings [(EC) No. 1346/2000] during 2013
  - to propose a Regulation on the transparency of debtors’ assets in improving the efficient enforcement of judgements in 2013 (cf. [CEP Policy Brief](#) on Green Paper COM(2008) 128: Transparency of debtors’ assets, in German only)
  - to amend the Regulation on the taking of evidence in civil and commercial matters [(EC) No. 1206/2001] during 2013
  - to publish a Green Paper in 2013 on minimum standards for civil procedures, and
  - to propose legislation aimed at improving consistency in civil procedural law in 2014.
- **Access to courts:** In the view of the Commission, it must be possible for individuals to assert their rights throughout the EU. The Commission therefore also wishes to perform the following during 2010, in order to provide easier access to justice:
  - amend the Regulation on jurisdiction, recognition and enforcement of judgements in civil and commercial matters [(EC) No. 44/2001; Brussels I; cf. [CEP Policy Brief](#)], in particular phasing out the “cumbersome and costly” (p. 5) *exequatur* process that is required to recognise and enforce a judgement in another jurisdiction
  - carry out a consultation on collective redress instruments in EU legislation (cf. [CEP Policy Brief](#) on mechanisms for collective consumer redress and [CEP Policy Brief](#) on collective redress in competition law, in German only).
  - propose a Regulation on limitation periods for cross-border road traffic accidents, and
  - publish a Communication or a Green Paper on alternative dispute resolution.
- ▶ **Product safety and protection of intellectual property**

In the view of the Commission, protecting citizens from the risks posed by international trade in dangerous or counterfeited goods also requires a coordinated approach. It wishes

  - to develop common risk criteria and standards for the security of goods during 2010
  - to amend the Regulation concerning customs action against goods suspected of infringing certain intellectual property rights [(EC) No. 1383/2003] in 2010
  - to extend the action plan concerning EU-China customs cooperation on protecting intellectual property during 2010
  - to propose legislation in 2011 on criminal measures aimed at ensuring the protection of intellectual property, and
  - to adopt guidelines during 2011 for customs controls with respect to product safety.
- ▶ **Common immigration and asylum policy**

According to the Commission, “immigration has a valuable role to play” in “addressing” demographic challenges, and can contribute to implementation of the Europe 2020 strategy by providing an “additional source of dynamic growth” [COM(2010) 2020; cf. [CEP Policy Brief](#)] (p. 7). The Commission wishes

  - to propose Directives in 2010 on the conditions of entry and residence of third-country nationals in the case of intra-corporate transfers and for the purposes of seasonal employment
  - to publish a Communication during 2012 on addressing labour shortages through migration in EU Member States
  - to consolidate and simplify legislation relative to legal immigration and, if applicable, to extend the existing provisions to categories of worker currently not covered by EU legislation during 2013, and
  - to prepare a report during 2014 regarding the Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009/50/EC].
- ▶ **Ensuring the security of Europe**
  - The Commission is planning an internal security strategy which addresses criminal law, organised crime, the fight against terrorism and disaster prevention.
  - During 2010 or 2011, the Commission wishes to conclude mutual recognition customs security agreements between the EU and identified partner countries to protect the international supply chain.

## Statement on Subsidiarity

The Commission wishes to “fully respect” the principle of subsidiarity with respect to criminal law (p. 5). It makes no other mention of subsidiarity.

## Political Background

Drawing on the Tampere (1999) and the Hague (2004) programmes, a European judicial area was developed for Justice and Home Affairs policies. Controls were lifted at internal borders within the “Schengen area” (cf. the Schengen agreements dated 14 June 1985 and 19 June 1990). The foundations have been laid for a common policy on asylum and immigration since 1999. Following the attacks on New York (11 September 2001) and Madrid (11 March 2004), numerous measures have been taken to combat terrorism and organised crime. In particular, judicial barriers within the single market have been gradually broken down since 1999. Worthy of particular mention are the Regulations on jurisdiction, recognition and enforcement of judgements in civil and commercial matters [(EC) No. 44/2001]; on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [(EC) No. 1206/2001]; on creating a European enforcement order for uncontested claims [(EC) No. 805/2004]; on creating a European order for payment procedure [(EC) No. 1896/2006; cf. [CEP Policy Brief](#)] and on establishing a European small claims procedure for cross-border disputes [(EC) No. 861/2007; cf. [CEP Policy Brief](#)]. In its Directive proposal on consumer rights [COM(2008) 614; cf. [CEP Policy Brief](#)], the Commission proposes making the transition from minimum to full harmonisation of contractual consumer rights. The Commission has campaigned for a European contract law since 2001 [cf. Communications (COM(2001) 398, COM(2003) 68, COM (2004) 651, and reports COM(2005) 456 and COM(2007) 447]. The EU Parliament [cf. Resolutions P6\_TA(2006)0109 and P6\_TA(2006)0352] and the Council [cf. Resolution ABl. C/2003/246/1] welcome the proposal. The Commission wishes to submit a mid-term review on implementation of the action plan during 2012.

## Options for Influencing the Political Process

Leading Directorate General:

DG Justice, Freedom and Security

# ASSESSMENT

## Economic Impact Assessment

### Ordoliberal Assessment

**The objective** pursued through the Stockholm Programme **of creating a European judicial area is, in principle, to be supported**, provided that the principle of subsidiarity is respected in doing so. **This is because life in the EU, both private and economic, is increasingly conducted at cross-border level**, making Europe-wide regulations advisable. Cultural differences will remain, however, and must be taken into account when establishing standards.

It is positive to note that, within its comprehensive action plan, the Commission gives a detailed account of the fields in which it proposes to implement the Stockholm Programme, and the (legal) instruments it intends to apply. However, **the action plan lacks explanations as to why, and in what manner, existing legal instruments should be altered**, e.g. the Directives on package travel [90/314/EEC] and on unfair business-to-consumer commercial practices [2005/29/EC]. If the Commission has recognised clear needs to amend individual regulations, it should be in a position to justify these in the action plan.

The expectations placed on a European judicial area should not be too high. That the scope of cross-border trade has hitherto lagged behind political expectation is not only due to variations in national contract law regulations, but also to linguistic barriers. These cannot be removed by a European judicial area.

### Impact on Efficiency and Individual Freedom of Choice

As the Commission promotes “minimum standards” for civil law within its action plan, it has evidently abandoned its objective of full harmonisation in certain areas of civil law, a goal that it still pursued in its proposal on the harmonisation of contractual consumer rights [COM(2008) 614; cf. [CEP Policy Brief](#) and [CEP Monitor](#)]. **Minimum standards cannot create a standardised judicial area** – which is necessary for an unrestricted single market. **Only full harmonisation will remove the fragmentation** present in the legal environment which applies to businesses, and thereby reduce transaction costs. Full harmonisation should therefore be pursued further; minimum standards should be avoided entirely.

Full harmonisation of large parts of contract law currently represents a political utopia owing to the strong national opposition anticipated in Member States. As a result, **a dispositive EU contract law** that can be applied voluntarily by contracting parties should initially be pursued. Such a law **may then gradually demonstrate its potential superiority in application of the law. That the Commission wishes to create the correct conditions for this**, by means of a Communication on European contract law and legislation on a corresponding common frame of reference, **is therefore to be welcomed**.

### Impact on Growth and Employment

Immigration can alleviate Europe’s demographic problems, but cannot solve them altogether – as is suggested by the Commission. Only if immigrants pay more into pension funds than they draw from them as pensioners, *and* if the number of their children is adequately large, will burdens on the pension system be relieved in the

long term. However, the education profiles of immigrants also play a crucial role: only highly qualified immigrants will be able to generate adequate payments for pensioners who themselves earned high entitlements during their working life.

If the planned Directive on the entry and residence of seasonal workers leads to an increase in jobs being performed which were hitherto not performed at all, or not to the same extent, this will boost growth and employment.

Europe's innovative power will be strengthened if the Commission wishes – as announced – to facilitate the enforcement of intellectual property rights in close coordination with other economic regions, in particular with China.

#### Impact on Europe as a Business Location

Regulations concerning simplified intra-corporate transfers of employees from third-countries, as envisaged by the Commission in its action plan, will have a positive impact on Europe as a business location: companies will then be able to assign positions based on suitability for the job, without paying heed to nationality.

## Legal Assessment

### Legislative Competence

Within civil procedural law, the EU may impose measures for the development of judicial collaboration in “cross border” civil matters (art. 81 TFEU). This expressly includes the possibility of aligning the national laws of Member States. Matters are deemed to be of a cross-border nature if differences in the legal systems of Member States are “noticeably” distorting competition within the single market (ECJ, ruling dated 05.10.2000, case C-376/98, para. 106). Measures related to substantive civil law may be based on art. 114 TFEU if they fulfil the objectives of the single market, or rather guarantee the functioning thereof.

The EU may develop a common policy on asylum and immigration (art. 78, 79 TFEU). Following the entry into force of the Lisbon Treaty, it is no longer restricted to imposing minimum requirements when doing so. The EU may not determine the number of third-country nationals permitted to enter a Member State in order to seek work there (art. 79(5) TFEU).

### Subsidiarity

Unproblematic, provided that cross-border cases are concerned.

### Proportionality

A foundation of basic legal concepts and principles which are accepted across the EU is currently lacking in the field of contract law. **A common frame of reference will establish the guiding principles necessary for future codifications in contract law** by determining harmonised principles and concepts. This frame of reference must therefore be completed before work on European contract legislation is begun. Furthermore, European contract law must take into consideration the impact exerted on other areas of civil law (e.g. property law, tort law, company law) to avoid system discontinuity. Contractual freedom must be the common guideline for the frame of reference and European contract law.

In its action plan, the Commission speaks in support of a greater understanding of the “legal traditions and methods” of individual Member States. Opinion prevails in many Member States that the law of civil procedure serves to enable individual enforcement of subjective rights. **Collective legal redress mechanisms are not compatible with the legal systems of many Member States.** Within the planned consultation, it should also be clarified as to whether the objectives pursued may also be achieved in other ways.

Improving information exchange for the purposes of cooperation between authorities and networking existing registers is proportionate for efficient enforcement. The disclosure of register information which does not facilitate enforcement is to be rejected. Should private or partly state-controlled authorities perform enforcement duties, careful checks must be made as to whether they can justifiably participate in information exchange owing to data protection. Furthermore, owing to the principle of due course of law (art. 6 TEU), it must be ensured within the scope of enforcement that the judgement debtor is adequately protected by effective, subsequent legal redress if the exequatur process is completely abolished.

### Compatibility with EU Law

Currently not foreseeable.

### Compatibility with German Law

Currently not foreseeable.

## Conclusion

The creation of a European judicial area is appropriate, as life in the EU, both private and economic, is increasingly conducted at cross-border level. The Commission, however, fails to provide explanations regarding how and why it wishes to alter the legal instruments affected in the case of proposed changes in the law. In addition, only full harmonisation, and not minimum standards, will strengthen the single market. It will, however, be possible to establish a voluntarily applicable EU contract law in parallel to the laws in force in Member States, thus reducing political opposition to standardisation.