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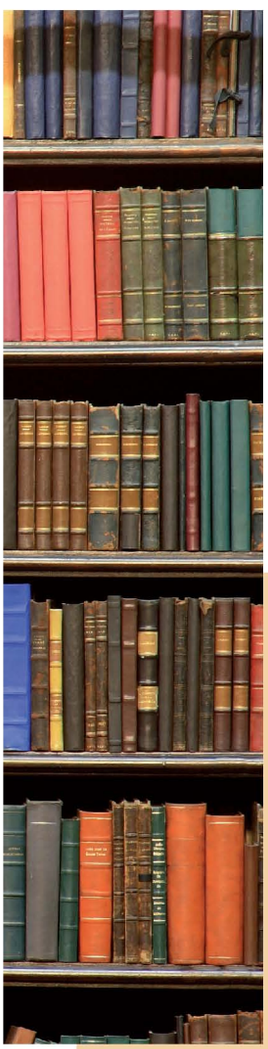
DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



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SUMMARY

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DIRECTORATE-GENERAL FOR INTERNAL POLICIES OF THE UNION

THEMATIC DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

Implementation of optional instruments within European civil law

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The study was commissioned by the European Parliament Committee on Legal Affairs.

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CONTENTS OF THE STUDY

Context

"Optional" legal instruments are additional schemes that are integrated with national legal systems without replacing the provisions of these laws. They therefore offer the parties concerned (citizens, businesses) a "second scheme".

This study of current optional instruments analyses the method already adopted by several European legal systems but little known up to now as it is not explicit and not systematised by the European legislator. The proposal for a regulation on a common European sales law, adopted by the European Commission on 11 October 2011 has shed some light on this. For the first time this document makes the method explicit, refines it and implements it to an extent not previously seen. In particular, it dissociates the regulation itself, which is directly applicable within Member States, from the annex containing general European sales law and must be chosen by the parties in accordance with clearly-defined rules. This proposal for a regulation is in a sense the archetype of an optional instrument. It is analysed as such in the first part of the study.

The study examines four categories of optional instrument, which are all identified and outlined briefly in the opening chapter:

i. Optional instruments in civil procedures: the European enforcement order, the European payment order, the European small claims procedure;

ii. Certain optional instruments in intellectual property law: Community trade marks, Community designs, the European patent;

iii. Certain optional instruments in the law on commercial companies and economic interest groups: the European company (SE), European economic interest group (EEIG), European Cooperative Society (SCE);

iv. An optional instrument in matrimonial property law, i.e. the common matrimonial regime created by the Agreement of 4 February 2010 between France and Germany.

The study is divided into five parts. Firstly, we had to discover whether optional instruments are actually considered to be such (Part 1) and also whether they are chosen by players (Part 2). The study then examines how they are applied by those responsible for implementing them (Part 3), if they actually improve the situation of those at whom they are targeted (Part 4) and if they might prove useful in other areas of civil law (Part 5).

The analysis of the notion of optional instruments Part 1) leads us to propose the following definition: a European optional instrument exists in so far as subjects have the choice of either, a system using at least in part national law or regime arising from an international convention binding on the Member State, or a European instrument that is relatively autonomous, arising from secondary legislation or an international convention signed solely by Member States of the European Union, and capable of benefiting all Member States of the Union, regardless of whether the two systems involved have a different territorial scope, provided that the use of one excludes use of the other.

If the expression "optional instrument" has only become current during the debate on general sales law, the optional nature of these instruments has always been recognised by European jurists, and national legislators have added these optional instruments to their national legislation. They have on occasion created a special national regime so that players may have a real choice between the European system and the newly-created national system.

National legislators have also adapted their legal codes so as to integrate the optional instruments within their legal systems and even sometimes in national legislation. It does happen on occasion that national adaptation measures are insufficient or restrictive, which may compromise the success of the optional instrument.

The issue of **effective choice**, of these instruments by players (Part 2) was raised for each optional instrument. In practice, official statistics are extremely scarce (with the exception of optional instruments in the law on intellectual property, as OHIM and EPO publish statistics) and an in-depth case study using questionnaires was carried out.

- The European Enforcement Order (EEO) is little used compared to the number of enforcement procedures carried out by a given country. However, if we look only at cross-border European enforcement orders applied for in a given country, in certain countries we then arrive at a proportion of three EEOs for each national procedure followed by an exequatur (Sweden, 2010).

- The European small claims procedure is little used, but again, overall, there are few cross-border claims for small sums.

- The European payment order is used in some countries (Germany, Austria), although almost never used in others (Luxembourg, Sweden).

- While the use of Community trademarks is different for each country, it is a widely-used instrument which is gaining ground over international trademarks.

- Community designs are also widely used.

- The European patent, an optional European procedure for granting patents (without granting an enforcement order), is also well used, with disparity between countries related to the variable number of registered trademarks and to the need for cross-border protection.

- The use of the European Company differs drastically by State. In certain states it is not used at all. In others the SE is making progress but numbers are still low. It is most widely used in Germany and the Czech Republic, although many SEs are dormant, ready to be taken up "key in hand" by an operator. These differences between States are probably explained by the fact that there are too many referrals to national laws, which means that there is no single SE, but multiple SEs depending on the country. This merely reinforces the idea that the optional instrument has a greater chance of success the more autonomous it is of national law.

- EEIGs are used to a very different extent depending on the Member State: while in some they are almost non-existent, or increasing only slowly, they are found in significant numbers in certain Member States: (Belgium, Germany, Spain, France, Italy, Luxembourg, the Netherlands and the United Kingdom).

- Only 21 European Cooperative Societies have been created so far in Europe, an extremely small number.

- Lastly, looking at Community Matrimonial Property regimes, the text is not yet in force and at the present time there is no real debate in other Member States apart from France and Germany.

Study of the **reasons for choosing or rejecting** these optional instruments (Part 2, Chapter 13) has led us to make the following distinction:

- the choice is sometimes made without comparing the benefits of the two options (exogenous reasons for the option). the scope of the optional instrument, its legal certainty, the complexity of the instrument, its cost, and the speed and efficiency of its procedures.

- the choice is sometimes made without comparing the benefits of the two options (**exogenous** reasons for the option). In this case determining factors include: the appropriateness, or lack of, of the optional instrument to the particular situation, the good or poor implementation of the optional instrument by national laws, lack of knowledge of the optional instrument. The neutrality of the optional instrument (compared to a national law under which two parties from two different countries would be unlikely to agree) is sometimes put forward, though not often.

The third part examines the **application of optional instruments** by judges, notaries, lawyers, company lawyers and consumer organisations. This part begins by identifying the information sources available to law professionals on optional instruments (law study programmes, certain professional examinations, conferences, specialised training courses, websites of organisations such as national industrial property offices, or professional publications by KICs or lawyers' chambers). The information was found to be still inadequate.

Judges only rarely come across optional instruments. Le contentieux est rare, à l'exception du contentieux des instruments optionnels de propriété intellectuelle. There have been 26 preliminary rulings on interpretation before the European Court of Justice (c.f. Chapter 16) of which 17 were on Community Trademarks and 3 on Community Designs. In general, national judicial interpretation does not distort the optional instruments and where there are difficulties of interpretation; they are resolved using the same methods of interpretation as other European legal texts. On the other hand, information does not circulate freely among national judges, who are not informed of the interpretations given by judges in other Member States, except in the area of intellectual property. Exchange of information on decisions between institutions should be expanded (*European Judicial Network*, Europa portal, Conference of the Presidents of the Supreme Courts of Member States etc.).

Notaries are affected by European Enforcement Orders and by the optional instruments of the law on economic groupings (as well as by the Community matrimonial regime when it comes into force). A study in France showed that notaries using European Enforcement Orders had no difficulty in using them. The biggest challenge is certainly the lack of information.

Lawyers specialising in cross-border litigation (in some States) know about optional instruments in procedure, and, if they are specialists in the area, in intellectual property law. Large legal chambers specialising in company law and European law are well-informed

about the optional instruments relating to the law on economic groupings. In the case of other lawyers, information on optional instruments and their advantages could be improved.

Data on the use of optional instruments by **company lawyers** are imprecise Several reports however mention that they are knowledgeable about the optional instruments on intellectual property and the law on economic groupings.

Consumer associations have more or less awareness of optional instruments (of procedure) according to the country and only rarely recommend that their clients use them (Czech Republic, Sweden, United Kingdom) **.**

Part 4 raises the issue of finding out whether the optional instruments have **improved the situation of consumers, citizens and companies,** in cross-border relations. Many respondents thought the question premature, since, with the exception of optional instruments on intellectual property law, there has not been sufficient time or informations.

This part looks at the respective merits of the method of the optional instrument and that of **maximum harmonisation**, based on replies to the questionnaire. Some respondents were very sceptical of resorting to the optional instrument method (Slovakia, Sweden). Others thought that even the real merits of the optional instrument did not exclude the superiority of maximum harmonisation (Belgium). Yet others believed recourse to the optional instrument to be a slow and more consensual route to harmonisation (German university report, Spain). Other respondents preferred the optional instrument to systems of harmonisation (German Ministry of Justice, Netherlands, Poland). Some also showed that it was possible to use both methods, for example maximum harmonisation for consumer law and an optional instrument for the general law on sales (France).

The fifth section of the study investigated the **extension of the method to other areas of civil law.** The various reports saw this as a general question about the added value provided by optional instruments. The following advantages were put forward: greater predictability of judicial solutions (Belgium), simplification of cross-border relations (Bulgaria, German university report), increase in judicial certainty (Germany), the choice offered to companies (Swedish Ministry of Justice, Netherlands), its optional nature, non-infringement of national law (Greece, Netherlands), its neutrality (Netherlands), creation of an integrated common market (Hungarian report), the practicality of optional instruments for parties active at an international level (Netherlands), an example of the modern Europeans' dual membership (Poland).

The reports emphasise the need for a successful awareness campaign (Bulgaria), informed choice (Swedish Ministry of Justice), the risk of judicial uncertainty in the event of multiple optional instruments (Luxembourg, Swedish Ministry of Justice), and the risk of avoidance of mandatory national rules (Swedish Ministry of Justice).

More precisely, a number of reports expressed a preference for the introduction of the European Certificate of Succession and the Unitary Patent into civil law. Some reports also emphasised that the optional instrument might be an alternative to international private law.

Almost all the reports noted that a solution should be found to the problem of separation of European bi-national couples, and that the optional instrument method might thus be useful in family law, including in non-property aspects of family law. In fact it is precisely in

areas where maximum harmonisation is unthinkable that the optional instrument could be an alternative solution. In addition, the neutrality and permanence of the optional instrument could be its great advantages for couples obliged to move around within and outside Europe.

The need to improve the cross-border credit was also mentioned, with contrasting opinions over methods (a compulsory instrument or an optional instrument like the Euro-mortgage). On the other hand the reports were largely not in favour of optional instruments in property law.

In conclusion, we could say that the success of the optional instrument method is real. There are optional instruments which it would be difficult to do without today, like optional instruments in intellectual property law. Others, like optional instruments in civil procedure, show promise.

Objectives

The aims of this study were four-fold:

- To discover how optional instruments are used in different European Union States;
- To assess the effective use of optional instruments in Europe;
- To discover the advantages of optional instruments for citizens and companies;
- To identify other areas of law in which optional instruments might be used as well as the directions to be followed in order to increase their chances of success (it appears that the greater the autonomy of the optional instrument with regard to national law, the greater its chances of success).

In order to attain the fourth objective, the study identifies four principles that must be followed to ensure the success of an optional instrument:

- To be drawn up for areas in which it produces surplus value for players;
- To be supported by extensive communication and training;
- To enshrine the maximum autonomy possible because any need to refer to national legislation will mean failure;
- To ensure judicial certainty because the risk of judicial uncertainty will frighten players away; this of course presupposes a consistent interpretation of the optional instruments by the EUCJ but to do the utmost in advance to reduce the risks of divergent interpretations by national judges.

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Role

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Policy Areas

- Constitutional Affairs
- Justice, Freedom and Security
- Gender Equality
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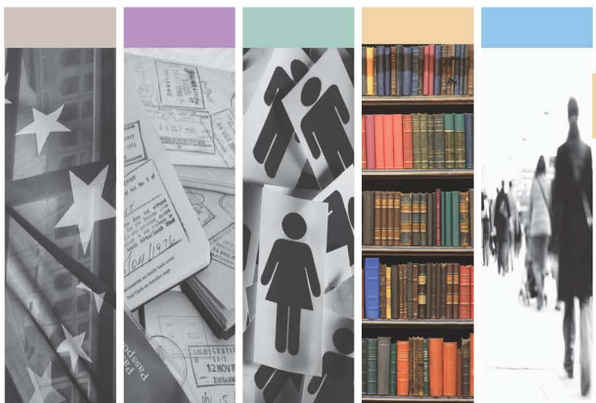

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