Preliminary paper

Priorities of the Netherlands for the EU for 2019-2024 in the area of civil justice

This paper sets out the priorities of the Netherlands in the area of civil justice for 2019-2024. It should be read in conjunction with the series of six policy papers that were recently published on our priorities for the EU for 2019-2024. In one of those papers, titled "An open, strong and sustainable European economy that offers protection", the Netherlands calls for a sustainable European economy and an enhanced and future proof Single Market. To achieve this, the Netherlands advocates an integrated, coherent and forward-looking approach to policy making that meets the needs of businesses and citizens and is based on facts and thorough analyses. At the same time there is a clear need in certain area's to step up our efforts to enhance the functioning of the internal market.

The Netherlands calls for an ambitious continuation of the better regulation policy and for strengthening of coherent policy making in the new European Commission. Citizens and businesses should be put in the center of policy-making while transparency of actions should be ensured. In this frame we have proposed to prioritize implementation and enforcement of existing Single Market legislation in the area of civil law. For the removal of remaining barriers and to prevent new ones, we advocate tailor made solutions.

State of play

In the recent past many important steps have been taken in the field of civil justice. In addition to the well-developed and extensive existing acquis that was already in place, a variety of instruments contributing to the competitiveness of the EU Member States and ensuring a well-functioning internal market for goods, services, capital and persons was agreed on during the previous mandate, such as:

- the recast of the Brussels IIa-regulation;
- the regulations on matrimonial property regimes and on the property law consequences registered partnerships;
- the European Insolvency Regulation and the directive on early restructuring and business insolvency;
- the directives on the sale of goods and the supply of digital content.

Lead-principles for new legislation

Given the extensive acquis already in place in this domain, new initiatives in the field of civil justice should have a clear added value for EU-citizens and companies. Their relation to national legislation should be thoroughly assessed. Two principles should be leading:

1) <u>Room for innovation</u>

Future initiatives should be the result of benchmarking. They should be principle based rather than aim for full harmonization.

In the field of civil justice the origin and intensity of problems encountered by citizens and companies can vary greatly among Member States. A problem in one Member State is not necessarily a problem (to the same extent) in all other Member States. The same goes for solutions: a solution that works in one Member State is not necessarily the best option for all other Member States.

The Netherlands strongly believes future initiatives could gain support quicker and more easily if the debate would focus more on *what* needs to be achieved. The choice of *how* that should be done should be left to a greater extent to the Member States. What needs to be achieved should be assessed by identifying problems in practice through a process of benchmarking and by finding solutions through the collection of best practices in the EU. What needs to be achieved should be translated in the establishment of a set of principles, objectives and/or minimum requirements to which at least a system under national legislation has to comply rather than by detailed and fully

harmonized sets of rules. Next to the fact that this approach facilitates agreement, it would allow Member States more room to preserve national systems that already proved to be successful and to further develop such national systems. Furthermore this approach would reduce costs for both Member States and markets as well working national legislation can continue to apply.

This proposed approach differs from the minimum harmonization approach to the extent that the latter identifies rather precise issues where Member States can prescribe a higher level of protection whereas the proposed approach starts from the establishment of principles or requirements that have to be met by Member States, without specifying too much detail.

The proposed new approach would notably work in the areas of civil procedural law and insolvency legislation. In the area of civil procedural legislation the directive on collective redress is an example of a problem where a considerable number of Member States have already introduced innovative legislation whereas in other Member States legislation does not yet exist. In the area of insolvency legislation the recent directive on early restructuring and business insolvency is another example of a problem for which a number of Member States already had prepared solutions. Once it was established that those solutions would remain largely unaffected an agreement was quickly found and market practice has reacted very positively.

2) Improving the functioning of existing legislation: enhancing possibilities to make use of rights

Before introducing new legislation difficulties and gaps encountered by citizens and companies in the application of existing instruments should be solved.

The well-developed *acquis* in the field of civil justice is beneficial for legal certainty. Nevertheless, in practice citizens, companies and in some cases even the judiciary seem to encounter difficulties in its application. It is essential that citizens and businesses can rely on and make full use of the rights that are provided to them in the existing acquis and that the judiciary has the full overview of that acquis. This problem is urgent and therefore needs to be addressed in existing legislation. It merits more attention in new legislation as well.

To provide for this, more focus should lie on evaluation of existing instruments. This includes consultation of Member States, stakeholders, the judiciary, citizens and businesses and by more frequently organizing expert groups and providing for independent research. It should be made as easy as possible to provide input to the European Commission. The Netherlands would encourage the Commission to initiate smaller, technical or focused evaluations and revisions of existing acquis to fix problems in practice rather than full evaluations and revisions which may take many years to complete. A reason to review or update an instrument could be to follow up on a ruling of the Court of Justice to codify, modify or clarify an instrument.

In addition, the Netherlands supports the further development of guidelines accompanying legal instruments. In practice, guidelines can fulfil a useful role in supplementing the recitals of an instrument. Guidelines help with the practical application of a directive or regulation. In order to fully make use of its potential and to improve the process it should be considered providing for a more active role for Member States, stakeholders and practitioners to improve their usability and authority in practice. While the interpretation of legal instruments is ultimately up to the Court of Justice, guidelines could serve as a joint understanding of provisions and be a basis for written comments in procedures before the Court, thereby helping the Court interpreting provisions and providing clarity and more legal certainty to practice.

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