Implementation of optional instruments within European civil law

STUDY

2012
Implementation of optional instruments within European civil law

Abstract

This study examines how European optional instruments are implemented in the Member States. It covers civil law and provides a comprehensive analysis of this innovative method, which although adopted in various fields (civil procedure, intellectual property, companies), was not organised or even clearly identified as such by the European legislator until a proposal for a regulation on a Common European Sales Law (11 October 2011) revealed its full potential. The study, which is based on field surveys conducted using a detailed questionnaire, identifies the strengths and weaknesses of this method and poses thought-provoking questions for the future.
This study was requested by the European Parliament’s Committee on Legal Affairs.

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<tr>
<td>BE</td>
<td>European Patent</td>
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<tr>
<td>PCCI</td>
<td>Paris Chamber of Commerce and Industry</td>
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<td>CCP</td>
<td>Code of Civil Procedure</td>
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<tr>
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<td>European Economic Interest Grouping</td>
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<td>OI</td>
<td>Optional Instruments</td>
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<td>NCI</td>
<td>National Consumers' Institute</td>
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<td>European Patent Office</td>
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<td>OHIM</td>
<td>Office for Harmonization in the Internal Market</td>
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<td>World Intellectual Property Organization</td>
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<tr>
<td>PCT</td>
<td>Patent Cooperation Treaty</td>
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<tr>
<td>IP</td>
<td>Intellectual property</td>
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<tr>
<td>SME</td>
<td>Small and medium-sized enterprises</td>
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<td>SE</td>
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<td>SPE</td>
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Context

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

This study of current optional instruments analyses this 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 which contains the common European sales law and which 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 instruments, 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 a 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 the use of the other.
If the expression "optional instrument" has only become current during the debate on common 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 occasionally 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 laws so as to integrate the optional instruments within their legal systems and even sometimes in their national codes. It does happen, however, 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 within 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 a European licence), is also well used, with disparities between countries, depending on the variable number of registered trademarks and the need for cross-border protection.

- The use of the European Company differs drastically from state to 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 among 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 the common matrimonial property regime, the text is not yet in force and at present there is no real debate in other Member States apart from France and Germany.

The 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 after comparing the benefits of the two options (endogenous reasons for the option), among which 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 inappropriateness, 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. Legal disputes are rare, with the exception of the cases related to the optional instruments in the field of intellectual property. 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 of procedure, and, if they are specialists in the area, in intellectual property
Implementation of optional instruments within European civil law

law. Large legal chambers specialising in company law and European law are well-informed about the optional instruments relating to the law on 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 groupings.

Consumer associations have more or less awareness of optional instruments (of procedure) depending on the country and still only rarely recommend that consumers 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 information.

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 legal uncertainty in the event of multiple optional instruments (Luxembourg, Swedish Ministry of Justice), and the risk of evading 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 legal 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.
INTRODUCTION

'Optional' legal instruments are additional systems, which do not replace those that are already provided for by national legal systems.

Since the 1970s, such instruments have been developed through international conventions or EU instruments (Regulations or Directives). In intellectual property law, the European trademark and designs proved to be very successful and a European patent project with a unitary system of protection was developed, outside the European patent established at the Munich Convention of 5 October 1973. With the creation of a European judicial area, optional instruments specific to European procedural law have emerged: the European Enforcement Order, the European Payment Order, the European Small Claims Procedure; There are other optional instruments in force or under development in company law, patrimonial family law, inheritance law and securities law. These instruments are presented in the preliminary part of this study.

This study identifies these optional instruments and seeks to examine how they are implemented in Member States and how often they are actually chosen. Where necessary, the study extends its scope to some international optional instruments (such as the European Patent Convention signed in Munich on 5 October 1973).

The overall analysis of this legislative technique has been particularly difficult because the areas covered are very varied and the legislative instruments seldom used. Moreover, as revealed by the questionnaire responses, the term 'optional instrument' was generally unknown to legal practitioners of the Member States until the debate launched by the Green Paper on European Contract Law promoted both the expression and use of this method.

A definition, based on a review of all questionnaire responses, is proposed in Part One of the study (at the end of paragraph 1.1): '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 system 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.'

In recent years, the lively debate on European contract law has fuelled the overall discussion on optional instruments in Europe.

The proposal for a Regulation on a Common European Sales Law, published on 11 October 2011 is the first text to explain, to an extent never before seen, the methodology used and the reasons for the European Commission's choice for an optional common European sales system. This proposal, together with a Communication dated the same day, marks an

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important step towards developing a European contract law. The project has generated a wealth of legal literature, not only on the content of the rules that should be adopted, but also on the legislative method and, more precisely, the optional instrument technique. It is in this second aspect that this proposal for a Regulation is of particular interest to this study.

The common European sales system is a ‘second system’, which has to coexist with those of non-modified national laws. It is proposed to the contracting parties, who must designate it in order to implement it. It is in this sense that it is optional. Once the parties have chosen it, they are bound by this system which contains a set of rules, some of which are mandatory.

The proposal for a Regulation on a Common European Sales Law, which was not available at the time the questionnaire was prepared, is the prototype of the European optional instrument. It will serve as an example of the optional instrument method (A) and of its advantages for building a European legal system (B).

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5 For an analysis of the nature of the optional instrument technique, see, inter alia: Opinion of the European Economic and Social Committee on ‘The 28th system — an alternative allowing less lawmaking at Community level’ (own-initiative opinion) (2011/C 21/05).

1. THE OPTIONAL INSTRUMENT METHOD

1.1. The Optional Instrument, Second System

The optional instrument method allows for pluralism and national laws to be respected, while providing the unity required to form a coherent and autonomous European legal system. The optional instrument does not replace the national law but complements it, offering a choice between two separate legal systems, the one provided by a particular national law, and the optional European system. National legislation is therefore not changed.

We have sometimes spoken of a '28th system', but in reality, to make it clear that this system integrates into national legal systems, it is more appropriate to use the term 'second system' or '2nd system' (as there may be others, for international sales, for example)\(^6\).

This second, European system is applied on a voluntary basis to cross-border contracts within its scope. It must therefore be chosen by the parties\(^7\).

The optional instrument is moving towards, without identifying with it, the approach used by some international conventions which allow parties to refuse the application of an international system and apply a national law instead\(^8\). The difference is that European optional instruments only apply if they have been designated (opt in), whereas international instruments, when in force and where the situation is within their scope, always apply unless specifically excluded (opt out).

1.2. Directive or regulation?

In theory, the European optional instrument can take the form of a Directive or of a Regulation.

If the optional instrument takes the form of a Directive, logic dictates that it should be implemented in the Member States as faithfully as possible so as to ensure the European optional system is the same everywhere. The Regulation technique is undoubtedly the most suitable option as it ensures greater consistency since the Regulation is directly applicable\(^9\).

The Green Paper on policy options for progress towards a European contract law for consumers and businesses proposed introducing a Regulation establishing an optional instrument (option four of seven)\(^10\). The European Parliament, in a resolution adopted on 8 June 2011 acknowledged the need for further progress in the area of contract law and

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\(^6\) See the prev. Opinion, Note 6, EESC (3.1.1 et s.).
\(^7\) On this mechanism, see Recital 9 to the Proposal for a regulation on a Common European Sales Law: (9) This Regulation establishes a Common European Sales Law. It harmonises the contract laws of the Member States not by requiring amendments to the pre-existing national contract law, but by creating within each Member State's national law a second contract law system for contracts within its scope. This second system should be identical throughout the Union and exist alongside the pre-existing rules of national contract law. The Common European Sales Law should apply on a voluntary basis, upon an express agreement of the parties, to a cross-border contract.
\(^8\) Some examples of opt-out models are the United Nations Convention of 1980 on Contracts for the International Sale of Goods (Article 6), the Unidroit Conventions on International Factoring (Article 3) and on International Financial Leasing (Article 5).
\(^9\) See the prev. Opinion of the European Economic and Social Committee on 'The 28th system — an alternative allowing less lawmaking at Community level' (own-initiative opinion) note 7, paragraph 1.8.
favoured, amongst other options, option 4 of setting up an optional instrument by means of a Regulation\textsuperscript{11}.

In the explanatory memorandum of its proposal for a Regulation, the Commission justified this legislative choice by comparing it, on the one hand, to a non-binding instrument and, on the other hand, to a Directive setting minimum standards for a non-optional European contract law:

'A non-binding instrument such as a toolbox for the EU legislator or a Recommendation addressed to Member States would not achieve the objective to improve the establishment and functioning of the internal market. A directive or a regulation replacing national laws with a non-optional European contract law would go too far as it would require domestic traders who do not want to sell across borders to bear costs which are not outweighed by the cost savings that only occur when cross-border transactions take place. In addition, a directive setting up minimum standards of a non-optional European contract law would not be appropriate since it would not achieve the level of legal certainty and the necessary degree of uniformity to decrease the transaction costs\textsuperscript{12}.'

The decision to adopt a regulation follows on from a number of previous EU initiatives, particularly in intellectual property and civil procedure. Thus, we can now consider that, in European law, two types of Regulations exist: mandatory regulations, which every judge in every Member State must apply, and Regulations establishing optional instruments. Such instruments establish European systems that do not replace national laws but complement them and judges only apply them at the request of the parties\textsuperscript{13}.

The innovative and elaborate structure of the proposed regulations on a Common European Sales Law allows for the best possible functioning of the mechanism. The proposal contains 16 articles essentially covering the implementation mechanism and the scope of the new rules. These articles will apply once the regulation is in force. Annex 1 however, containing 186 articles and entitled 'Common European Sales Law', only applies where the parties designate the Common European Sales Law. This is where the optional law for the parties is found.

Some optional instruments require national amendments to be made (sometimes to the extent that a new special national system is created). This may present difficulties or even compromise the success of the optional instrument where these measures are not properly introduced into national laws\textsuperscript{14}. It is therefore preferable, as far as possible, that the optional system is autonomous.

\textsuperscript{11} European Parliament Resolution of 8 June 2011 on Policy options for progress towards a European Contract Law for consumers and businesses (2011/2013(INI)), paragraph 5.
\textsuperscript{12} Paragraph 3, p. 11.
\textsuperscript{14} See Part One of the study.
2. THE EUROPEAN OPTIONAL SYSTEM: IDENTITY BUT NOT UNIFORMITY

An optional instrument adopted by regulation is different from one resulting from a directive since the regulation is directly applicable and allows for an identical system to be established in all Member States. This ensures its uniformity of application (subject to any deviations arising not from any differences in transposal by Member States but from divergent legal interpretations by judges, and it will be up to the ECJ to ensure uniformity of interpretation). This is one of the advantages of Regulations compared to directives, at least those that are based on minimum harmonisation, in the sense that they only impose a minimum threshold beyond which each Member State is allowed to go, in order to establish a higher level of protection for consumers, for example.

Given the drawbacks of this method, which left too many discrepancies between the laws of the Member States, the process of maximum harmonisation has been incorporated into European consumer law, with the 'New approach' advocated by the European Commission since 2005 and implemented for the first time by the directive of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market15.

This process has, however, been criticised for its significant drawbacks brought to light in the objections and discussions concerning the proposal for a Directive of 8 October 200816. The removal of the freedom of Member States to provide a higher level of protection for consumers was one of the criticisms levelled against this method. The proposal for a Directive was finally adopted after several years of negotiation, with provisions for maximum harmonisation, but its scope is very small17.

It might be tempting to draw an analogy between the Regulation establishing the optional instrument and the maximum harmonisation method. This would, however, be overlooking a major difference, which is the richness of this innovative method. Since the instrument is optional, the Regulation makes it available to the parties without imposing it on them18, and since this system is supplementary to the national laws of the Member States, these remain unchanged. This is self-evident when the instrument only covers cross-border situations but it is also true when the parties have the option of designating it for domestic contracts as well.

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18 This is particularly apparent in the structure of the regulation on the Common European Sales Law, which separates the articles of the regulation from those of Annex I, which contains this common law.
2.1. Autonomy of the optional instrument, a guarantee of its effectiveness

The effectiveness of an optional system rests on its autonomy. More specifically, the instrument must be self-sufficient and self-referential, that is, its body of rules must be as complete as possible for the scope covered to avoid having to be supplemented by a national law.

In particular, the system, even when optional, should contain its own mandatory rules and laws.

For example, the Common European Sales Law includes its own consumer protection rules. The proposal for a regulation provides for a high degree of protection. This setting aside of national mandatory rules, including mandatory laws (which are fundamentally consumer protection laws in this case), appears to be the logical result of creating a complete European system, the appeal of which rests on its uniform application across all Member States of the European Union19.

The Common European Sales Law strives, for the scope covered, to ensure the greatest possible autonomy for this instrument (in contrast, for aspects that are not covered, such as illegality of contracts or representation, the existing rules of the Member State's civil law still apply). This autonomy is permitted, on the one hand, thanks to a body of 186 articles in Annex 1 of the proposal for a Regulation and, on the other hand, thanks to the principle of autonomous interpretation (Articles 4.1 and 4.2).

As far as possible, gaps must be filled and the European text must be interpreted by reference to the Regulation itself rather than by recourse to any other system. Provisions for this autonomy in filling gaps and interpreting the text were not always included in the first European texts establishing optional European systems and the proposal for a Regulation on a Common European Sales Law may, in the future, serve as a model in this regard.

2.2. The contribution of optional instruments to European construction

The contribution of optional instruments to constructing a European legal system are primarily economic. The globalisation of trade, the opening up of markets and instantaneous global dissemination of information have reinforced the need for supranational legal instruments (1). There are also advantages for the legal system. By establishing an autonomous European system, these optional regulations contribute to the coherence and unity of European law (2).

2.2.1. Economic advantages

On the economic front, optional instruments have the advantage of offering operators an additional system, specifically designed to facilitate trade and the development of economic activities within the European Union.

According to the Commission, companies lose out on at least EUR 26 billion of sales every year because of obstacles linked to differences in national legislation. Whereas European

19 See the prev. Opinion, note 7 (paragraph 1.8 of the Opinion).
consumers are deprived of a greater and more competitive choice of products, not only because businesses refuse to sell in their countries, but also because consumers lack knowledge about their rights when making purchases abroad.

During the impact assessment, the cost of adopting a mandatory uniform contract law system, in terms of adaptation and training, was noted in particular. In this regard, the optional system is also clearly preferable as those who wish to apply it are only required to make one-off payments.

The legal basis of this uniform and unique set of contract law rules of sale, including provisions to protect consumers, is Article 114 of the Treaty on the Functioning of the European Union (TFEU) which concerns the establishment and functioning of the internal market. In this regard, the optional system is also clearly preferable as those who wish to apply it are only required to make one-off payments.

In the other branches of law where optional European instruments have been adopted, the establishment and functioning of the internal market have also been highlighted, but the legal basis given was the former Article 308 TEC (now Article 352 TFEU) or even the former paragraph c) of Article 61 (now Article 81 TFEU).

Article 308 TEC therefore formed the basis of Council Regulation (EC) No 40/94 of 20 December 1993 on Community Trademarks. Now, Article 118 TFEU provides a specific legal basis, limited to intellectual property rights.

In fields related to civil procedure and to the free circulation of documents, Article 61 point c) TEC serves as the legal basis. Although the construction of the area of freedom, security and justice seems to be the primary driver, the proper functioning of the internal market is also cited, thus highlighting the economic advantages of these optional instruments.

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20 As regards the debate on the choice of the appropriate legal basis for the optional instrument in common sales law, see prev. Opinion of the EESC, note 7, esp. paragraph 3.3; add, in favour of Article 352, HESSELINK/RUTGERS/DE BOOYS, ‘The Legal Basis for an Optional Instrument on European Contract Law’, Centre for the Study of European Contract Law Working Paper, No 2007/04.

With regard to contract law, the question also arose as to whether it is necessary to base the optional instrument on Article 81 TFEU (former paragraph c) of Articles 61 and 65 of TEC), which would have meant that the choice would be a choice of private international law, executed at the level of conflict of laws, and not a choice of substantive law. This option was clearly rejected by the Commission, which considered that the choice was one of substantive law and not of private international law, thus setting aside the Rome I Regulation.

21 See the recent Council Decision of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection (2011/167/EU).

The Council of the European Union, having regard to the Treaty on the Functioning of the European Union, and in particular Article 329(1) (...) whereas:

(1) In accordance with Article 3(3) of the Treaty on European Union (hereinafter ‘TEU’), the Union shall establish an internal market, shall work for the sustainable development of Europe based on balanced economic growth and shall promote scientific and technological advance. The creation of the legal conditions enabling undertakings to adapt their activities in manufacturing and distributing products across national borders and providing companies with more choice and opportunities contributes to attaining this objective. A unitary patent which provides uniform effects throughout the Union should feature amongst the legal instruments which undertakings have at their disposal.

(2) Pursuant to Article 118 of the Treaty on the Functioning of the European Union (hereinafter ‘TEU’) and in the context of the establishment and functioning of the internal market, measures should include the creation of uniform patent protection throughout the Union and the establishment of centralised Union-wide authorisation, coordination and supervision arrangements.
2.2.2. Advantages for the legal system

On the legal front, optional instruments have the double advantage of being, on the surface, in accordance with the principles of subsidiarity and proportionality (Article 5 TFEU) since they do not replace national laws and must be freely chosen to apply (a) and of allowing the Union to adopt a body of coherent rules, which form a complete set (b).\(^22\)

a. Respect for the principles of subsidiarity and proportionality

The principles of subsidiarity and proportionality are \textit{a priori} respected because, by their very nature, these instruments are optional and their application subject to the choice of the contracting parties or the operators concerned.

Moreover, the scope of a number of instruments covers cross-border situations.

The text on sales specifies:

‘The scope of the proposal is confined to the aspects which pose real problems in cross-border transactions and does not extend to aspects which are best addressed by national laws.’

b. Complete and coherent set of rules

Optional instruments have, in comparison to the sectoral approach of traditional directives and regulations, the advantage of allowing the Union to adopt a body of coherent rules, which form a complete and, as far as possible, autonomous set. This is supported by the fact that the scope of the optional instrument is quite vast. From this point of view, it is unfortunate that the scope of the common sales law instrument is quite limited, restricted to a specific number of contracts. The observation is however tempered by two points. Firstly, this instrument contains general rules that are transposable to all types of contracts. Secondly, once the regulation has been adopted, Member States will have the opportunity to extend its scope to internal contracts covered by this regulation.

In the future, this code may also serve as a model for national legislators, including those from non-Member States, and international legislators (it could therefore form the basis for a global code of sale).

The work of the Commission on the optional instrument of sale, has also created new momentum for all contract law and even in other domains.

The extension of this legislative method in intellectual property is currently under study.

The Commission has announced, in its strategy on intellectual property law, an ambitious approach to create a comprehensive unitary European Copyright Code\(^23\). The idea was subject to consultation in the ‘Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market’\(^24\).

\(^{22}\) According to the EESC, prev. Opinion, note 7, the aim is 'Better lawmaking' and optional instruments could even lead to less lawmaking.


In addition to this Code, the Commission announced that an 'optional unitary copyright title could be created on the basis of Article 118 TFEU\textsuperscript{25}. Such an optional title could be made available on a voluntary basis and co-exist with national titles. Future authors or producers of audiovisual works would have the option to register their works and then obtain a single title that would be valid throughout the EU. The feasibility, actual demand for, and the tangible advantages of, such a title, together with the consequences of its application alongside existing territorial protection must be thoroughly examined'.

These recent developments show that there are new prospects for the optional instrument method.

Four rules or guiding principles will be identified in the study:

- Added value for the operators (citizens, businesses) provided by the instrument
- Communication and training for professionals and operators
- Autonomy and, subsequently, completeness of the rules in the scope covered
- Judicial certainty.

Communication and training for professionals is a critical issue, which remains to be implemented, according to the guidelines established by the Communication of 13 September 2011\textsuperscript{26}. Among the priority areas of training cited by this text\textsuperscript{27}, many contain optional instruments and all would benefit if more was known about them.

As regards judicial certainty, it means, as well as establishing some rules that constitute the optional instrument, providing for some 'accompanying measures'. The proposal for a Regulation on selling, following on from the recommendations made by the European Parliament\textsuperscript{28}, therefore provide for the development of 'standard contract terms' based on common law, adapted to each sector and available in all the EU languages\textsuperscript{29}. A database will also be created, which will list all final judgments where the 'second system' was implemented at European (ECJ) and national level\textsuperscript{30}. These measures were requested by market players, some Member States (including France), legal practitioners and academics in the consultations that followed the adoption of this proposal for a regulation. The proposal also provides for the deployment of alternative dispute resolution, as the European Parliament had hoped for.

The success of a common European optional law depends on its effectiveness and frequency of application by the operators concerned. It also depends on its reception by the Member States and its capacity to be a legislative model. An interesting test, in this respect, may be to observe whether the national laws of the EU States and even those of non-Member States are inspired by the model. Another test is to see whether the Member States allow operators to designate the optional instrument including outside its scope when it is restricted to cross-border operations. It would also be good legal practice to include in future optional instruments an article similar to that of Article 13 of the proposal for a Regulation on the Common European Sales Law (entitled 'Discretion left to the

\textsuperscript{27} These policy areas are: environmental law; civil, contract, family and commercial law, competition law, intellectual property rights; criminal law (in particular the implementation of the European arrest warrant), crime against Union financial interests; fundamental rights and data protection.
\textsuperscript{28} Prev. 'Policy options...'; note 11.
Member States’), which allows for the common European law to be applied outside its scope.

By firmly establishing the conditions for implementing the different optional instruments and by seeing them successfully adopted by their operators, and also where they fail, we will be able to identify the main pitfalls to avoid, and the conditions required for the optional instruments' success. Each situation is different in this respect.

We will therefore begin by briefly presenting the optional instruments in civil law (preliminary chapter), before analysing the results of the survey in five areas:

- Are the instruments that are the subject of the study optional instruments? (Part One)
- Are these optional instruments chosen by the operators? (Part Two)
- How are optional instruments applied by judges, solicitors, legal practitioners and other key European Union bodies? (Part Three)
- Do optional instruments improve the situation? (Part Four)
- Could optional instruments be useful in other areas of civil law? (Part Five)

A concluding chapter will highlight the main findings of the study.
PRELIMINARY CHAPTER: CONCISE PRESENTATION OF THE EUROPEAN OPTIONAL INSTRUMENTS IN THE FIELD OF CIVIL LAW

There are several optional instruments, in various branches of the law, the optional nature of which has sometimes gone unnoticed. It is true that their discretionary nature has not been explained with as much educational effort as in the proposal for a Common European Sales Law. In order to draw up the necessary questionnaire for this study, initial identification work was therefore required.

This preliminary section briefly presents the different European optional instruments identified and mentioned in the questionnaire.

1. CIVIL PROCEDURE

European Enforcement Order31

Regulation No. 805/2004 of 21 April 200432 on creating a European Enforcement Order for uncontested claims implements the European Enforcement Order. The aim of this text is to simplify the transfer of decisions, court settlements, and official deeds within the European area of ‘freedom, security and justice’33.

This regulation is integrated into the legislation of Member States, without them having to necessarily modify their own national law:

‘Recital (19): This regulation does not require Member States to adapt their national legislation to the minimum procedural standards that it lays down. It encourages them to do so by denying a more efficient and more rapid enforcement of decisions in the other Member States unless these minimum standards are observed’.

In the texts, the European Enforcement Order does not replace the exequatur procedure of Regulation No. 44/2001. The creditor remains free to opt for, at his convenience, one or other of the two procedures and it is only if he opts for the European Enforcement Order that he can benefit.

In practical terms, the European Enforcement Order involves the withdrawal of the exequatur mechanism. Therefore, the Order moves without hindrance and without the

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required enforcement proceedings from one Member State to another (Article 1). Having come into force on 21 January 2005, this new instrument concerns civil and commercial matters, with the exclusion however of taxation, customs or administrative issues. The European Enforcement Order concerns all European States with the exception of Denmark.

The decision relating to an uncontested claim (Article 3) is certified as a European Enforcement Order by the original Member state, subject to certain specific decisions. The certification is carried out by issuing a standard form. The certification may only relate to one part of the decision, this is then known as a ‘partial enforcement order’ (Article 8). The certification procedure requires the judge in the State of origin of the decision to verify fulfilment of a certain number of procedural requirements (respect for the right of defence, in particular delivery of the document instituting proceedings or summons (Article 13 and 14), supply of various details relating to the claim (in particular its amount and the interest on this) and to the procedural rules open to the alleged debtor for contesting it (Article 16 on the document instituting proceedings)). Subsequently, the enforcement phase (Article 20 et seq.) in the State in which judgement is sought will be governed by the procedural provisions of the host State’s national legislation on the European Enforcement Order. The creditor will be, for his part, obliged to present various documents to the authorities responsible for the enforcement. The decision and the European Enforcement Order certificate will be sent with, if required, a translation of this certificate into the language of the State in which judgement is sought or in a language easily understood in the latter. The competent authority in the host State of the European Enforcement Order can only refuse its implementation if it is proved to be incompatible with a decision made previously in any Member State or third country.

**European order for payment procedure**


The objective of this text is, firstly, to simplify, accelerate and reduce the costs for resolving cross-border disputes concerning uncontested pecuniary claims by instituting a European Order for payment procedure and secondly, to ensure the free movement of European payment orders within all Member States by establishing the minimum standards of which compliance renders any previous national procedure obsolete in the Member State of enforcement prior to recognition and enforcement. Only cross-border disputes are concerned. In addition, the scope of the Regulation is limited since only civil and commercial claims can be the subject of a European order for payment procedure, in the context of European law. This text concerns all Member States with the exception of Denmark.

The procedure instituted is supplementary to that laid down by national legislation and is

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thus a second system that is additional and optional\textsuperscript{37}.

The operators have the choice of requesting recognition of a national payment order by applying the Brussels Regulation or using this European procedure. In effect, European payment order decisions falling within the scope of the Regulation and made in a EU Member State are recognised in other Member States without it being necessary to use any specific procedure, unless there is dispute, if recognition is obviously contrary to the public policy of the Member State addressed or if it is irreconcilable with a decision made between both parties by the Member State addressed or with a decision previously made in another Member State or third country between both parties in a dispute having the same objective and the same purpose.

**European Small Claims Procedure\textsuperscript{38}**

The Regulation instituting a European small claims procedure (in force since 1 January 2009) created a specific procedure for claims of small amounts\textsuperscript{39}. It aims to increase the effectiveness of access to justice: when the amount of the dispute is small, the claimant would waive his action rather than risk facing a costly and no doubt long procedure. It is therefore useful to have the availability of a simple and quick procedure\textsuperscript{40}.

The optional and additional nature of the European small claims procedure appears in Article 1 of the Regulation, entitled 'Object': *The European small claims procedure is available to litigants at the same time as the procedures laid down by the legislation of Member States*.  

The Regulation only covers cross-border disputes, for which the uncertainty associated with proceedings is without doubt still more of a deterrent if the amount claimed is less than EUR 2 000. In addition to the traditional issues excluded by judicial cooperation instruments, maintenance obligations, labour law, building tenancy agreements (excluding pecuniary requests) and abuses of privacy are set aside.

The characteristics of the new procedure are as follows: It is a written adversarial and highly standardised procedure that excludes legal representation and is tightly controlled by multiple deadlines. After a maximum of sixty days (if there are no additional claims and no difficulties with providing evidence), an order can be obtained that is immediately enforceable in all Member States.

\begin{footnotesize}
\textsuperscript{37} The procedure instituted by this regulation should serve as an additional and optional means for the claimant, who remains free to resort to a procedure provided for by national law. Accordingly, this regulation neither replaces nor harmonises the existing mechanisms for the recovery of uncontested claims under national law (recital 10 of the Regulation creating a European order for payment procedure).


\textsuperscript{39} OJ L 199 of 31.07.07


\end{footnotesize}
2. INTELLECTUAL PROPERTY LAW

'Community' trademark

The territoriality of intellectual property rights recognised by numerous international agreements made in this field forms a natural obstacle to the free movement of goods between Member States by helping to maintain a certain amount of partitioning between national markets. The Court of Justice has established the rule according to which rights are exhausted once goods are first placed on the market in the European Union, but this is a compromise. If we wish to avoid these difficulties, a supranational title is required that is therefore detached from any national jurisdiction.

Council Regulation (EC) No 40/94 on the Community trademark of 20 December 1993, that instituted the Community trademark, must be issued in accordance with a Community procedure with supranational effects, i.e. throughout the whole Union.

Recital (5) of the Regulation highlights the additional and as a result optional nature of the Regulation: ‘Whereas the Community law relating to trademarks nevertheless does not replace the laws of the Member States on trademarks (...)’. Operators who market their products in Europe may choose to register several national trademarks or one Community trademark.

'Community designs'

As with trademarks, the disparities between national legislation for ‘Community’ designs are large. They lead to much legal uncertainty, as well as unequal competition according to the country in which the registration of the design has been carried out. The European Union first attempted to harmonise national legislation relating to designs through European Directive 98/71/EC on the legal protection of designs. This Directive did not provide for a unique Community system and registration of the design in each Member State was necessary. The procedure was long, tedious and costly.

Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, followed by its amended acts in 2003, 2005 and 2007, enabled the creation of a unique European system for the protection of designs. There are now two types of protection. The first is a...
protection for three years starting from the date on which the design was revealed for the first time to the public within the EU (sale of the product). It applies to non-registered Community designs. The second concerns Community designs which have been registered with the Office for Harmonisation in the Internal Market (OHIM), the single point of contact for all nationals of an EU Member State, and protects from a minimum of 5 years up to a maximum of 25 years. Community designs are better protected than non-registered ones. The protection covers deliberate copying as well as the independent development of similar designs, a protection that is not afforded to non-registered designs.

Operators can therefore choose between registering a Community design with the OHIM or registering a design with one or several national offices and complying with the relevant legislation in each State. This mechanism has allowed a second European system to be established that is parallel to that of each Member State. However, it has not been followed to its logical conclusion which seeks an autonomous and self-referential system. In effect, if the Community system used is incomplete, issues which do not fall within the scope of the Regulation will be governed by national protection systems. In the same way, it is envisaged that ‘in the absence of procedural provisions in this Regulation (…), the Office shall take into consideration the principles generally recognised in the Member States’ (Article 68 of the Regulation, entitled ‘Reference to general principles’).

**European patent**

Patent protection in the European Union is changing rapidly.

Until now, it was ensured by two systems, neither of which was based on a legal instrument of European law: the national patent systems and the European patent system, implemented by the European Patent Convention (Munich Convention) of 5 October 1973 to which all Member States of the EU adhered.

The Munich Convention established a single procedure for awarding a European patent. It instituted the European Patent Office (EPO), which issues the patents that subsequently become national patents subject to national Regulations.

A patent belonging to the European Union’s legal system does not exist yet, but work is in progress and the European Union envisages introducing a ‘unitary European patent’ (see infra the section on projects in progress) as an extension to the work on the Community patent. It would be a supranational title with supranational effect (like the Community trademark and design).

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3. **LAW OF ECONOMIC INTEREST GROUPS AND COMPANY LAW**

**European company**

The European Company (SE) was created after 30 years of negotiations. The legislation came into force in 2004.

Four methods for establishing an SE were laid down: establishment by merger between limited companies from different Member States, creation of a holding company, establishment of a joint venture and conversion of a public limited company under national law. SEs have, with a few exceptions, a minimum share capital of EUR 120,000. The registered office of an SE, as set down in its Articles of Association (registered office), must correspond to the place where its central administration is located, i.e. its actual head office. An SE may easily transfer its registered office within the EU without having to dissolve the company in a State. This is one advantage of the SE.

All European Companies are registered in the State of the registered office in a register designated by the legislation of this State.

The Articles of Association of the European Company provide fora shareholder’s meeting and either a management body and a supervisory body (two-tier system) or an administrative body (one-tier system).

Of course, no operator is obliged to use the SE. If it prefers, it may create a company under national law.

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Implementation of optional instruments within European civil law

European economic interest grouping (EEIG)\(^49\)

The difficulties faced in making progress with European Company legislation led negotiators to turn to the EEIG, the objectives of which were less ambitious.

Council Regulation No.. 2137/85 of 25 July 1985 instituted the European Economic Interest Grouping. From 1 July 1989, it became possible to create an EEIG in the countries that had adopted the essential measures for the implementation of the Regulation\(^50\).

The European Grouping benefits from automatic recognition in all Member States. Therefore, the EEIG may, for example, transfer its registered office or administrative headquarters or its main establishment (in an economic sense, used by certain countries) to any EU country, on the one condition that the procedure laid down by the Regulation is observed.

The Regulation provides a new instrument to operators, without necessarily removing the existing national instruments and without affecting the freedom of Member States to take new legislative measures\(^51\). Rather than creating an EEIG, the operators may therefore choose to create a company in a Member State, and then develop an economic activity (freedom to provide services) or create an agency or branch (freedom of establishment) in any EU country.

European Cooperative Society\(^52\)


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\(^50\) Article 43 of the regulation stipulates the entry into force of application (set for nearly four years after the adoption of the text, in order to enable States to adopt the necessary measures, such as those on advertising). In France: S. VICHATZKY, ‘Le groupement européen d’intérêt économique’, Revue trimestrielle de droit européen 1990, p. 275; A. PETELAUD, ‘La construction de la Communauté Européenne et le Groupement Européen d’Intérêt Economique (GEIE)’, Revue des sociétés, 1986.

\(^51\) The penultimate recital specifies: ‘Whereas the Member States are free to apply or to adopt any laws, regulations or administrative measures which do not conflict with the scope or objectives of this Regulation.’


\(^54\) In Spain, J. MINONDO SANZ, El nuevo Estatuto de la Sociedad Cooperativa Europea, CIRIEC-España, Revista de Economía Pública, Social y Cooperativa, No 41, August 2002, p. 9-23; M. Paniagua Zurera, El estatuto de la sociedad cooperativa europea el problema de su aplicación en España, Revista de Economía Social, 2007.
with this Directive by 18 August 2006 at the latest (Article 16). The Regulation provides a cooperative framework of all kinds of companies that wish to combine their efforts to achieve a common benefit. The cooperative movement exists in many sectors of the economy (agriculture, banking, insurance, distribution and media). Operators will therefore have the choice between an SEC and a purely national cooperative format, as Recital No 20 expressly states: ‘The use of this statute must be discretionary’.

4. FAMILY PROPERTY LAW

Matrimonial property system

On 4 February 2010, an agreement creating a common matrimonial property system for participation in acquired property was signed between France and Germany. According to the explanatory memorandum for the agreement ‘almost 13 % of marriages celebrated (in 2006) and divorces declared (in 2005) in Germany involved spouses of different nationalities. In France, 14.59 % of marriages celebrated in 2006 involved couples of different nationalities’. This is where the interest lies in defining a common matrimonial property system, using an optional instrument. This bilateral treaty is not closed since it is open to other Member States to sign.

The text of the agreement specifies that ‘the common system is an optional system of participation in acquired property, which can only be chosen through a marriage contract. During the marriage, it functions as a separatist system, but when the marriage ends the spouses split between them the difference that exists between their respective wealth’. In practice, couples of different nationalities who do not choose this system, will continue to be subject to the rules of international private law to determine their matrimonial property system.

5. PROJECTS IN PROGRESS

Euro-mortgage

The idea of a common mortgage for EU Member States is not new, but it is progressing slowly.

As early as 1966, the Segré report on the ‘development of a European capital market’ argued in its favour by reasoning that this would facilitate the integration of capital markets. Following this, in 1987, a commission of the International Union of Latin Notaries

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56 Agreement of 4 February 2010 between France and Germany concerning the creation of a common matrimonial property system.
Implementation of optional instruments within European civil law

(IULN) proposed a pan-European mortgage available to lending institutions which would co-exist with immovable property rights existing in each Member State. Various groups, in particular the ‘Euro-mortgage’ group and the Forum Group, were subsequently formed to try and develop guidelines for a European mortgage. It is on the basis of this project that a Green Paper on mortgage credit in the EU was issued in 2005.

**European Certificate of Succession**

It is sometimes very difficult to have one’s rights asserted in a succession. The implementation of a European Certificate of Succession is laid down by the proposed Regulation of the European Parliament and of the Council on the jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in terms of succession and on the creation of a European Certificate of Succession. Such a certificate would allow proof of one’s inheritance status or powers to act as an administrator or executor of a succession to be supplied without any formality. The succession procedures would therefore be accelerated and their costs reduced. According to Article 36 2 of the proposed Regulation, ‘Use of the European Certificate of Succession is not obligatory. The certificate does not replace national procedures’. Therefore, this certificate would not replace those existing in certain countries and each will reserve the right of being issued with a national certificate or a European certificate.

In the current form of the proposed Regulation, the request for a European Certificate of Succession is made before the competent court, i.e. the court of the Member State in which the deceased was habitually resident at the time of death and if this is not in a Member State, the court of the Member State in which the deceased had assets as well as being habitually resident within the five years before his death, or alternatively, the Member State of which he was a national, or alternatively the State in which the heir or the legatee has its habitual residence or failing that in the State where the request relates exclusively to assets situated in this State. The court will rule on the basis of the request in view of the documents provided without delay. In the Member State of the competent authority, proof of hereditary entitlement and administrator or executor powers of the succession is carried out according to national procedure. To facilitate the transfer of the certificate within the EU, a uniform approach should be adopted. To do this, the Regulation proposes the drafting of a standard form. Once issued, the certificate will be legally recognised in all Member States. The Regulation shall not apply to Denmark, the United Kingdom or Ireland.

**‘Community patent’ or ‘unitary European patent’**

The community patent has been under discussion for more than 20 years, but obstacles such as choosing the language or the competent court have prevented its realisation. Following the request from certain Member States, the Commission has adopted two Regulation proposals on the conditions for implementing enhanced cooperation: one for

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59 http://www.pfandbrief.de/cms/_internet.nst/0/D56E60ADCD3A8C06C1257802004AE8DC/$FILE/Eurohypothek
Creating a unitary patent protection and the other on the translation provisions applicable for the unitary European patent.

Unlike the European patent implemented by the European Patent Office (EPO), the ‘unitary European patent’63, will be a single patent, valid as such in the European Union, without becoming a range of national patents once it is obtained. This patent will therefore have the same legal effects throughout the European Union. Therefore, when the texts under discussion come into force, operators will have the choice between the European patent (EPO), one or several national patents and the unitary European patent.

European Private Company64

The proposed Regulation on the Statute of the European Private Company is designed to promote the activities of small and medium sized businesses (SMEs)65. These businesses are often exposed to costs when they wish to develop cross-border activities: Expansion requires the parent company to consider the legal form to choose for its subsidiary according to the law of the State in which the operator wishes to establish itself.

The European Private Company, valid in each Member State, will constitute a unique legal form. The operators may choose this legal form even if their activity is not cross-border.

The proposed Regulation on the Statute of the SPE provides that it will be a limited liability company constituted by at least one natural or legal person and of which the minimum capital is one euro. The registered office and the central administration or the main establishment of the SPE must be established within the EU. It is not obliged to establish its central administration or its main establishment in the Member State of its registered office (Article 7). The company is registered in the Member State of the registered office but its branches are governed by the national law in which they are established. The registered office may thereafter be transferred to another Member State, subject to registration in this host State, without the legal personality or contracts previously signed being called into question.

As with all the other optional instruments, the operators remain free to not choose this additional and optional European system.

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The proposal for a Regulation on the creation of a European Account Preservation Order will facilitate cross-border debt recovery in civil and commercial matters. It aims to guarantee the rights of individuals with claims in another country. This text, of which the scope is limited to situations having cross-border implications, covers civil and commercial matters (with some exceptions). It provides for the use of provisional measures in order to ensure that the credit has not already been moved or used when the person holds an enforcement order. Indeed, when the claim is situated abroad, the language, the differences in procedure and the disparities in procedural delays mean that the creditor has no or few guarantees.

The objectives are as follows:

- Enable creditors to obtain account preservation orders on the basis of the same conditions, irrespective of the country in which the competent court is located;67
- Enable creditors to obtain information on the location of their debtor’s bank accounts;
- Reduce the costs and delays for creditors seeking to obtain and enforce an account preservation order in cross-border situations.

With the European Account Preservation Order, account preservation orders issued in a Member State under the proposed procedure will be automatically recognised and enforced in any other Member State without any special procedure being required. This would guarantee greater efficiency and speed.

This European order will be made available to the creditor, who may choose to use it in place of the preservative measures in force within Member States.

These are the optional instruments on which the questionnaire was based. The results from the extensive survey which was carried out must now be disclosed and analysed.


67 As also defined in European Parliament initiatives: see G. PAYAN, ‘Saisie européenne des avoirs bancaires et transparence patrimoniale: les jalons posés par le Parlement européen’, Petites affiches, 2 September 2011 No 175 p. 8 ff.
PART 1 - ARE THE INSTRUMENTS THAT WERE PART OF THE STUDY OPTIONAL?

We have just seen in the European texts that the instruments that were the subject of our study are optional and discretionary. However, are they seen as such by European citizens?

To find out, two points must be addressed:

CHAPTER 1: ARE THE OPTIONAL INSTRUMENTS THAT ARE THE SUBJECT OF THE STUDY CONSIDERED BY EU LEGAL PRACTITIONERS AS OPTIONAL INSTRUMENTS?

CHAPTER 2: HAVE NATIONAL LEGISLATORS REPLACED THEIR LEGISLATION WITH THE OPTIONAL INSTRUMENT OR HAVE THEY ADDED IT TO THEIR LEGISLATION?
CHAPTER 1: ARE THE OPTIONAL INSTRUMENTS THAT ARE THE SUBJECT OF THE STUDY CONSIDERED BY EU LEGAL PRACTITIONERS AS OPTIONAL INSTRUMENTS?

We will present an analysis of the responses (1.) followed by a detailed summary showing the different responses from each country (2.).

1. ANALYSIS OF THE RESPONSES

The different reports show a generally positive response, often preceded by a fundamental issue with the concept of the optional instrument. Therefore, we must first examine this concept (1.1), before showing that European legal practitioners consider that these texts are effectively optional instruments (1.2).

1.1. The concept of the optional instrument

Several responses have shown that there was a fundamental issue with the nature of the optional instrument.

All the rapporteurs highlight the fact that the optional instrument is not optional for Member States. The Hungarian response indicates: 'In every area of law relevant to the field of interest covered by this Survey, the legal instruments examined are almost always Regulations of the Parliament and the Council and as such are directly and not optionally applicable instruments in Hungary'.

The optional, discretionary or alternative nature implies a choice for operators to submit to it, a choice that can be qualified with an 'opt-in', according to the accepted wording.

However, several questions are asked in order to define the scope of the instrument, in particular, what are the alternatives and to what extent must the national and European instruments have the same scope?

1.2. Firstly, what are the alternatives?

A priori, a choice must exist between a national system and a European system.

1.2.1. With regard to the national system

The German report issued by the Ministry of Justice emphasises that no national alternative to the European Enforcement Order would exist.

'With regard to the enforcement of a national title in other Member States, there is no alternative national law, since the procedure is exclusively provided for at European level (especially by the Brussels I Regulation). The national alternative would therefore merely be to obtain a title in addition to the already existing one in the Member State in which you want to enforce it subsequently'.

In other words, the European Enforcement Order would not be an alternative to a national enforcement order, as the latter could only be enforceable in Europe by virtue of an exequatur procedure resulting, not from a national system but from a European Regulation.

68 The wording is preferred by the Hungarian report.
It should be noted however that the first alternative (national law and the European exequatur procedure) both involve national law, since the order must first be enforceable under national law.

In addition, certain bilateral or trilateral agreements between Member States should be considered with national law. Therefore, the Belgian report states, for example, that there is no Belgian law for trademarks or designs, but this can be found in the Benelux convention signed in The Hague on 25 February 2005 with regard to intellectual property. The Luxembourg and Dutch reports were indifferent to this detail in order to qualify the optional instrument and have not mentioned it. The first alternative will be in this case an international agreement linking a Member State.

The first alternative must therefore implement at least in part a national law or the text which is applied in a Member State in the absence of European intervention.

1.2.1.1. The second alternative must be European

Two questions can then be asked.

The first question is considered together with the one previously asked for national law: Can we speak of an optional instrument if the European alternative is not completely autonomous, but sometimes necessitates resorting to national law to supplement it?

The Spanish report thus mentions a ‘principle of relative autonomy’. There may be an optional instrument even if European law does not govern everything and refers to national law for certain points:

‘Scholars stress another principle: the principle of relative autonomy. The OI do not regulate exhaustively industrial property rights or the European society; on the contrary, for certain aspects they call the national rule. Consequently, the European Society and the European Economic Interest Grouping have their specific features in each Member State. Hence, it is said that instead of a ‘European society with national variants’ one should speak of a ‘Limited National Society with European Character’. The many references to national laws may hamper harmonisation since Member States may try to keep their national singularities in order to maintain a specific body of law for societies established in (their) territory’.

In reality, this does not affect the qualification of the instrument, but it compromises its effectiveness. While criticising in the same way the incomplete nature of certain optional instruments, the Italian report does not however rule out speaking of an optional instrument.

The French report insists on the fact that this is the case in terms of European companies and European Economic Interest Groupings. In the texts there are rules on hierarchy and on combination, from which we can deduce that the European system is not completely autonomous. The fact remains that the operators have the choice, under certain conditions, of creating a European company or creating a company governed by French law.

The European alternative can therefore have relative autonomy.

The second question is as follows: Should the second alternative be constituted exclusively under European law or can it also stem from international agreements which would only link European States?
It should be remembered that in the past, Europe often used the technique of International agreements. It did this with the significant Brussels Convention of 27 September 1968 on the jurisdiction and enforcement of judgements\(^\text{69}\), which has since become a Regulation\(^\text{70}\). In the same way, it made this choice for optional instruments under intellectual property law, as the Munich Convention shows on the European procedure for issuing patents and the Luxembourg Convention on the Community patent. It is due to the failure of the latter that Regulations have then been used, in particular for the community trademark\(^\text{71}\) and Community designs\(^\text{72}\).

However, the technique of the international agreement between Member States was used before the revision of the treaties which have progressively assigned new powers to EU institutions within the field of civil law that are linked to the development of the European area of justice. This technique is used less today given the powers conferred to the EU since then. Nevertheless, since it was used in the past, there is no objection to keeping as a second alternative of the option, a European system based on an agreement between Member States.

However, the question becomes more delicate when this international agreement initially linking only Member States has been opened to some Non-Member States of the EU. This is the case with the Munich Convention on the European patent which was ratified in particular by Croatia, Norway, Switzerland and Turkey, which are not members of the EU\(^\text{73}\).

1.2.2. To what extent should the national system and European system have the same scope in order that we can speak of an optional instrument?

This is at the heart of the questions in the different reports, particularly when the European system has a much larger scope than the national system. The term 'scope' is used here to refer to the territorial scope, the material scope and the effects of the optional instrument. Is a difference with one of these elements sufficient to exclude the qualification of the optional instrument?


\(^{73}\) The convention is currently ratified and in force within 38 States (Albania, Austria, Belgium, Bulgaria, Cyprus, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Iceland, Italy, Latvia, Lichtenstein, Lithuania, Luxembourg, Macedonia, Malta, Monaco, Norway, the Netherlands, Poland, Portugal, Romania, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey and United Kingdom).
This is another way of asking the question under consideration above for the European Enforcement Order which is enforced on European territory, compared with the national enforcement order, which with no exequatur, only has a territorial scope.

However, it is above all in terms of intellectual property that this issue is found.

Therefore, the Spanish report prefers to speak of coexistence\textsuperscript{74}, in order to demonstrate that a choice exists between two systems which do not have the same territorial scope:

\textquote{More commonly, scholars (for example, Broseta Pont/Martínez Sanz, Fernández Novoa, Gómez Segade) refer to the ‘principle of coexistence’, in the sense that there are two systems –the national Spanish and the European– available to the parties. This is especially important in the field of industrial property rights because of its territorial nature, i.e. the party applies for protection –whether national or European– depending on the territory where he wishes to be protected’.}

In the same way, the French report refers to the view of certain individuals questioned who argued that an optional instrument should have the same purpose as the rules set aside by the option. Therefore, an optional system under contract law would have the same purpose as the disregarded system whilst the European trademark, that aims to establish a protection for all EU Member States would not have the same purpose as national trademark law which aims to establish a protection at a national level only.

However, if both terms of the option have the same effect and the same scope\textsuperscript{75}, we question the purpose of having the possibility to opt.

It seems to us that these indecisions result from denaturing the concept of the option. The option is the fact, in a given situation, of having the choice between at least two alternatives.

The fact of having a choice is sufficient to create the option, even if the two alternatives are complete opposites (for example buy or do not buy).

The simple fact that the European legislator provides an option between national law and a European system shows that these systems have a degree of substitutability that is sufficient to govern the situation, with little importance that one of the two will resolve it better or with greater efficiency or scope than the other.

Ultimately, in light of all the reports, we will consider that there is a European optional instrument \textsuperscript{76} from the moment that a choice is given to the subjects between firstly, a system implementing at least in part a national law or a system established by an international agreement linking the Member State, and secondly a European instrument, with relative autonomy, established by secondary legislation or by an international

\textsuperscript{74} It is also the term used in the report from the Max Planck Institute entitled ‘Study on the overall functioning of the European trademark system’ of 15 February 2011: (http://ec.europa.eu/internal_market/indprop/docs/tm/20110308_allensbach-study_en.pdf), however, in this case, it is more concerned with showing that the two systems co-exist and that the operator has the choice. ‘One of the core elements in European trademark law is the principle of coexistence. Recital 6 in the preamble to the CTMR voices this principle by stating that the Community trademark law does not replace the law of the Member States on trademarks and that national trademarks continue to be necessary for those undertakings which do not want protection of their trademarks at Community level’ (no 1.1 p. 45).

\textsuperscript{75} In the broad sense, defined above.

\textsuperscript{76} The optional instrument technique may be used elsewhere than in Europe. For example, the Vienna Convention on the International Sale of Goods of 11 April 1980 is an optional instrument of international law.
agreement that is only signed by EU Member States and that is likely to benefit all EU Member States, with little importance that the two systems in question have a different territorial scope from the moment that the use of one excludes the use of the other77.

1.3. European legal practitioners consider overall that these texts create optional instruments

The investigation has shown that, if the expression ‘optional instrument’ has only recently become common (1.2.1), the discretionary nature of these instruments has been recognised (1.2.2).

1.3.1. The rare use of the expression ‘optional instrument’

Many reports stated that the expression ‘optional instrument’ was not known by legal practitioners of Member States. It is the debate on the Green Paper on European Contract Law which made this expression known.

Therefore, the Dutch report recognises that ‘the term optional instruments is only rarely used in the Netherlands. This is now changing a bit as a result of the discussion about the idea of an optional contract code, seen as one of the options in the 2010 Green Paper on European Contract Law. However, even though the term is not used for the above instruments, it is clear to Dutch lawyers that these instruments are alternatives for the existing national law and are treated as such in doctrine and by the legislature and courts.’ Similarly, the Austrian report indicated that ‘However, the term OI is so far being used almost solely for a (possible future) European contract law. For most Austrian jurists it is closely linked with the developments around the (D)CFR and the debate on a ‘blue button’ for consumers’. In the same way, the Spanish report states: ‘The listed Instruments may be considered optional in the sense that the parties are free to keep on applying exclusively the national law but if they are willing to, additionally they can decide that the concrete legal relationship is governed by the European Instrument. However, Spanish scholars and case law rarely qualify these pieces of legislation as ‘optional instruments’.

1.3.2. Recognising the discretionary nature of optional instruments

If the terminology ‘optional instrument’ is still not widely used, European legal practitioners recognise the optional nature of most of the instruments listed.

Even though this comes from European texts (cf supra), certain legislators have used it in their national law. Therefore, with regard to the European payment order, the Dutch report specifies:

‘Thus, when the Dutch Act was drafted, the legislature explicitly held that the European procedure will stand next to the national procedure: it is a complementary and facultative instrument for the claimant, who can continue to make use of procedures in national law (MvT TK 31 513)’.

Conversely, the Polish report points out that no Article of the Polish Code mentions the discretionary nature of these instruments. However, it adds: ‘Indirectly, such a conclusion

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77 We have decided nevertheless to keep in this study the agreement on the EU patent for three reasons. Firstly, this agreement involves the European Patent Office (EPO) which is a European office that is part of the European Patent Organisation (Munich Convention Article.5). Secondly, all the EU Member States have ratified the Munich Convention. Finally, the questionnaires include questions on the implementation of the EU patent and it would be a pity to not to summarise the content. However, it should be remembered that the European patent is not an OI connected to the EU.
follows from art. 505 section 1 k.p.c. pursuant to which the court shall inform the claimant about the possibility of issuing the European order for payment in regard to a part of the claim'. It is very interesting to note that it is the judge in this case who promotes the optional instrument, bringing it to the attention of the claimant.

Some reservations are raised in the reports for certain optional instruments:

Firstly, the optional nature of the Franco-German matrimonial property system is dismissed by certain reports, for the reason that it cannot be applied in their country. Inevitably, without ratification of the convention by other European States, the Franco-German matrimonial property system is only proposed to couples of which the matrimonial property system is subject to the law from one of the two contracting States78. In reality, by virtue of the rules on conflict of laws which often represent, in this field, the law chosen by the spouses or, alternatively, that of their first common habitual residence, spouses can access this, even if they are not of French or German nationality. The scope of the instrument is therefore potentially larger than it initially seems.

The other instrument of which the optional nature raises some doubts is the European patent established by the Munich Convention. Both the French report and the Swedish report insist on the fact that the European patent from this convention is not a unitary order. It is just a European procedure for issuing patents, which is then considered as ‘a range of national patents’ and not as a supranational order.

It is certain that it is not a substantive optional instrument enabling cross-border rights to be issued like the Community trademarks or designs. However, we can accept that it concerns a procedural optional instrument. The operators have the choice between using the European procedure for issuing patents established by the Munich Convention, and using the national procedure for issuing patents for each territory in which they intend to exploit their invention. It seems to us therefore that it is more an optional instrument limited to the procedure of issuing the permit.

78 Under The Hague Convention on the law applicable to matrimonial property systems of 14 March 1978, the law applicable to matrimonial property law for two spouses is, either that which they have chosen before their marriage, Article 3 of the convention does only allows them to choose ‘1. the law of the State of which one of the spouses holds the nationality at the time of this designation; 2. the law of the State on the territory of which one of the spouses has its habitual residency at the time of this designation; 3. the law of the first State on the territory of which one of the spouses will establish a new habitual residency after the marriage’, or that ‘of the State on the territory of which they establish their first habitual residency after the marriage’ (Article 4 of the Convention). The proposed Regulation of 16 March 2011 on the jurisdiction, applicable law and recognition and enforcement of decisions in terms of matrimonial property systems, COM (2011) 126/2, has underpinned a large part of these solutions.
## 2. COUNTRY-BY-COUNTRY SUMMARY OF RESPONSES TO QUESTION 1

<table>
<thead>
<tr>
<th>Member State</th>
<th>Table 1</th>
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<tr>
<td>Belgium</td>
<td>Table 1 Do the European legal practitioners from your country consider these instruments as optional instruments (OI)?</td>
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<tr>
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<td>These instruments are considered as optional by legal practitioners in Belgium.</td>
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<td></td>
<td>With regard to the European Enforcement Order (EEO), Belgian legal practitioners consider that it is more efficient and less costly to use this procedure rather than apply the procedure laid down in Regulation 44/2001. Consequently, even if it is optional, the legal practitioners encourage it to take precedence in relation to the other possibilities offered by Belgian and European legislation.</td>
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<td>With regard to the payment order: Belgian legal practitioners also consider that the system implemented by the Regulation is more efficient and straight-forward than procedures existing beforehand. Therefore, although this instrument is optional, they push for it to take precedence in relation to other possibilities offered by Belgian and European legislation.</td>
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<td>With regard to small claims proceedings: as with the Regulation on the European payment order, the application of this text in terms of small claims is favoured in relation to the other possibilities offered by Belgian law.</td>
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<td>With regards to Community designs: in Belgium, individuals or companies who wish to register a trademark have the choice of using Benelux Law on trademarks or the Regulation on the Community trademark. However, it was found that the two procedures were applied in the same manner.</td>
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<td></td>
<td>With regard to Community designs: as with the trademarks, individuals or companies who wish to register their designs may choose between the European Regulation on the Community trademark, the Benelux Law of 25 October 1996 for designs and the Uniform Law of 1 December 1970.</td>
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<td>With regard to the European patent: in Belgium, an individual who wishes to patent an invention may, according to the level of protection that he wishes to obtain for his invention, use the Belgian Law of 28 March or the Munich Convention.</td>
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<td></td>
<td>Adoption of the Community Patent Regulation is however awaited with interest. Having a Community patent will in effect promote innovation, growth and competitiveness, necessary for the development of the internal market.</td>
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<tr>
<td>Country</td>
<td>Comment</td>
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<td>Bulgaria</td>
<td>With regard to the European Certificate of Succession project: in Belgium, there would also be an optional instrument. Bulgarian legal practitioners are aware of these optional instruments, but do not always consider them to be appropriate. Moreover, the concept of an optional instrument itself is still not very popular amongst Bulgarian legal practitioners and, as some of these optional instruments are relatively new, the majority of lawyers have still not implemented them in their practice. With regards to the intellectual property OIs: They are largely used by practitioners and are considered to be very useful by Bulgarian lawyers.</td>
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<tr>
<td>Czech Republic</td>
<td>With regard to OIs for civil procedure, intellectual property law or law of economic interest groups, Czech legal practitioners consider these instruments as being optional. Practitioners and academics are aware that these instruments are parallel to those laid down by national legislation or to other Community instruments. However, the family property law OI has not been discussed and is almost completely unknown in the Czech Republic.</td>
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<tr>
<td>Germany</td>
<td><strong>Academic response</strong></td>
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<td></td>
<td>German academics consider that it is difficult to provide an overall response with regard to all of the optional instruments given that there is no homogenous group of legal practitioners to refer to. However, these same academics emphasise that both by the name of the optional instrument (which generally refers to ‘European’ or ‘Community’ law) and by the legal definition of its scope, all the optional instruments in force are considered by German legal practitioners as optional instruments of which the legal system, firstly, is subject to certain conditions and/or certain specific effects linked to the European/Community arena, and secondly, co-exists with that of a national instrument.</td>
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<td><strong>The Ministry’s response</strong></td>
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<td>The fact of knowing whether the EEO is an OI depends on the sense or even the term optional instrument: Is an OI a legal option which can only be chosen by one party or by both parties together? In the case of the EEO, the creditor may decide by himself, whether or not he will request accreditation in the form of a European Enforcement Order. This would be different with regards to the instrument discussed as could be the ‘28th system’ in European contract law, which could only be chosen by both parties under mutual agreement. With regard to the European Executive Order (EEO), the Ministry asks whether an OI should be considered as a national or a European legal option. In effect, between the European Enforcement Order and the</td>
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enforcement of a national order in other Member States, there is no other alternative national law, since the procedure is exclusively intended for the European level (particularly by the Brussels I Regulation). Therefore, the national alternative would be to simply obtain an order in addition to that already existing in the Member State in which the individuals wish to apply it thereafter. However, the authors of this study seem to view the notion of an OI in the same way as the EEO, as being a discretionary instrument relating to the exequatur procedure and consequently to the Brussels I Regulation, and therefore considered as being a European legal instrument. However, the European contract law optional instrument is something fundamentally different. The ‘28th system’ would be in effect an option for the 27 national legal systems as a whole and not an option with a Single European Act. Therefore, on the whole, there is considerable doubt as to whether the EEO can be considered as being an OI, as the questionnaire seems to suggest.

With regard to the payment order: it considers these instruments as optional.

With regard to family property law: it considers these instruments as optional.

With regard to the European Small Claims Procedure: it considers that it could be an alternative to national procedures. The claimant has in effect the choice between the different types of procedures. However, if he chooses the procedure under Regulation No. 861/2007, the defendant is bound by it.

With regard to company law: as a general rule, it considers these instruments to be optional. However, once the decision has been taken to opt for a supranational statute, the national and European mandatory rules must be observed.

With regard to European cooperative societies: no information available.

Greece
The civil procedural instruments in question are considered to be optional instruments by Greek legal practitioners.

With regard to the European Enforcement Order (EEO): the Hellenic Doctrine emphasises the discretionary nature of the mechanism in relation to the Brussels I Regulation. Therefore, it is the responsibility of the creditor to choose whether he prefers to use the European Enforcement Order which will exempt him from the exequatur formality, or whether he deems it more appropriate to use the exequatur procedure laid down in Regulation 44/2001.

Spain
The instruments listed may be considered as discretionary in the sense that the parties may continue to exclusively implement national legislation if they wish; however, they may also decide for their legal relationships to be governed by the European instrument.
Nevertheless, Spanish researchers and case law rarely qualify these texts as ‘optional instruments’. More generally, researchers refer to the 'principle of coexistence' in the sense that there are two systems available to the parties, the national system or the European system.

This is particularly important within the field of industrial property due to its territorial nature. In effect, the party requests a protection, whether it be national or European, according to the territory in which it wishes to be protected.

Spanish researchers highlight another principle: ‘the principle of relative autonomy’.

In effect, OIs do not comprehensively govern industrial property or European company rights and, for certain aspects, need to use the national law. Consequently, the European company and the European economic interest grouping have their specific features in each Member State. Therefore, they point out that instead of a 'European company with national variants', it would be preferable to speak of a 'national company with European characteristics'. Numerous references to national legislation are likely to hinder harmonisation as Member States may try to keep their national features in order to maintain a specific set of rules for company law set down in its territory.

The eventual incorporation of Spain into the Agreement of 4 February 2010 between France and Germany leaving its complexity to one side in a multi-legislative State may only entail an optional Regulation, as it concerns assets from the marriage where parties are free to agree on their specific system and agree on their financial relations.

The Regulation on the European Certificate of Succession will be discretionary for Article 36 of the proposal which specifies that the certificate will not be obligatory. It is not expected for the Regulation to provide otherwise. Consequently, use of the certificate will depend on the willingness of the parties involved.

France

For French legal practitioners, the response is different according to the instruments concerned.

I. Civil procedure

For some French legal commentators, the three Regulations listed in section 1-C are optional instruments, in the sense that they offer an additional procedure for the settlement of cross-border disputes, without prohibiting the use of other procedures recognised by the law of a Member State or European law.

However, the response from legal practitioners is a little different. For them, the question of the optional instrument is rather perceived as a practice which has superseded another practice which has become obsolete. The legal practitioner does not ask himself this question. He
uses the procedure which becomes the most common, most simple and least expensive practice as soon as it is recognised in Orders and Courts.

With regards to the European Small Claims procedure: the lawyer, who generally deals with them using a correspondent abroad due to it being too costly to deal with from France, may from now on act directly thanks to the optional instrument. Therefore, the optional notion disappears and the procedure is considered as the new useful procedure.

The same has been said for the European Enforcement Order.

II. Intellectual property law

Community trademarks, designs and plant variety rights which are considered as truly optional must be distinguished. They give in substance the same protection as national orders with which they overlap. The Community protection is valid for all Member States.

However, with regard to the European patent, this only constitutes a centralised registration system. It only allows the issuing of national orders in the States referred to in the registration application. Therefore, strictly speaking, it is not an optional instrument (contrary to the project for an EU patent).

III. For instruments concerning groupings

With regard to European company (SE), the responses to these two questions were in part positive.

A review of the conditions for setting up the European company needs to assess two distinct areas. In effect, the SE is governed by a mixed law, i.e. both of a Community nature - on the basis of two main texts that are Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute of the European Company and Council Directive No 2001/86/EC of 8 October 2001 supplementing the Statute of the European Company with regard to the involvement of employees. The rules governing the SE are in effect based on a complex hierarchy of applicable rules. The legislator has therefore indicated in Article 9 of Regulation No. 2157/2001 the hierarchical or combination rules that should be observed and which can be systematised in five phases.

- Certain points are proposed by Regulation No. 2157/2001 itself. Its provisions are then essential; they set aside the rules of national law, even if they disregard Community provisions. For example, with the Regulation precisely setting down the forms of establishment permissible for an SE, it is not possible to provide for others by national law, which would differ from it.

- For all the points expressly proposed by Regulation No. 2157/2001 and for which it refers to statutory freedom, it is the
Statutes of the SE which are applied; designed in this case as a result of the Regulation, they can also differ from the provisions of national law which do not provide statutory freedom for public limited companies under their national law. For example, the Statute of the SE that freely sets down the rules for a quorum and a majority of bodies of the SE (Article 50).

- Failing provisions in Regulation No. 2157/2001 or referral by the Regulation to statutory freedom, or if fragmented provisions exist within the Regulation, it is then national legislation that specifically targets the SE which applies. In effect, the Regulation provides for options in order that the States can legislate on certain points. The aim is that they can propose, within the framework outlined by the Regulation, specific rules that are applicable to SEs which are registered on their territory. Therefore, the national provisions specific to the SE may differ from a general principle laid down by the Regulation under the conditions that it sets. However, if the State does not exercise the option, it is the general Community provision which will be applied to the SE registered on the territory of the Member State in question. For example, whilst Article 2 section 2 of Regulation No. 2157/2001 enables, for a legal entity not having its central administration in the Community, Member States to provide for the possibility of participating in the establishment of an SE if it is constituted according to the law of a Member State, has its registered office in this Member State and an effective and continuous link with the economy of a Member State, the French legislator would not deem it appropriate to exercise this option. Furthermore, and without doubt more specifically, on the basis of Article 8 section 14 of the Regulation, which leaves Member States with the option of stipulating, for SEs registered on their territory, that the transfer of the registered office to a Member State will not take effect in case of opposition from a competent authority for reasons of public interest, the French legislator has decided that only the Public Prosecutor, the Committee for credit institutions and investment firms (when the SE is a lending institution) and the Financial Markets Authority (when the SE is an insurance or reinsurance company) may oppose the transfer of an SE registered in France.

- When Regulation No. 2157/2001 is silent and national law relating to the SE contains no rule for a particular point, it falls on national law relating to public limited companies to prevail. In effect, in this case, the provisions of national law of the Member State in which the SE has its registered office that are applicable to public limited companies should be referred to, once it is registered. For example, for matters that are not governed by the Regulation, in particular such as taxation, competition, intellectual property and insolvency, or when Regulation No. 2157/2001 refers to national laws, it is the provisions of law applicable to public limited companies of the Member State where the SE has its registered office which should apply.

- Finally, in the absence of Regulatory provisions, national law applicable to public limited companies of the Member State in which the SE has its registered office may provide the Statute with the authority
to set a specific rule. However, in this case, the provisions must not be contrary to the legal provisions for public limited companies of the Member State in which the SE has its registered office.

With regard to European cooperative societies (SCE), the responses are the same. The Statute of the SCE is based on a combination of national and Community rules. The emergence of the European cooperative society is, first of all, the fruit of Community institutions which have enabled the adoption, firstly, of Regulation No. 1435/2003/EC of 22 July 2003 on the Statute of the European Cooperative as amended by correction (OJ L 049 of 17/02/2007 p. 0035) and secondly, of Directive No 2003/72/EC of 22 July 2003 supplementing this Statute with regard to the involvement of employees. In national law, Law No. 2008-89 of 30 January 2008 as well as Law No. 2008-649 of 3 July 2008, supplemented by Decree No. 2008-439 and 2008-440 of 7 May 2008 on the involvement of employees in the European cooperative society, incorporate this structure into French law. Therefore, they both implement this Community structure and enrich its contents by adapting it to existing French law for cooperative societies.

Frequently presented as a more modest replica of the European company, the rules governing the SCE are in effect structured in the same way as for SEs. The key to its functioning is identical, which is based on a complex hierarchy of applicable rules. In effect, as with the SE, the SCE is governed by a mixed law, i.e. of both a community and national nature. The legislator has therefore indicated in Article 8 of Regulation No. 1435/2003 the hierarchical or combination rules that should be observed and which can be systematised in five phases:

- Certain points are proposed by Regulation No. 1435/2003 itself. Its provisions are then essential; they set aside the rules of national law relating to public limited companies, even if they disregard Community provisions. For example, with the Regulation precisely setting down the forms of establishment permissible for the European cooperative, it is not possible to provide for others by national law, which would differ from it.

Furthermore, when the Regulation does not expressly propose the applicable rule, it shall refer, as within the framework of the SE, to national law on public limited companies. For example, the Regulation provides that the law applicable to public limited companies of the Member State where the European cooperative has its registered office is applicable to the SCE by analogy in particular with regards to: the designation of experts and the evaluation of assets other than cash (Article 4 section 6), the contents of letters and documents sent to third parties (Article 10 section 1), the requirements for the disclosure of documents and information (Article 11 section 5, 12 section 1 24 section 1 32) or in the event of establishing the European cooperative through a merger, the provisions applicable in the event of a merger of public limited companies apply with regard to the protection of creditors and the obligations of the cooperatives which merge (Article. 28 section 1).
For all the points not expressly proposed by Regulation No. 1435/2003 and for which it refers to statutory freedom, it is the statutes of the SCE which are applied; designed in this case as a result of the Regulation, they can also differ from the provisions of national law that are applicable to cooperatives. For example, the Statute of the SCE may provide that the cooperative will host non-Members for the benefit of its activities or will enable them to participate in its operations.

Failing provisions in the Regulation or referral by Regulation No. 1435/2003 to statutory freedom, or if fragmented provisions exist within the Regulation, it is then the national law that specifically targets the European cooperative which shall apply. In effect, the Regulation provides for options in order that the States can legislate on certain points. The aim is that they can propose, within the framework outlined by the Regulation, specific rules that are applicable to European cooperatives which are registered on their territory. Therefore, the national provisions specific to the SE may differ from a general principle laid down by the Regulation under the conditions that it sets. However, if the State does not exercise the option, it is the general Community provision which will be applied to the European cooperative registered on the territory of the Member State in question. For example, whilst Article 2 section 2 of the Regulation enables, for a legal entity not having its central administration in the Community, Member States to provide for the possibility of participating in the establishment of an SCE if it is constituted according to the law of a Member State, has its registered office in this Member State and an effective and continuous link with the economy of a Member State, the French legislator would not deem it appropriate to exercise this option under the Law of 3 July 2008. Furthermore, and without doubt more specifically, on the basis of Article 7 section 14 of the Regulation, which leaves Member States with the option of stipulating, for the SCEs registered on their territory, that the transfer of the registered office to a Member State will not take effect in case of opposition from a competent authority for reasons of public interest, the French legislator has decided that only the Public Prosecutor, the Committee for credit institutions and investment firms (when the cooperative is a lending institution) and the Financial Markets Authority (when the SCE is an asset management company) may oppose the transfer of an SCE registered in France. It is therefore not one but several authorities that France has chosen to implement.

When Regulation No. 1435/2003 is silent and national law relating to the European cooperative contains no rule for a particular point, it falls on national law relating to cooperatives to prevail. In effect, in this case, the provisions of national law of the Member State in which the European cooperative has its registered office that are applicable to cooperative societies should be referred to, once it is registered. For example, for matters that are not governed by Regulation No. 1435/2003, in particular such as taxation, competition, intellectual property and insolvency, or when the Regulation refers to national laws, it is the provisions of law applicable to cooperatives of
the Member State where the SCE has its registered office which should apply.

- Finally, in the absence of Regulatory provisions, national law specific to the European cooperative and/or national law applicable to cooperatives, may provide the Statute with the authority to set a specific rule. However, in this case, the provisions must not be contrary to the legal provisions for cooperatives of the Member State in which the SCE has its registered office.

With regards to the European Economic Interest Grouping (EEIG): things are a little different. The EEIG is an interesting instrument as it is legally neutral, i.e. it is not primarily governed by the national law of a Member State. By virtue of Regulation No. 2137/85, all its provisions – concerning in particular the conditions which govern the establishment of the EEIG, the operation (EEIG bodies) and the protection of third parties (liability, disclosure) and members (member privileges) – are essential and directly applicable in all Member States. Therefore, in the years before the SPE, a form of Community company of a uniform manner was created by completely eliminating the points of contention.

However, in line with normal practice, as with the SE, the SCE and to a lesser extent the SPE, the Regulation makes reference to national legislation on a certain number of points.

On certain points, the Community legislator granted the national legislator the freedom to choose between several solutions. There are ‘options’ of the Regulation that are found in other forms of European structures such as the SE. Example: Article 1 section 3 of Regulation No. Regulation No. 2137/85 stipulates that Member States determine whether or not the EEIGs registered on their registers have legal status and what, due to existing differences between the legislation of Member States about the consequences of tax measures, such a legal status would involve. The French legislator, under the terms of Article L 252-1 of the French Commercial Code, has specified that EEIGs registered in France on the trade and companies register have legal personality as soon as they are registered. In Germany and in Italy for example, it is a different matter as, in these States, fiscal transparency, which is essential for the EEIG, is only recognised for entities which do not have legal personality; consequently, an EEIG registered in one of these two States does not have legal personality, which does not affect its capacity to operate.

In some instances, the Regulation refers to the law of the State of the Registered office, for example for the law applicable to the contract of the grouping and for the internal operation of the grouping, subject to essential provisions of the Regulation in this matter (Article 2 section 1). National law therefore governs the consequences of the unlimited joint and several liability of members (art. 24 section 1), the causes of dissolution in relation to the EEIG and the conditions of its liquidation (Regulation, Article 35), bankruptcy of the EEIG, the tax legislation applicable to members provided that fiscal transparency is observed.

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(Article 40), and finally the insolvency and suspension of payments (Recital 13).

In some instances, Regulation No. 2137/85 makes direct reference to national law, which then includes the rules on private international law. Therefore, if the EEIG is registered in France, it is French national law with regard to the establishment and operation of the EIG which will apply to the EEIG on these points. Example 3: Under the terms of Article L 252-7 of the French Commercial Code, the provisions of the Commercial Code applicable to an EIG under French law in relation to accounting requirements, auditing and liquidation are applicable to EEIGs.

Finally, within the areas not covered by Regulation No. 2137/85 and which mainly relate to the economic activity of the grouping, the provisions of national law shall apply, or even Community law. There will for example be social legislation, competition law and intellectual property law (Recital 15).

The difficulty stems in general from numerous gaps in the Regulation and the following area to be attributed to national legislation. The areas for interpretation of Regulation No. 2137/85 such as its implementation within different national legislations make, in certain cases, the use of this instrument delicate. However, overall, it is primarily the Regulation which sets down the key elements of the legal framework of the EEIG in all Member States.

IV. Family property law

For French legislators there is in effect an optional instrument.

However, the opposing opinion of M. Y Balensi must be noted. In his opinion, it is very difficult to define the notion of an 'optional instrument', or perhaps more accurately termed as an 'optional legal system'. In effect, when a national law lays down that we can choose between several legal forms or several matrimonial property systems, can we speak of optional systems? What difference is there between these choices and the choice of rules of the Vienna Convention which are an integral part of each signatory State's national legislation? In his opinion, the first do not seem to correspond to the notion of an optional instrument or system as defined by the Commission. The second, however, appear to him to be the same. The notion seems to him to involve two elements: firstly, a broader scope than a national law (such is the case of a law resulting from an international agreement providing an option in the national legislation of signatory countries, such would be the case of a European Regulation introducing an option into the national legislation of Member States, whilst it is not the case of options between several purely national systems) and secondly, a purpose that is identical to that of the rules set aside by the option. Therefore, an optional system under contract law has the same purpose as the disregarded system while the European trademark, that aims to establish a protection for the whole EU, does not have the same
purpose as national trademark law which aims to establish a protection at a national level only. Perhaps a third condition should be added which is the integrity of the option choice, which in contractual terms assumes a genuine agreement between the parties and which, in non-contractual areas, assumes that the different ways between which the option is exercised may lead to the same result, which returns to the question of the identity of purpose.

Italy

Civil procedure

First of all, with regard to the optional nature of the instruments, Italian legal practitioners consider that EU Regulations on civil procedure have created institutions (payment order) and procedures (order for payment procedure, small claims procedure) which are alternative to those established in accordance with the lex fori.

Therefore, they represent an additional and optional choice for creditors which aim to reduce the fees and the costs of the national procedure for uncontested claims and which thus enables a model to be worked towards with minimum and spontaneous convergence. According to the principles of proportionality and subsidiarity, the optional instruments do not oppose the use of national rules, when they appear to be better adapted for the creditor.

Harmonisation through European legislation will only be achieved therefore if new instruments appear more efficient, practical and cost-effective than those proposed by the legislation of Member States (Article 1 Regulation 1896/2007 and of Article 27, Regulation 805/2004).

Generally considered as being an important step towards more efficient legal cooperation for civil and commercial matters, the choice of the discretionary nature of the Regulation adopted by the legislator of the EU has therefore acknowledged contrasting opinions in Italian literature. It has thus been claimed that what would not have been reasonable by EU institutions, at this stage of integration of the Community law for civil and commercial matters, would be to impose these measures as being the exclusive and compulsory legal instrument for cross-border disputes.

Generally establishing predefined and comprehensible forms indicates 'sophisticated' and pragmatic awareness: Besides the aim of simplifying the law, this course of action may thus enable the improvement of the harmonisation process through the development of a common and shared language and culture.

However, the limited range of these instruments, which concerns mainly cross-border disputes, has been heavily criticised as a weakness. Certain authors have thus claimed that the optional instrument was an insufficient measure, and that harmonisation could not be achieved without obligatory common rules on access to justice for cross-border disputes.
Secondly, concerning the absence of 'autonomy' for these instruments, Italian legal practitioners point out that another common characteristic of these instruments is that they are neither autonomous nor auto-efficient. They only provide general rules whilst they should be integrated by national law in regard to several aspects. It has therefore been said that, thanks to this technique, the EU legislator creates 'procedural autonomy' in light of the subsidiarity principle. When this is asked of him, the national judge must consequently refer to the national rules which have a fundamental role for the whole of European procedure.

Finally, with regard to the effect on national law, Italian practitioners consider that the application of these instruments within national legislation requires a process of coordination and integration which, for the moment, has only been agreed by the judiciary. To date, no legislation has been introduced. However, decisions still remain very rare as the Regulations for civil procedure (except for Regulation 805/2004) have only been applied in recent years.

Furthermore, interpretation can no longer be guided by European case law given that a preliminary ruling has still not been sent to the ECJ with regard to Italian case law.

**Luxembourg**

The optional instruments listed are considered as optional by Luxembourg legal practitioners.

**Hungary**

‘For Hungarian legal practitioners, the expression optional instrument is not adequate for this study. In effect, in all relevant fields of law covered by this study, the legal instruments reviewed are nearly always Regulations of the European Parliament and of the Council and as such are instruments that are directly and not potentially applicable in Hungary. The operators can choose to apply the systems provided by these instruments outlined in this study as an alternative to existing national systems. Consequently, Hungarian rapporteurs point out that the use of the expression ‘alternative system’ in the title of the study would be more appropriate.

Notwithstanding the above, the term and the abbreviation OI will be used to describe the different systems investigated in the responses provided by Hungarian legal practitioners.

Hungarian rapporteurs admit that the OIs outlined are recognised and considered by certain branches of the profession as alternative to other legal systems with regard to national systems governing the areas of law addressed by the study.

However, it is necessary to point out that the profession disregards the OIs particularly with regard to their rules for implementation ('skill') and their legal framework.

The main reason for this phenomenon is due to a lack of general interest (on behalf of operators and clients) in the application of these
instruments within the framework of settling legal disputes.

However, some professionals are aware of and apply these OIs.

These are the specialists within the fields of law where the OIs in question are or can be applied, and who deal with the application of rules relevant to the EU on a daily basis.

These professionals are more competent in the use of these tools. However, due to a lack of information from the profession on these OIs, it is very rare that operators, or certain branches of the profession (such as lawyers), use these OIs as part of their work.

With regard to company law: in Hungary, the three instruments (the associations of supranational companies) addressed in this study are not considered as OIs as the characteristics of the Regulation are not decisive and national legislation relating to these OIs is no more than the implementation word by word of the relevant Community Regulation. Furthermore, the majority of lawyers in Hungary are not aware of the possibility of establishing and exercising the substitution systems included in the OIs, therefore they do not benefit from the possibilities offered to them (and to their clients) by the other systems of the OI.

**The Netherlands**

The expression ‘optional instrument’ is only rarely used in the Netherlands. This is however in the process of changing slightly following discussions on the idea of an optional code for contracts, considered as one of the options of the Green Paper of 2010 on European Contract Law.

However, even if the expression is not used for the instruments above, it is clear for Dutch legal practitioners that these instruments are alternatives to the national legislation in force and are treated as such by legal commentators, the legislator and the courts.

I. Civil procedure

With regard to the European Enforcement Order (EEO): it was introduced into Dutch law on 21 October 2005 through the *titelverordening Europese Uitvoeringswet executoriale*.

The terminology used in the Netherlands to describe this Regulation is not that of an optional instrument. However, it is clear that the Regulation leaves largely intact the application of national legislation for enforcement orders. When the Dutch legislation of the EEO was introduced, the legislator explicitly confirmed that the application of national laws would remain completely possible, in accordance with Article 20 of the Regulation. This means that in practice, parties use the European Executive Order as an optional system: they can make use of it if they prefer this to submitting a Dutch enforcement order.

With regard to the European order for payment procedure: Regulation
1896/2006 was introduced into Dutch law on 29 May 2009 using l’betalingsbevelprocedure Uitvoeringswet Verordening Europese.

The terminology used in the Netherlands to describe this Regulation is generally not that of an optional instrument. However, the way in which the Regulation is understood by the Dutch legislator and by Dutch legal commentators states that it can be described as a discretionary system. Therefore, when the Dutch law was redrafted, the legislator expressly stated that the European procedure would stand beside national procedure: it is ‘a supplementary and discretionary instrument for the claimant, who may continue to make use of procedures within national law’. It does not replace or harmonise the existing possibilities for payment procedures. For the Netherlands this means that in a cross-border affair the claimant can choose between the European payment procedure and the ‘normal’ Dutch procedure for submitting a claim.

With regard to the European Small Claims Procedure: Regulation 861/2007 was introduced into Dutch law with the verordening Uitvoeringswet geringe vorderingen procedure voor Europese, in force since 1 January 2009.

The terminology used in the Netherlands to describe this Regulation is generally not that of an optional instrument. However, the way in which the Regulation is understood by the Dutch legislator and by Dutch legal commentators states that it can be described as a discretionary system. Therefore, when the Dutch law was redrafted, the legislator expressly stated that the European procedure was an alternative to existing national procedures: the Regulation does not replace the existing possibilities within national law. For the Netherlands, this means that the claimant can choose between the European procedure for settling small claims and the ‘normal’ Dutch procedure with the court of first instance for small affairs.

II. Intellectual property law

With regard to the Community trademark: Regulation No. 40/94 on the Community trademark was introduced into Dutch law by the Gemeenschapsmerk Uitvoeringswet EG-verordening het inzake.

This implementation means that parties may choose between registering a trademark with the Benelux countries (on the basis of an agreement between the Netherlands, Belgium and Luxembourg) or with the European Union as a whole. This makes it an optional system.

With regard to Community designs: Regulation No. 6/2002 on Community designs was introduced into Dutch law by the Uitvoeringswet betreffende EG-Verordening Gemeenschapsmodellen, in force since 30 November 2004.

This implementation means that parties choose, in reality, between registering a design with the Benelux countries (on the basis of an agreement between the Netherlands, Belgium and Luxembourg), with
the European Union as a whole or internationally (on the basis of ‘The Hague’ system). This makes it an optional system.

With regard to the European patent: the Munich Convention of 5 October 1973, revised on 13 October 2007, which created a discretionary system for issuing European patents, instead of asking each national office to issue a patent, was ratified by the Netherlands on 12 January 1977.

The European patent therefore stands alongside the option of requesting a Dutch patent and is, in this sense, an optional system. The parties have in effect the choice of applying for a Dutch or a European patent.

III. Company law

With regard to the European Company: Regulation 2157/2001 on the Statute of the European Company was introduced into Dutch law on 1 April 2005 by the Vennootschap Uitvoeringswet Europese.

The SE is considered as an optional instrument in Dutch legislation. It leaves the parties the choice of integrating their company as either Dutch or European.

With regards to the European Economic Interest Grouping (EEIG): Regulation No. 2137/85 of 25 July 1985 was introduced into Dutch law by the EESV Uitvoeringswet.

The EEIG is considered as an optional instrument in Dutch law. It leaves the parties to choose the appropriate form for their company.

With regard to European cooperative societies: Regulation 1435/2003 of 22 July 2003 on the Statute of the European Cooperative Society was introduced in the Netherlands on 18 August 2006 by Uitvoeringswet vennootschap Europese Verordening cooperatieve.

The SCE is considered as an optional instrument in Dutch law. However, the operation of the SCE is closely linked to other provisions of Dutch law. In this respect, it is difficult to see the SCE as a truly distinct option.

IV. Family property law

With regard to the Franco-German agreement on the optional matrimonial system: the Netherlands have not signed up to this agreement.

The majority of instruments listed above should not normally be considered as OIs, even if after a detailed review, numerous Austrian legal practitioners agree that the instruments have much in common with what we normally designate under this term.
However, the term OI is really only used to designate a European contract law (likely in the future). For the majority of Austrian legal practitioners, it is closely linked to the debate on the Draft Common Frame of Reference (DCFR) and a ‘blue button’ for consumers.

<table>
<thead>
<tr>
<th>Location</th>
<th>Information</th>
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<tbody>
<tr>
<td>Poland</td>
<td>The OIs for civil procedure, intellectual property law or law of economic interest groups are considered as OI’s by legal practitioners in Poland. The procedural provisions laid down in Regulation No. 805/2004, No 1896/2006 and No 861/2007 do not make one completely independent. For issues regulated by Community law, the national procedural rules of Member States apply. The Polish Code of Civil Procedure contains appropriate provisions which supplement the Regulations above. None of the Articles of the Polish Code mention the optional nature of these instruments (OI). Indirectly, such a conclusion results from Article 50518 section 1kpc, by virtue of which the court should inform the claimant of the possibility of issuing a European payment order with regard to part of the claim. Nevertheless, it is not an inaccuracy of Polish legislation. In the Polish system of procedural law, there is a distinct part of the Code that has been dedicated to international civil procedure since 1964. There is a rule embedded in the mind and practice of Polish lawyers that international procedural provisions, including European texts, should be applied in cases involving a foreign element. As for the Franco-German agreement on the optional matrimonial system, it is hardly known in Poland. There is only certain information on the Internet on this subject.</td>
</tr>
<tr>
<td>Portugal</td>
<td>No response to this question.</td>
</tr>
<tr>
<td>Slovakia</td>
<td>All the instruments studied, with the exception of the Franco-German agreement on the matrimonial property system, are considered as optional instruments under Slovak law, i.e. that the parties may, according to their preference, in light of all the relevant circumstances, choose between optional instruments and the relevant national instruments governing identical or similar legal relations or institutions. The sole exception is the matrimonial property system based on the Franco-German agreement. For the moment, the Slovak Republic does not intend to sign up. For this reason, this agreement cannot be considered as an optional instrument under Slovak law.</td>
</tr>
<tr>
<td>Sweden</td>
<td>The OIs for the law of economic interest groups as well as the Community trademark and design are considered as optional instruments. These instruments have not in effect replaced national rules, but have been added to them.</td>
</tr>
</tbody>
</table>
The European Patent Convention (EPC) is not EU legislation. It sets down a centralised application procedure for European patents issued by the European Patent Office (EPO). A European patent is not a unitary patent, it can be considered more like a ‘range of national patents’.

The claimant may indicate the States for which he requires patent protection and obtain a protection in these States after a validation procedure. Validation usually requires the payment of fees and – in the majority of cases – a translation of the patent. There is however an optional protocol to the EPC, the London Agreement, by virtue of which the Parties of this Agreement choose to renounce all or part of the translation requirement.

The claimant may choose to apply either a European patent or a national patent to obtain patent protection in Sweden. European patents seem therefore to be optional instruments from this point of view.

The applicant often makes his choice – with regard to national and European patents – based on strategic and economic considerations.

The legal effects of a European patent are largely determined by national law, even if a European patent cannot be declared invalid by the national courts or administrative bodies for reasons other than what is laid down in the EPC. Chapter 11 of the Swedish legislation on patents contains provisions concerning European patents validated in Sweden. The relevant provisions of the EPC have also been implemented into Swedish legislation on patents. The national and European patents co-exist and are generally treated in the same way by the national courts and authorities.

United Kingdom

The Ministry’s response

According to the UK Ministry, legal practitioners in their country consider these instruments as optional.

Academic response

According to this response also, UK legal practitioners consider these instruments as optional, which explains why they are not often used.
CHAPTER 2: HAVE NATIONAL LEGISLATORS REPLACED THEIR LEGISLATION WITH THE OPTIONAL INSTRUMENT OR HAVE THEY ADDED IT TO THEIR LEGISLATION?

An analysis of the responses shall be presented (1), followed by a more detailed summary showing the different responses from each country (2).

1. ANALYSIS OF THE RESPONSES

The questionnaire hypothesised that the national legislator would have modified the national section of the option because of the introduction of the optional instrument. States could indeed have decided that some optional instruments fitted the needs in question so well that it was not necessary to choose between a national section, which was too complicated, and a European section, which was more simple and effective. Such an approach was unlikely in the short term, before Member States had the chance to effectively enjoy the benefits of such an optional instrument, whose use would be determined by the operators.

All the same, the responses to the questionnaire showed that the issue of the intervention of the national legislator has been split in two.

Certainly, it is necessary to find out if the national legislator has retained the national section of the option, and, on that front, the response is overwhelmingly positive. However, it is also necessary to find out how the national legislator has integrated some optional instruments into national law, that is to say, how the national legislator has adapted or developed national law in order to apply the optional instrument.

The relevance of this second point leads us to extend the scope of this study to include these two aspects.

1.1. National legislators have added the optional instrument to their national laws

The issue of the effective coexistence of applicable systems in the Member States must, most importantly, not be confused with the issue of the simultaneous use, on the part of the operators, of the two systems.

Thus, the Bulgarian report indicates that the European patent system established at the Munich Convention is different to the national Bulgarian system, but that the European patent and a Bulgarian patent can coexist. This means that the applicable systems (in this case, procedural arrangements for the granting of the patent) coexist, but that the operator must make a choice between the two: one excludes the other, which is in keeping with the concept of an optional system.

If we stick to the coexistence of the applicable systems, there is a nice unanimity between the Member States. They have added the European optional instruments to their national legislations, as this was the purpose and the function of these optional instruments. Clearly, then, the purpose and the function of the optional instruments are well understood.

Two remarks can, nonetheless, be made.
Some Member States are not familiar with as special forms of procedure as those governed by some optional instruments. For example, the issue of the recovery of small debts does not lead to the creation of a special national system in the 27 Member States. Thus, the Czech report and the Italian report indicate that there is no special procedure which deals with small debts in their countries. At best, in Italy, the justice of the peace is authorised to give a ruling on disputes relative to these small debts, which has the effect of benefiting the claimant of a simplified, less formal, procedure.

This does not mean that national law does not address this issue. However, it is addressed on its merits, through recourse to the State's ordinary law (cf the Czech report: 'there are other means that serve similar purposes'). The choice is not then between a special national system and the special European optional instrument, but between a national ordinary law system and the special European instrument.

Even more interesting is the fact that the adoption of the European optional instrument has sometimes led a Member State to create a new special national system. That is, to remodel the national section of the option in order to make it more suitable.

Thus, the Bulgarian report mentions the fact that the payment order would have been introduced into Bulgarian law after the European Regulation of 12 December 2006, thereby creating the European optional instrument:

>'the new Bulgarian CPC, adopted in 2007, introduced in Bulgarian legislation a national order for payment procedure. This procedure is regulated in Chapter 37 (Articles 410, et seq.) of the CPC and is very similar to the European one, though not identical'79.

Furthermore, the Italian report reveals that some Italian legal commentators would encourage Italian legislators to do the same:

>'It has thus been argued that the Italian legislator should provide an instrument on small claims on the basis of the European procedure, extending its scope to internal litigations. The adoption of this model, with the aim of simplifying and fastening the Italian civil law justice, could even enhance the access to justice according to the ECHR and the so controversial length of civil litigation in Italy'.

1.2. National legislators have adapted their national law to integrate the optional instruments in their legal order

This time, we are no longer dealing with the national section of the alternative, but with the national law necessary for the enforcement of the European section of the alternative.

It may be considered surprising that European Regulations, which are directly applicable in the Member States, should require 'integration' measures. We use this word deliberately as we are not referring to implementation measures. In actual fact, just like a national law occasionally requires an implementing order so that it may effectively be applied, some optional instruments also require national adaptation measures in order to be effectively applied.

79 Some basic differences are pointed out in: Златарева, М., Международен граждански процес, Ciela, Sofia, 2010, pp. 256-258. See also Кюркчиев, С., Заповеднопроизводство. Европейсказаповедзаплащане, Ciela, Sofia, 2010.
One must be aware that this is a risk factor for the optional instrument. If, deliberately or not, the national adaptation measure is not satisfactory, the success of the optional instrument could be compromised\textsuperscript{80}.

In any case, the different reports show that numerous European optional instruments have given rise to integration measures in national laws (2.2.1). However, some reports do express some reservations (2.2.2).

1.2.1. National legislators have adopted provisions for the implementation of the optional instruments, thus 'integrating' them into their law, while some even 'include them in their national codes'

For example, in Germany, the European Enforcement Order has been integrated into the German Code of Civil Procedure in the section 1079 et s. in part 11 of the Code, under the title 'Judicial cooperation in the European Union' \textsuperscript{81}. European payment order procedure has been integrated into German national law through section 1087 et s. of the German Code of Civil Procedure, in the same part of the Code as the enforcement order. Finally, the European procedure which deals with the settlement of small disputes is found in section 1097 s. of the German Code of Civil Procedure.

Polish law has done the same:

'\textit{The Polish legislator took the position that there is no need to institute a single coherent payment-order procedure and small claims track. Instead, another strategy was chosen. Along the already existing procedures a separate Regulation of European order for payment has been introduced (arts. 505\textsuperscript{15} - 505\textsuperscript{20} k.p.c.). The procedure concerning small claims has been treated analogically (arts. 505\textsuperscript{21} - 505\textsuperscript{27} k.p.c.)....}'

The idea of a 'second system', rather than a '28\textsuperscript{th}', may be rendered here in a certain way.

The Slovak report indicates that the European instrument has been added to existing law, and that it is now part of national law: 'These optional instruments, which are part of national law, allow parties to choose between two alternative sets of rules, both of which are considered national rules'\textsuperscript{82}.

However, not all States have proceeded as Slovakia has. The Greek report indicates that procedural European optional instruments, which are of direct application in Greece, have not been integrated into the Greek Code of Civil Procedure.

1.2.2. National implementation rules are occasionally insufficient or restrictive

The Belgian report emphasises several difficulties associated with the application of European optional instruments. These difficulties are encountered due to shortcomings on the part of Belgian implementation law. Such difficulties are encountered with regard to the European Enforcement Order:

\textsuperscript{80} Cf infra, chapter 13 (points 13.1.3 and 13.2.2) and concluding chapter.
\textsuperscript{81} HESS, Europäisches Zivilprozessrecht, 2010; Musielak, Kommentar zur ZPO, 2009; WAGNER, Zur Vereinheitlichung des Internationalen Privat - und Zivilverfahrensrechts, NJW 2004, pp. 1835 sqq.; WAGNER, Die neue EG-Verordnung zum Europäischen Vollstreckungstitel, pp. 189 sqq.
\textsuperscript{82} The underlining is of the authors’ doing.
'European legislators leave the task of identifying the appointing authorities, in terms of certification, to the Member States. In Belgium, this identification is provided for in the circular of 22 June 200583, which is strongly challenged in legal commentary84 and case law85 for misinterpreting the Regulation. It stipulates, above all, that the appropriate body for granting the European Enforcement Order certificate is the head court office of the court who made the decision or who registered the court settlement. However, this delegation seems to exceed the interpretative limits tolerated by the Regulation. On the one hand, the Regulation invariably uses the term ‘original court’ which the Regulation defines as being the court ‘attached’ to the decision on the substance of the case86. On the other hand, though Regulation forces States to notify the Commission of any decision concerning the authorities who are responsible for the certification of official deeds, nothing is mentioned with regard to the identification of ‘original courts’. This very much seems to indicate that States are not given any discretionary power87. Case law almost unanimously considers that it is the responsibility of the judge to certify the decision as a European Enforcement Order and the responsibility of the officer of the court to issue the European Enforcement Order certificate.

Finally, article 19 of Regulation 805/2004 provides a review procedure. The question of ascertaining whether Belgium satisfies the minimum conditions of this article is very controversial. The stakes are high, as if Belgium does not satisfy the minimum conditions for a review in exceptional cases, the Regulation is, in compliance with recital 19, unenforceable88.

These comments are probably very important in minimising the risks associated with future European optional instruments. It is advisable to minimise the influence of national implementation rules, which can be such as to weaken the direct effect of European Regulation.

The Bulgarian report demonstrates another difficulty, with respect to the Bulgarian Constitution, which has just limited European association optional instruments:

'It should be noted that Bulgaria has limited the possibility for Bulgarian entities possessing land in Bulgaria to participate in the establishment of a SE or a SCE with seat and registered address in another Member State. It is also prohibited (for) registered SEs, SCEs and EEIGs possessing land in Bulgaria to transfer their seat and registered address to another Member State. These (limitations) have been introduced with respect to the public interest to restrict foreign ownership of Bulgarian land (Article 22 of the Constitution of the Republic of Bulgaria89 90).'

83 M.B., 28 October 2005, p. 47042 et s.
## 2. COUNTRY-BY-COUNTRY RESPONSES TO QUESTION NO 2

<table>
<thead>
<tr>
<th>Member State</th>
<th>Table No 2</th>
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<tbody>
<tr>
<td>Belgium</td>
<td>Has your national legislator replaced its legislation with the OI or has it added the OI to its legislation?</td>
</tr>
</tbody>
</table>

- **Belgium**
  - In Belgium, the OI and Belgian law coexist.
  
  With regard to the European Enforcement Order (EEO) and the small claims procedure: Belgian legislators have not yet adapted their legislation to the OI. Furthermore, there are three application problems. First of all, there is the problem of the assimilation of the absence of the defendant to an uncontested debt (EEO). Secondly, there is the problem of identifying the authorities which are appropriate for the task of the certification of the EEO. Finally, the third problem which exists is the problem concerning the review procedure in article 19 of Regulation 805/2004 (EEO and small claims).

  With regard to the European payment order: Belgian legislators have not yet adapted their legislation to the OI. This causes uncertainty as to the identification of the author of the statement of claim (this could be lawyers as well as notaries or bailiffs), or as to the issue of ascertaining if the Regulation does or does not provide for the issue of an authentic copy.

  With regard to the Community trademark: Community Regulation coexists with the Benelux Convention, signed in the Hague on 25 February 2005, as it pertains to intellectual property. Nonetheless, one law, dating from 10 May 2007, which is relative to aspects of the objective law surrounding the protection of intellectual property rights, brought objective law into conformity with Regulation since it stipulates that the tribunals in the commercial court in Brussels are the only tribunals which are authorised to deal with issues surrounding the Community trademark.

  As regards Community designs: Community Regulation (as concerns community designs) coexists, in Belgian law, with the Benelux Convention of 25 October 1996 and the uniform law of 1 December 1970. The law of 10 May 2007, which is relative to aspects of the objective law surrounding the protection of intellectual property rights, stipulates that the commercial tribunal is familiar with statements of claim relative to community designs, even when the parties are not retailers (article 574, 14° C.J.)

  With regard to the European patent: the Munich Convention coexists, above all, with the law of 28 March 1984 on patents.

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90 А. КАЦАРСКИ, Г. ТУШЕВА, Законодателството и регистърът. Тематичен коментар, Ciela, Sofia, 2007, p.118.
With regard to European Companies: legislators considered it essential to include provisions which are specific to the SE in the company Code. The new order relating to the SE was included by way of a royal decree on 1 September 2004. A law dating from 17 September 2005 which covers different provisions in terms of the appointment of a special negotiating body, a representative body and a procedural body dealing with the involvement of workers at the heart of European companies, has also been adopted.

With regard to European Cooperative Societies: a royal decree dating from 28 November 2006, which enforces Regulation No. 1453/2003, from the Council of 22 July 2003, concerning the status of the European Cooperative Society, has been adopted. Legislators adopted the law, dating from 9 May 2008, which includes different provisions concerning the appointment of a special negotiating body, a representative body and a procedural body dealing with the involvement of workers at the heart of European Cooperative Societies.

With regard to the European Economic Interest Grouping (EEIG): it was the responsibility of each State to legislate on questions which remained optional or which were not explicitly addressed in the Regulation. The EEIG in Belgium is subject to the law dating from the 12 July 1989 which includes different measures for the application of the Regulation as application legislation and as an option of the Regulation.

Bulgaria

In Bulgaria, OIs have not replaced the corresponding national legislation.

With regard to the European Enforcement Order (EEO): this was introduced into the Bulgarian Code of Civil Procedure (art. 619 et s) as an OI. The national enforcement order procedure with exequatur has not been cut.

With regard to the European payment order: European procedure coexists with national procedure which was adopted in 2007 (chapter 27 of the Bulgarian Code of Civil Procedure: articles 410 et s), after the European Regulation which created the OI.

With regard to small claims procedure: the procedure provided for by Regulation No. 861/2007 remains an alternative to national procedure.

With regard to the European Company, the European Cooperative Society, and the EEIG: these three OIs coexist with national forms of associations. Bulgaria has made it more difficult for Bulgarian entities, which possess land in Bulgaria, to participate in the creation of an SE or an SCE whose seat and registered address are in another Member State. SEs, SCEs or EEIGs which are registered in Bulgaria and which have land in Bulgaria are prohibited from transferring their seat to another Member State. These restrictions were introduced in order to protect public interests, by restricting foreign ownership of Bulgarian
land (article 22 of the Constitution of the Republic of Bulgaria).

With regard to intellectual property OIs: the Community trademark is an alternative to the national Bulgarian trademark. It can coexist with national protection without it being necessary to put an end to the latter. The Community design is an alternative to the national industrial design. The Community design can also coexist with the national industrial design. The European patent is an alternative to the national patent, however these two patents cannot coexist.

With regard to the Franco-German agreement on the optional matrimonial system: Bulgaria has not adhered to this agreement, despite the fact that French and German ministers for justice addressed a letter to the respective ministers in all the EU Member States, including Bulgaria.

<table>
<thead>
<tr>
<th>Czech Republic</th>
</tr>
</thead>
<tbody>
<tr>
<td>In the Czech Republic, these optional instruments have not replaced national rules. According to Czech legal practitioners, this is neither the purpose nor the function of optional instruments.</td>
</tr>
</tbody>
</table>

I. Civil procedure

Civil procedure can be applied in cross-border contexts as an alternative to national procedures or as an alternative to general EU procedures (Regulation 44/2001).

In any case, only one of these procedures has a national law counterpart, which is the payment order procedure.

As a result, in this case, the OI and national procedure exist in tandem with one another.

Having said that, there is no special procedure to deal with small debts or to deal with the enforcement of uncontested debts. Nonetheless, there are other means which achieve the same ends.

II. Intellectual property

The Community trademark and Community designs have equivalents in Czech law.

The European patent, on the other hand, does not have a counterpart in national law.

If the Community or unitary patent was adopted, it would be a real OI.

III. Law of economic interest groups

The role of the OIs in the law of economic interest groups is a uniquely supplementary role.
<table>
<thead>
<tr>
<th>Germany</th>
<th>Academic response</th>
</tr>
</thead>
<tbody>
<tr>
<td>With regard to the European Enforcement Order (EEO): this was integrated into the German Code of Civil Procedure in articles section 1079 et ss. of part 11 of the Code under the title 'Judicial Cooperation in the European Union'. The enforcement order exists in tandem with national provisions, but these provisions remain optional. The European Enforcement Order does not replace national law. The operator may therefore choose between national law and the European optional instrument.</td>
<td></td>
</tr>
<tr>
<td>With regard to the European payment order procedure: this optional instrument has been integrated into national law through articles section 1087 and onwards in the German Code of Civil Procedure, in the same part of the Code as the enforcement order. The order procedure exists alongside national law and is also optional for the operators.</td>
<td></td>
</tr>
<tr>
<td>With regard to the European procedure for the settlement of small claims: This was integrated into section 1097 s. of the German Code of Civil Procedure. This procedure is also an optional instrument for operators.</td>
<td></td>
</tr>
<tr>
<td>With regard to the Community trademark, Community designs and European patents: national scope is coded in the following German laws; the law on trademarks (Markengesetz) for trademarks, the law on designs (Geschmacksmustergesetz) for designs and the law on patents (Patentgesetz) for patents. These national rules have been kept along with European Regulations on the Community trademark and designs. These are directly applied in German law in as much as the Regulations do not require implementation in the legislation of the Member States.</td>
<td></td>
</tr>
<tr>
<td>Having said that, the Munich Convention on European patents was implemented in German law by a law dating from 26 July 1979 (Gemeinschaftspatentgesetz). Insofar as the rules included in national German law have remained in force despite the establishment of Community instruments, the latter are considered in German law as real optional instruments. (Klett/Sonntag/Wilske, Intellectual Property Law in Germany, 2008, chapters. 5, 4 and 1).</td>
<td></td>
</tr>
<tr>
<td>With regard to the European Company, the European Economic Interest Grouping and the European Cooperative Societies: these types of companies were integrated into German law (by way of 'enforcement laws') as non-mandatory European instruments which are available to operators and which coexist with national structures.</td>
<td></td>
</tr>
<tr>
<td>With regard to the matrimonial property system: the implementation law has not yet been approved. The German Ministry of Justice has developed a bill which is currently making the rounds in the chambers of Parliament.</td>
<td></td>
</tr>
</tbody>
</table>
The Ministry's response

With regard to the European Enforcement Order (EEO), there is no national rule which is corresponds to the EEO, because recognition and enforcement rules concerning judgments in Europe were provided for by the Brussels I Regulation, before the EEO came into force.

With regard to the European payment order procedure for the settlement of small claims: they have been added.

As regards company law: they have been added. There is no national law which corresponds to the EEIG. For the SCE: the SCE has been added.

With regard to family law: they have been added.

Greece

With regard to European civil procedure texts, national legislators have not replaced their own legislation with the OI, they have added it to their legislation. However, in comparison to other European countries, such as France, legislators have not integrated provisions relating to Regulations in the Code of Civil Procedure.

Spain

With regard to the European Enforcement Order (EEO): OIs in Spain coexist with national legislation.

With regard to the European payment order procedure for the settlement of small claims: in September 2010, the Spanish government prepared a bill aiming to modify the law on civil procedure in order to make the enforcement of payment procedure and small statements of claim easier. The law on civil procedure shall consequently be modified in conformity with European legal provisions.

With regard to company law, Regulation 2157/2001 required a national legislative text. Law 19/2005 became part of the royal legislative decree 1/2010 (Title XIII) by transferring the completed text of the company law. National and European legislation are connected, since European legislation refers to national law with a view to filling in its gaps. It is not surprising, therefore, that article 455 of royal legislative decree 1/2010 stipulates that European Companies that have their place of business in Spain 'are governed by Regulation 2157/2001 by the rules of the present order and by the law which governs the involvement of workers at the heart of European companies'.

With regard to the European Economic Interest Grouping (EEIG): this has been implemented in Spanish law with law 12/1991 which dates from 29 April 1991. Article 22 stipulates that the present law is applicable to European Economic Interest Groupings each time that the European Regulation refers to the national legislation of each Member State.

With regard to the European Cooperative Society (SCE): there was a
heated debate at the heart of the Spanish Parliament concerning legislation which was designed to make the constitution of such cooperative societies possible. The division of power between the State and the autonomous communities (which have the power to regulate the cooperatives) has delayed the adoption of a law.

This has the potential to cause problems as, for example, Regulation establishes the registration of the cooperative society in conformity with legislation on limited liability societies in the Member State. However, the autonomous communities have the power to regulate on the registration of cooperatives. Finally, law 3/2011 dating from 4 March 2011 which regulates European Cooperative Societies which have their place of business in Spain, was published in the Official bulletin of 8 March 2011.

Within the field of intellectual property law, the Community trademark coexists with the national trademark which is governed by law 17/2001 dating from 7 December. Articles 84-86 of this law define certain rules in order to allow the application of a European trademark in the Spanish patent and trademark office or directly in the Office for harmonisation in the internal market. As concerns Community designs, Law 20/2003, dating from 7 July, must be taken into account, as it introduces the notion of the intellectual design in Spain. As a consequence of the ratification of the Munich Convention in 1973, single registration with the European Patent Office is sufficient to produce legal effects in one or more Member States. The advantage of this is that the party does not need to undertake legal proceedings in each Member State. However, once the patent is granted, it is governed by the respective national legislations. The 1989 Luxembourg Convention is not in force in Spain.

With regard to the Franco-German agreement on the optional matrimonial system: the potential integration of Spain into this agreement between France and Germany would make it possible to create a new participation matrimonial property system which would not replace the systems which are already in force in Spain but would add a new system which could be chosen by parties.

As regards the Regulation of a European Certificate of Succession: this shall not replace any national rules, as article 36.2 of the proposal expressly specifies that ‘the certificate must not replace national procedures’. As in Spain, there is no equivalent to this certificate, the European certificate shall not replace the notarial act of declarations by the court of inheritance.

France

I. Civil procedure
French legislators have added these three instruments to their legislation, without reforming or modifying their national law in tandem with these instruments. Thus, the European payment order procedure created by Regulation No. 1896/2006, dating from 12 December 2006, was added to the national law which deals with the payment order
II. Intellectual property
Community trademarks, designs and new variety certificates - obtained following one registration procedure only with the Community authorities (OHIM or the Community Plant Variety Office) - coexist with national certificates granted by the INPI and the Committee on Plant Variety Rights. These do not replace national certificates, but are an alternative for applicants who wish to benefit from wider protection throughout the whole of the European Union. In addition, these certificates may be used simultaneously (statement of claim for a national patent and statement of claim for a European patent until granting, national trademark and Community trademark concurrently).

The result of this plurality is therefore that the legal position is not simplified by the existence of a Community or European instrument but can, on the contrary and on certain points, be rendered more complex. This can happen, for example, with the interpretation of the notion of distinctiveness in trademark law, the protection associated with a statement of claim for a national patent and a European statement of claim which have to do with the same object, the designation of countries with a European statement of claim and administrative or judicial dispute procedures. On the other hand, the protection of the certificate in several EU countries is easier practically speaking.

III. Law of economic interest groups
The response is integrated in the answer to question 1.

IV. Patrimonial family law
The OI was added to national French and German systems.

Italy

I. Civil procedure

With regard to the European Enforcement Order (EEO): this is an instrument which may be used in cross-border cases as an alternative to national legislation. As a consequence, this instrument has the same enforceability as the payment order, in compliance with national rules contained in Article 474 of the Code of Civil Procedure which defines the 'payment order' as all decisions, orders and other acts to which the law expressly refers to as being an instrument which is enforceable. Law 35/2005 and, later on, Law 263/2005, added a second paragraph to this instrument, recognising the enforceable nature of the payment obligation contained in a private account and executed in front of a notary public. Due to its proper functioning, the European payment order does not require the appending of the enforcement order which is called upon in Article 475 CPC.

With regard to the payment order: the European settlement serves as a simplified alternative to national procedure, provided for in article 633 and on of the CPC and with a view to recovering debts which are likely to be disputed by the debtor. The former may therefore be enacted
against foreigners who reside abroad according to article 9 para. 1 of Legislative Decree 231/2002 which implements Directive 2000/35, which in turn fights against late payment in commercial transactions. The use of the national payment order procedure is non-mandatory in as much as creditors or the people who have the right to receive specific movable property can always bring an ordinary action. The power of the court is defined in accordance with Regulation 44/2001.

With regard to the European procedure for the settlement of small claims: this Regulation introduces an ad hoc and non-mandatory procedure for small debts which constitute cross-border disputes. This collection of rules is an alternative to the existing collection of ordinary law civil procedure rules.

More specifically, the Italian system does not stipulate a specific procedure. The choice of court is made with respect to the object or the value of the cases in question. Therefore, disputes concerning movable property of a value which does not exceed EUR 5 000 (except if the law expressly stipulates the contrary) and damages and interest associated with car or boat accidents whose value does not exceed EUR 20 000, are heard by the Justice of the Peace (Art. 7 CPC). This is a recent law dating from 18 June 2009 which doubled the value of disputes, which before was settled at EUR 2582.28. Therefore, all disputes which are registered after 4 July 2009 are governed by the new system. In Italy, as a consequence, the low value of a case authorises the justice of the peace to qualify the case as 'ordinary civil jurisdiction', which is a simplified and more informal procedure. It is therefore emphasised that Italian legislators should provide an instrument for small debts which is based on the European procedure, by widening its scope to include national disputes. The adoption of this model, with the aim of simplifying and securing Italian justice in terms of civil law, could even improve access to justice, in conformity with the ECHR, and it could also improve the so controversial length of civil litigation cases in Italy.

This consideration is all the more important given the high number of national disputes of little importance which in fact constitute a very high proportion of the overall quantity of disputes which are settled each year by the authorised national jurisdiction.

II. Intellectual property law

With regard to the Community trademark: this is governed by Regulation No. 40/94 of the CE, then by Regulation No. 207/2009 of the Council. In Italy, this is currently considered as a non-mandatory instrument which may be used instead of national trademark rules, which are contained in Legislative Decree 30/2005 (intellectual property code). Therefore, the OIs do not replace national rules but are supplementary to these rules.

With regard to Community designs: these were established in Regulations 6/2002 and 2245/2002 which secure rules on the implementation of the aforementioned Regulation. In Italy, these are
currently considered to be a non-mandatory instrument which may again be used for national rules which are recited in Legislative Decree 30/2005 (industrial property code). Therefore, the OIs do not replace national rules but are supplementary to these rules.

With regard to the European patent: this was established by the Munich Convention. In Italy, this is currently considered to be a non-mandatory instrument which may be used instead of national patent rules, which are also enacted in Legislative Decree 30/2005 (intellectual property code). There also, the OIs do not replace national rules but are complementary to these rules. Nonetheless, the European patent is subject to national Regulation for the part of the patent which is not regulated by the Convention. This part of the patent is therefore under the power of each State. As a consequence, in light of the hierarchy of the Regulations, national legislation is subsidiary to European legislation, as it only applies when there are gaps in the Monaco Convention.

Bearing in mind all the optional tools mentioned above, it is important to emphasise that the normative content of legislative decree 30/2005 is very similar to European Regulation, as it was prepared with the aim of harmonising law.

III. Company law

With regard to the European Economic Interest Grouping (EEIG): the EEIG was adopted by the Regulation of 25 July 1985. European rules on this instrument have been added to national rules.

With regard to the European Company (SE): the European Company was adopted by Council Regulation No. 2157/2001 dating from 8 October 2001. This SE Regulation was completed by Directive 2001/86/CE on the involvement of workers in the SEs. The dateline for adapting national legislation to European legislation on SEs was fixed for 8 October 2004, however Italy only implemented this Directive with a legislative decree in 2005 and decided not to exercise the power granted by article 9 of the said Regulation in order to adopt 'the provisions of the adopted laws [...] the implementation of Community measures which specifically target SEs.' As a consequence, rules relating to the optional instrument have been added to national laws. In order to effectively apply European rules, coordination between these rules and national Regulation is necessary.

With regard to the European Cooperative Society (SCE): The status of the Cooperative Society was enacted by Regulation No. 1435/2003 dating from 22 July 2003. The SCE Regulation was completed by Directive 2003/72/CE of the Council concerning the participation of workers in the SCE which was implemented in the Italian legal system with a decree in 2007. This Regulation forces Member States to take the measures which are necessary in order to implement this Regulation as concerns, above all 'the laws adopted by the Member States in the implementation of Community measures which specifically
target SCEs' (article 8). Nevertheless, national legislators have not adopted any specific law for the Cooperative Society.

Communication from the Ministry for economic development, dating from 2007, emphasised that in order to effectively apply European rules, rules relative to the optional instrument must be added and integrated into national rules.

It is noteworthy that the Italian reform on company law which was adopted by the legislative decree of 17 January 2003, following the Council's Regulation (no 2157/2001), preceded the adoption of SCE Regulation, and also established a limited liability company (in the structure of a firm which would be regulated by Regulation 2157/2002).

The Italian reform allowed for cooperatives to choose between the two forms of corporate governance (one or two tier system) provided for in traditional national rules (tripartite system: the assembly of members, the management board and the supervisory board).

Cyprus

The OIs have been added to Cypriot legislation.

Luxembourg

Legislators from Luxembourg have chosen to add the optional instrument to their legislation.

All the instruments have been integrated, in their optional form, into Luxembourg legislation (please refer to Luxembourg's legal web portal: www.legilux.lu).

Hungary

I. Civil procedure

Due to the provisions of the Hungarian Constitution and the scope of procedural Regulation, the OIs in questions have not replaced national systems, but they do provide and add a supplementary layer of Regulation (or occasionally even protection) which can be chosen and applied in cases where this is necessary. Having said that, it is another question altogether to find out if operators really benefit from it, given the lack of general information on these OIs.

II. Company law

Company law covers the following aspects:

The 2006 Company Act, for which the civil Code provides a secondary legal framework.

The company act is also impinged upon by the 2006 Firm Act, the 2000 Accounting Act, the 1991 Bankruptcy Act, the 2001 Capital Markets Act, the 1996 Competition Act, the 1952 Civil Procedure Act, the 1988 Foreign Investment in Hungary Act, the 1997 Branch Office and Commercial Representation of Foreign Firms Act, the 2009 Private Firm Act, the 2003 European Economic Interest Grouping Act, the 2004

The systems established by the OIs should, in theory, be added to this framework, but for the reasons described in the answers to the following questions, this is not the case.

**The Netherlands**
In the Netherlands, these instruments are considered to be non-mandatory and do not replace the existing national rules. There are some cases where the details of national legislation have had to be modified following some Regulations (as, for example, was the case with Regulation 805/2004), but when that was the case one could no longer talk about an optional instrument in the real sense of the term.

**Austria**
The national rules which correspond to the listed optional instruments have not been repealed by the Austrian legislative assembly. Consequently, the optional instruments are additional to the national system which existed beforehand and do not replace it.

It is noteworthy, however, that some optional instruments simply cannot replace national rules, as the effect of the optional instrument is quite different to that of the national rules. For example, the registration of a Community trademark or design results, in all the Member States, in protection, whereas the registration of a national trademark or design results in protection which is limited to the Austrian courts. Community and national instruments in this field are real alternatives, therefore, if the national system was replaced with the Community system, the choice of the operators as concerns the territorial scope of the protection required would be limited.

On the other hand, one could consider not repealing the national instruments which are covered by the scope of the OIs, for example the European payment order or the European procedure for the settlement of small claims. The corresponding national instruments (that is to say, the national payment order followed by an exequatur procedure in the State where the order must be enforced) and the OIs mentioned are different ways of achieving the same result, which is the enforcement of an order made by the court of another jurisdiction. Nevertheless, the Austrian legislative assembly has not yet chosen to replace national instruments with these OIs.

**Poland**
In Poland, rules concerning the OIs mentioned in section 1 C II have been added to national Regulation.

I. Civil procedure

None of the following Regulations: 805/2004, 1896/2006 and 861/2007 have replaced national laws. This is due to several reasons.

Firstly, the 1964 Polish Code of Civil Procedure contains full Regulation in terms of international civil procedure. The reason for the modification
or replacement of some provisions over the last few years is the need to examine the statements of claim of the judge and of legal commentators and to ensure the effectiveness of European Regulations.

Secondly, before the accession of Poland to the EU, rules concerning payment procedures were modified and new summary procedure was introduced by a law dating from 24 May 2000. Polish legislators therefore decided against establishing a unique coherent procedure for the payment and monitoring of small claims.

In addition to the existing procedures, different Regulation establishing a European payment order procedure was introduced (art. 505-15 to 505-20 KPC). Procedure for statements of claim of little consequence were correspondingly addressed (Art. 505-21 to 505-27 KPC). As a consequence, special distinct Regulations were introduced for the application of European law as concerns the granting of the certificate for the European Enforcement Order (Art. 795-1 to 795-5 KPC); or the declaration which acknowledges the enforceability of the European payment order (Art. 795-6 to 795-7). This is also the situation for: the enforceable nature of court rulings, Regulations, documents appended to a European memorandum of satisfaction, the opposability of European payment orders and the opposability of enforceable court rulings made in small claims cases.

Polish law provides different rules for court rulings and settlements and for documents coming from EU Member States. Polish law also provides different stipulations for the declaration which acknowledges the enforceability of court rulings, Regulations and documents coming from third party States.

II. Company law

European Regulation surrounding the European Company (SE), the EEIG and the European Cooperative Society has been added to national Regulation. In addition to the Council's Regulation, which is used directly, there are also the following acts: the act dating from 4 March 2005 on the EEIGs and SEs and the act dating from 22 July 2006 on the SCEs which respect European Regulation.

<table>
<thead>
<tr>
<th>Country</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>Portugal</td>
<td>Portuguese legal practitioners did not wish to respond to this question.</td>
</tr>
<tr>
<td>Slovakia</td>
<td>Rules surrounding the aforementioned optional instruments have not replaced national rules in Slovak law.</td>
</tr>
</tbody>
</table>

They have been added to these national rules and serve as an alternative to them. These optional instruments, which are a part of national legislation, thus allow parties to choose between the two collections of rules, which are both considered to be national rules.
Sweden

I. Civil procedure

Additional provisions contained within national legislation have been added to the Regulation pertaining to the optional instruments.

II. Intellectual property law

The listed intellectual properties must be considered as optional instruments as they give parties the choice between applying for national trademark or design registration, applying for a patent with the Swedish Patent and Registration Office (PRV) (in conformity with Swedish national intellectual property legislation), applying for a Community trademark or design in accordance with the EU's Regulations or applying for a European patent from the EPO in compliance with the EPC.

Swedish trademark and design legislation is harmonised in order to conform to EU trademark and design Directives.

The law on Swedish national patents is revised in order to allow parties to apply for a European patent in accordance with the EPC. The concept of what is called potential harmonisation (this means that even if a national registration authority or court should be free to examine an application or a breach because of national legislation, the registration authority or court must make its decision based on reasons given in harmonised law or in view of principles apprehended by the EPO) has been recognised for several years by Swedish legislators, registration authorities and courts. Thus, Swedish registration authorities and national courts make their decisions in light of European legislation which is harmonised with EPO decisions.

III. Company law

Rules on the relevant optional instruments have been added to the corresponding national rule.

United Kingdom

The Ministry's response

Procedural rules have been modified to take account of the optional Regulations.

Academic response

Court rules have also been modified. Here are some examples:

I. Civil procedure

The new Civil Procedure Rules (CPR), which came into force on 21 October 2005, give effect to Regulation (CPR, parts 74 and 78).
For example, the European procedure for the settlement of small claims is explained in part 78 of the CPR (see also rule 23.1 (1) of the 2002 rules relating to small claims in Scotland). This text helps parties to carry out a European procedure for these small debts.

The European payment order procedure is in part 23 CPR.

The EEO was also implemented into English national law in 2005 by the civil procedure rules. In Scotland, changes were made simultaneously to the rules relative to the 'Court of Session' and to the rules of the 'Sheriff Court', in order to give effect to this new procedure.

II. Intellectual property law

Different texts, in English law, introduce European Regulation on Community designs and European trademarks (see all the references in the annex). Thus, for example, in the United Kingdom there are two trademark systems, namely the Community trademark system and the national trademark system.

III. Company law

A whole series of texts (statutory instruments) have been adopted in order to allow for the implementation of European optional instruments (these are cited in the annex).
PART 2 - ARE THESE OPTIONAL INSTRUMENTS CHOSEN BY THE OPERATORS?

Are these optional instruments chosen by the operators? This question shall be asked for each optional instrument, and the responses shall be addressed in the following chapters (chapter 3 to chapter 12 because, as was previously indicated, sequence numbering was chosen in order to maintain the numbering of the questions asked).

The study shall then research the reasons for the operators' choice either to use or not to use the optional instrument (chapter 13). In other words, this chapter shall allow us to learn of the reasons for the success or failure of the optional instruments.

CHAPTER 3: DO OPERATORS CHOOSE THE EUROPEAN ENFORCEMENT ORDER?

The question asked during the survey was more precise than the one which is the title of this chapter. In fact, rapporteurs were also asked if statistics, official or not, concerning the use of this instrument had been published in each country. In the absence of statistics, the rapporteurs were requested to state the approximate subjective percentage use of this European Enforcement Order, in relation to the national enforcement order. The rapporteurs were requested to match this to an exequatur procedure and to indicate what analysis, research and/or documents this percentage is based on.

An analysis of the responses (1) shall subsequently be presented, followed by a more comprehensive summary of the different responses, country by country (2).

1. ANALYSIS OF THE RESPONSES

The responses of the various rapporteurs show that there is practically no national official statistics (1.1). Some national reports mention unofficial statistics or objective figures (1.2). Others express only subjective opinions (1.3).

1.1. The overall virtual absence of official statistics

The various reports show that there are no official published statistics.

Only the Luxembourg report mentions official statistics in the 2010 activity report which shows that the European Enforcement Order is not used very much:

'During the legal year 2009/2010, information provided by the Public Prosecution's documentation agency which is based on the 2010 activity report (to be published) shows that only the following statistics are available:

The magistrate's court in Esch-sur-Alzette granted 11 European Enforcement Orders.
The magistrate's court in Diekrich granted 21 European Enforcement Orders (...).
The Diekrich magistrate's court 2009 activity report for legal year 2008-2009 shows that this court granted one European Enforcement Order, out of 6738 enforcement orders, in this legal year. We conclude from these activity reports and from
information that professionals have communicated to use during our interviews with them that operators do not use the European Enforcement Order very much.\(^91\)

1.2. **Objective figures**

When speaking of objective figures, we refer to data which is founded not on intuition but on an objective study. We refer to data which is not official, and which is not conducted with the same scientific rigour as statistical studies.

The Hungarian report communicates figures given by the Hungarian national chamber of notaries, which believes that there has only been around twenty European Enforcement Orders since 1 June 2010.\(^92\)

The report also mentions a doctrinal study which was carried out by the author who identified, systematically it seems, local case laws in some Hungarian courts: \(^93\)

\[ 'In the article cited above, the author concludes in 2008 that after 4 years of R2 being in force there is no real practice in Hungary in which R2 is applied as basis for the enforcement of cross-border claims. She bases this determination on information gathered with research analyzing cases in Győr and Mosonmagyaróvár municipal courts. Author of said article repeated the analysis of court cases between January and June 2009 in four counties: Győr-Moson-Sopron, Komárom-Esztergom, Vas and Veszprém (...). As basis for the reconducted analysis the author chose counties with a relatively large amount of cases involving a cross-border enforcement element. E.g. in Győr-Moson-Sopron count, in the north-western Dunántúl region (near the Austrian border) there were 8-10 such cases in 2009 and author found evidence that since the adoption of R2 in 2004 in the five years until 2009, almost 50 cases involved cross-border enforcement in legal arguments (...)' \(^94\)

This shows that the enforcement order is not used very often, but that it does exist.

The Slovak Ministry of Justice report includes unofficial statistics which are based on data provided by Slovak courts. This data is objective, but it is not exhaustive, as not all the courts were in a position to provide the relevant information to the Ministry. With those exceptions, it is thus stated:

\[ 'According to information provided by courts, 374 European Enforcement Order (EEO) applications were filed between 2006 and 2010. 252 EEO certificates were issued - 80 for judgments and 172 for authentic instruments. According to information provided by courts, 83 enforcement applications based on foreign EEOs

\(^{91}\) People consulted in this regard: Master C. HENRY-SITTON, Master A. MOSSLER, K. FABECK, assistant public prosecutor (documentation agency in the public prosecutor’s office in Luxembourg).

\(^{92}\) This figure is nonetheless somewhat unreliable as the report specifies that these figures are founded on the Brussels I regulation or on the EEO Regulation which it calls (R2).

\(^{93}\) Gécziné Dr. E. BÁRDOSI, *A nem vitatott követelésekre vonatkozó európai végrehajtható okirat* [on the EEO for uncontested claims]; Available in Hungarian at: http://www.law.klte.hu/jogimuhely/cikk_2008_01_01_bardosi.php.

\(^{94}\) This is how the Hungarian report refers to the Regulation on the European Enforcement Order.

\(^{95}\) Background information in: Gécziné Dr. E. BÁRDOSI, ‘A határokon átnyúló végrehajtási eljárások has Magyar bírósági gyakorlatban - egy összehasonlító vizsgálat tanulságai’ [Cases involving the enforcement of cross-border claims in Hungarian judicial practice - Results of a comparative analysis], *Európai Jog*, 3/2010, pp. 24-32.

\(^{96}\) For detailed (unofficial independent research-based) statistical data on the subject see: Annex 3/A-3/C, *Cases involving a cross-border enforcement element (under R or R2) in 4 counties of North-Western Hungary between May 2004-June 2009*. 

91
were filed in Slovakia. However, with respect to this question, most courts indicated that no specific records were kept, and therefore this figure may be largely underestimated.

These figures are then compared with the enforcement procedures which take place in Slovakia:

'For the sake of comparison, 1 495 355 enforcement procedures (independent of the enforcement orders) took place between 2006 and 2010 in Slovakia. It follows that the percentage use of EEOS as concerns national enforcement orders is probably lower than 1 %'.

It is, however, noticeable that the comparison took place with all the enforcement procedures, and not only with cross-border enforcement procedures. Nevertheless, with national enforcement procedures the European Enforcement Order was not useful and it is understood that it was not requested.

The report also indicates that '22 % of bailiffs participating in our survey indicated that they had dealt with the European Enforcement Order in their legal practice'. Slovak bailiffs are therefore familiar with the European Enforcement Order.

The English Ministry of Justice mentions unofficial statistics, which should therefore be considered with some reservation, but nonetheless show the following:

'In 2009/10 there were: 32 applications for an EEO Certificate; and 980 applications to enforce orders made under the EEO procedure '.

1.3. Subjective opinions

Subjectively, the various rapporteurs do not seem to accord much importance to the European Enforcement Order.

The Czech report estimates that the European Enforcement Order is used in some tens of cases a year.

The German Ministry of Justice talks about the small role ('small role ') of the European Enforcement Order and the German university report is also very reserved. Practitioners and works talk about a reticent reception of the enforcement order97.

The French report shows that it is 'extremely difficult to set an approximate percentage use of the European Enforcement Order, in comparison with the national enforcement order, combined with an exequatur procedure, but the percentage is definitely lower than 5 % '.

The Italian report is more optimistic:

'Nevertheless, the spreading of the payment order is today confirmed by the increasing case law: Trib. Spezia (ord.), 7 February 2008; Trib. Milano (ord.), 23

The Swedish Ministry of Justice estimates that out of 595 000 statements of claim for enforcement, around 40 were European cross-border disputes, and, out of those 40, 30 were associated with the European Enforcement Order.99.

'According to the Enforcement Authority’s monitoring system, 595 000 individual matters for enforcement were entered into the system during 2010. There are no statistics on various types of enforcement orders. However, an approximation shows that, as compared to the total 595 000 claims, the European titles of execution only amounted to about 40 matters in all. Approximately 30 of these claims concerned the European Enforcement Order'.

The low level of use of the European Enforcement Order must be put into perspective. Indeed, it must be compared not with the number of procedures of enforcement in a given country, but with the number of cross-border European enforcement procedures which took place in a country or which began in this country.

Certainly, nothing is stopping an operator from requesting a European Enforcement Order for a national dispute.100. But why exactly would the creditor do this? Certainly the creditor's debtor could always change the country of their residence before the enforcement, but this is not very likely. The European Enforcement Order will be a success if it is used in a large number of European cross-border disputes.

The latest figures from a Swedish report demonstrate this clearly. If out of 595 000 cases of enforcement, only 40 are cross-border cases, it is natural that the European Enforcement Order is only used in a small number of cases. In this last statistic, the European Enforcement Order nonetheless accounts for 75% of the cases in which it was useful to proceed to a cross-border enforcement, which is, in fact, a lot! In European cross-border procedures in 2010 which involved Sweden, the European Enforcement Order was applied in three out of four cases!


99 The Swedish Ministry of Justice bases these statistics on the ‘Enforcement Authority’s monitoring system’.

100 Regulation No. 805/2004 concerning the European Enforcement Order does not require the case to be a cross-border case.
## 2. COUNTRY-BY-COUNTRY SUMMARY OF RESPONSES TO QUESTION NO 2

<table>
<thead>
<tr>
<th>Member State</th>
<th>Table No 3</th>
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</thead>
<tbody>
<tr>
<td><strong>Belgium</strong></td>
<td>With regard to the European Enforcement Order (EEO): Belgian legislation is, generally, similar to the rules recited in the Regulation, but there are uncertainties surrounding the interpretation of some aspects of the text. It is primarily this legal insecurity surrounding the interpretation of legal texts which causes operators to prefer the procedure which was introduced by Regulation 44/2001.</td>
</tr>
<tr>
<td><strong>Bulgaria</strong></td>
<td>With regard to the European Enforcement Order (EEO): operators use this from time to time. Courts do not keep accurate statistics on this subject and there is no official statistical data concerning the EEO available to the public. A representative from the regional court in Sofia - the biggest regional court in Bulgaria - indicated that two statements of claim for the granting of European Enforcement Orders were submitted to this court in 2010. It was not possible to locate statistics on the number of cases where operators from other European Member States used a European Enforcement Order instead of a national enforcement order accompanied by an exequatur procedure.</td>
</tr>
<tr>
<td><strong>Czech Republic</strong></td>
<td>With regard to the European Enforcement Order (EEO), the payment order and the European procedure for the settlement of small claims: unfortunately, there is no official data available. Czech legal practitioners have therefore consulted the Ministry of Justice and the Supreme Court in the Czech Republic. They were informed that for the moment there are no statistics and no collection of this type of data is anticipated in the medium term. The only official statistics which are available are considerably more general and deal with the subject of the procedure. Unofficially, they estimate that each instrument may be used in several dozen cases per year.</td>
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<tr>
<td>Country</td>
<td>Academic response</td>
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<tr>
<td>Germany</td>
<td>Practitioners and works are talking about a reticent reception of these instruments. In order to support their comments, they refer to two internet addresses: <a href="http://www.kanzlei-feser.de/43.html">http://www.kanzlei-feser.de/43.html</a> and <a href="http://www.adf-inkasso.de/inkasso_newsletterarchiv/ADF-InkassoNews_2007-04.pdf">http://www.adf-inkasso.de/inkasso_newsletterarchiv/ADF-InkassoNews_2007-04.pdf</a>. Furthermore, in the discussions which are taking place in Germany, the emphasis is put on shortfalls in terms of legal security, due to the absence of an exequatur procedure, which is one of the main drawbacks of the European instrument.</td>
</tr>
<tr>
<td>Greece</td>
<td>With regard to the European Enforcement Order (EEO): some operators choose this. In the absence of statistics, but after having collected information from practitioners, Greek legal practitioners can confirm that even if cases of certification exist, at the present time, to their knowledge, there are no litigations as concerns corrective measures for the non-respect of procedural minimum guarantees.</td>
</tr>
<tr>
<td>Spain</td>
<td>There are no statistics available.</td>
</tr>
<tr>
<td>France</td>
<td>With regard to the European Enforcement Order (EEO): no official statistics have been published. Nonetheless, it seems that this procedure is used very rarely by operators. It is obviously extremely difficult to establish an approximate percentage use of the European Enforcement Order, in comparison with the national enforcement order, combined with an exequatur procedure, but it is certainly lower than 5 %.</td>
</tr>
<tr>
<td>Italy</td>
<td>With regard to the European Enforcement Order (EEO): Italian legal practitioners confirm that this procedure has been integrated into Italian law very slowly. According to them, this delay is an inevitable consequence of the non-mandatory nature of the instrument. Commentators believe that it was predictable that national practitioners should continue to prefer to use instruments recognised in art. 38 and on of Regulation 44/2001 (exequatur), even in cases where the EEO could be used. Nonetheless, the propagation of the payment order is today ensured by case law which has been growing since 2007. Italian legal practitioners</td>
</tr>
<tr>
<td>Country</td>
<td>Information</td>
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</tr>
<tr>
<td>Cyprus</td>
<td>No information is available concerning this question.</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>During the judicial year 2009/2010, information provided by the Luxembourg Public Prosecution documentation agency and by the 2010 activity report (to be published) shows that only these statistics are available: the magistrate's court in Esch-sur-Alzette granted 11 European Enforcement Orders while the magistrate's court in Diekrich granted 21. The 2009 activity report of the magistrate's court in Diekrich for 2008-2009 emphasises the fact that this court had only granted one European Enforcement Order in comparison with 6738 national enforcement orders. Legal practitioners in Luxembourg have not succeeded in collecting figures concerning the use of the national enforcement order for the courts in Esch-sur-Alzette and Diekrich for the 2009/2010 judicial year. The Luxembourg magistrate's court activity report for the 2009-2010 judicial year indicates that this court dealt with 8665 enforcement orders, but no indication concerning the precise number of European Enforcement Orders dealt with exists. Legal practitioners in Luxembourg draw their conclusion from professionals who have informed them of their opinion that the EEO is little used by operators.</td>
</tr>
<tr>
<td>Hungary</td>
<td>Hungarian legal practitioners specify that they have no accurate statistical data and that it is therefore impossible to provide percentages, even if they were only approximate percentages, concerning the use of the OIs. In the majority of cases and in the majority of subjects dealt with in the survey, there are no official national statistics which would make it possible to measure the effectiveness and the implementation of the EU's legal instruments. Some public bodies nonetheless collate statistics and use this data internally for research, but this data is not generally made public and is not available for practitioners who work within these entities. The other field in which statistical analyses are shared is the field of research. The researchers have in fact set up statistical analyses for the purposes of their own study, based on their individual research and the contribution of their personal professional network. Some of these statistics will be quoted as the answers to certain questions of the survey. As for an estimate of the percentage use of national Hungarian procedures and in each case involved in the study, there is no statistical data which measures the ratio of cross-border legal conflicts in comparison with the number of conflicts which are regulated by or under the legal system of the OIs. Consequently, it would be misleading to estimate the percentage use of these non-mandatory procedures which were introduced by the OIs as this would risk distorting the results of the survey. As a result, the investigator did not want participants to guess an approximate percentage use of the procedures introduced by the OIs because of a lack of an exact starting point as a point of reference. A solution to the lack of nationally available statistical data as concerns the legal instruments referred to in this study could be the promotion of analyses and statistical tools which could be used in the planning of</td>
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</table>
Implementation of optional instruments within European civil law

future EU Regulation, and which could be carried out by EU bodies (for example EUROSTAT). This would serve as a base for reliable SWOT analyses which could be taken into account before taking regulatory measures involving the OIs, Regulations or Directives.

With regard to the European Enforcement Order (EEO): the combination of the responses (which were based on interviews) emphasises the fact that several professionals (mainly lawyers and judges) concluded that the low use of the EEO from Regulation R 805/2004 is due to the fact that operators or clients do not know that these instruments exist.

Many lawyers and judges have, however, been met with several claims in which clients invoked the application of Regulation R 44/2001 (herein: R), a predecessor of R 805/2004 (herein: R2) under the terms of the recognition of the enforcement of civil and commercial decisions. One of the two, a practitioner, indicated that one of its clients did not choose to employ EEO Regulation against a German debtor because the procedure that they should have used seemed too complicated.

The same goes for notaries: operators use the EEO but no statistical data has been published about the use of this instrument. As regards the enforcement of notarial acts, within the framework of the application of the EEO, the national Hungarian chamber of notaries (HNCCLN) has, as yet, no statistics, however the chamber is aware of the fact that only 20 EEOs have been published by the notaries since 1 June 2010 within the framework of R or R2. (Due to a modification in civil procedure law, since 1 June 2010, only notaries are able to issue European Enforcement Orders).

Case study concerning the application of Regulation 44/2001 (R) within the field of the cross-border enforcement of claims - Part 1: the National office for taxes and customs (Sud-Alföld Regional Command SARC), provided accurate statistics concerning cases where R was used as a reference point to the research director. These statistics took into account, above all, the legal fees associated with procedures undertaken against foreign clients, in order that a statement acknowledging the enforceability of these judgments should be released.

The statistics compiled for the research director are based on files dealt with in 2008-2009 in cases where legal fees were acknowledged.

Problems concerning the practical application of the EU's instruments such as R or R2 - Part 2:

The Hungarian report picks up on a tendency, in all cases, to reject procedures which implement Regulation 44/2001.

In 2010, the SARC communicated the certificates associated with different cases which were granted by the Court (with a translation included) to the authorised courts in the Member States. The SARC came to the conclusion that the practice of the Member States involved in the cases was not unified and was not clear as concerns the applicability of

As a response to the SARC’s request, the Court of Appeal in Alba Iulia, Romania, arranged a date for the trial of one of these cases. The SARC asked the Court to hold a hearing in the absence of the debtor, but the Court made a decision to reject this request. In another case, the Brasov Court refused to order the enforcement due to the fact that the legal Regulation of the Member States did not allow for such action to be undertaken. Bulgaria, by means of a court in the county of Vraca, declared that the legal fees retained by the Hungarian court were enforceable on the basis of a certificate granted by the Court in the county of Béké and on the basis of a request of the SARC. It can be deduced from the numerous examples given in the report that as regards the application of Regulation 44/2001 legal practice is not uniform in Hungary, nor in other Member States.

In order to avoid these problems, Regulation 805/2004 (R2) tends, on the contrary, to perform cross-border enforcements of court decisions more quickly in order that violations of the rights of justiceables may be compensated more quickly, avoiding the need to wait for the just satisfaction of their claims for a longer period of time. In an article dating from 2008 one author concludes that there is no real practice in Hungary of applying R2 as a base for the enforcement of cross-border debts, even though it has been in force for four years. The author bases this decision on information collected during its research.

The author chose counties with a relatively significant quantity of cases which involved cross-border enforcement as the basis for the analysis. For example, in Győr-Moson-Sopron, in the north-west of the Dunántúl region (close to the Austrian border), there were between eight and ten cases of this kind in 2009 and the author found proof that since the adoption of R2 in 2004 until 2009, almost 50 cases which involved cross-border application took place. The author identified 118 cases in the four counties between May 2004 and June 2009 which incorporated the cross-border application and whose claims were based either on R or R2.

The Netherlands

No statistical data concerning the use of this instrument has been published in the Netherlands.

With regard to the European Enforcement Order (EEO): there is anecdotal evidence that the use of this instrument depends a lot on the creditor. In particular, when the creditors in question are big creditors (for example, banks), they often ask for the EEO as a matter of course, even if they are well aware that the other party is located in the Netherlands. Other parties ask for the EEO very infrequently or not at all. It is therefore very difficult to give exact figures on this subject.

Austria

Data on the use of the EEO in Austria has not been made available to Austrian legal practitioners who responded to this questionnaire.
Poland

No statistical data has been published, regardless of whether it is official or not. Neither the Ministry of Justice nor any other public institutions have carried out an institutional survey on this subject. It would therefore be impossible to determine the quantitative relationship (in percent) between the EEO and the national enforcement order. In the largest online databases (LEX, LEXPolonica, Legalis) which include sets of Polish court judgments, only a small number of selected judgments is published. Moreover, this question was not clarified by the Polish Supreme Court, since the right to overturn a judgment has been excluded from this issue.

Portugal

There are no statistics available which address this question.

Slovakia

There is no official statistical data which addresses this question.

Nevertheless, the Ministry of Justice of the Slovak Republic established unofficial statistical data based on the data provided by the Slovak courts. This statistical data is very approximate, since, given the lack of accurate documents, not all the courts were in a position to provide the relevant information.

According to information provided by the courts, 374 statements of claim for the EEO were filed between 2006 and 2010 and 252 EEO certificates were granted (80 for judgments and 172 for official deeds). According to information provided by the courts, 83 statements of claim for application based on foreign EEOs were filed in Slovakia. Nonetheless, with regard to this question, the majority of courts indicated that no specific documents have been kept, therefore this figure could be largely underestimated.

The majority of data received from the district courts contain figures which are relatively comparable (from zero to two applications of the EEO per year). The only significant divergence involves the Bratislava regional court and the application of the EEOs for official deeds (264 statements of claim between 2006 and 2010). The situation is similar as concerns statements of claim for enforcement (between zero and two applications per year).

In the absence of sufficient data, the percentage use of the EEO in comparison with the national enforcement order cannot be established. For the sake of comparison, 1 495 355 enforcement procedures (excluding the enforcement orders) took place between 2006 and 2010 in Slovakia. It follows therefore that the percentage use of EEOs as concerns national enforcement orders is probably lower than 1 %. In addition, 22% of Slovak bailiffs who participated in this survey indicated that they had dealt with the EEO within the context of their legal practice.

Sweden

The Ministry’s response

According to the surveillance system of the Authority for the enforcement of orders, 595 000 individual statements of claim for application have
been entered into the system throughout the course of 2010. There are no statistics on the different types of enforcement orders. However, one estimate shows that, in comparison with a total of 595 000 statements of claim, only 40 of these were statements of claim for European Enforcement Orders. Approximately 30 of these statements of claim were to do with the European Enforcement Order.

United Kingdom

<table>
<thead>
<tr>
<th>The Ministry’s response</th>
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<tbody>
<tr>
<td>English legal practitioners confirm that operators in England do choose the European Enforcement Order.</td>
</tr>
<tr>
<td>Nevertheless, there are no official statistics, but English legal practitioners have managed to provide some unpublished statistical data. Thus in 2009-2010, there were 32 statements of claim for EEO certificates and 980 statements of claim for enforcement orders made by way of the EEO.</td>
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<table>
<thead>
<tr>
<th>Academic response</th>
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</thead>
<tbody>
<tr>
<td>English legal practitioners use the EEO. However, courts do not keep accurate statistics on the subject and there are no official statistics available to the public. It is however specified that in 2009/2010, there were 32 statements of claim for certificates relating to the EEO and 980 claims for the enforcement of procedures by way of the EEO.</td>
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</table>
CHAPTER 4: DO OPERATORS CHOOSE TO USE THE EUROPEAN SMALL CLAIMS PROCEDURE?

As described previously, the question asked in the survey was more specific than the one used for the title of this chapter. The rapporteurs were asked whether official statistics had been published concerning the use of this instrument in each country and, if so, what were the results. In the absence of statistics, each rapporteur was asked to subjectively estimate the approximate percentage of use of this procedure relative to the national procedure and to indicate on what analysis, research and/or documents this percentage was based.

We will present the analysis of the successive responses (1) then a more detailed summary of the different responses, country by country (2).

1. ANALYSIS OF THE RESPONSES

Figures on small claims are even rarer than those on the EEO.

1.1. Rare official statistics

In Luxembourg, it is possible to draw on the 2009-2010 annual activity report of the Justice of the Peace and the statistics to be published in the 2010 judicial activity report. These official sources show that:

‘The Justice of the Peace of Luxembourg received 23 requests for small claims procedures out of a total of 27,595 complaints filed;
The Justice of the Peace of Esch-sur-Alzette received 3 requests based on the European small claims procedure’.

The Luxembourg report concluded that this procedure is used very infrequently by operators and represents barely 0.08 % of claims filed.

Once again, the relevant comparison is not between the optional instrument and all claims regarding small claims, but rather between the optional instrument regarding small claims and cross-border disputes of under 2 000 euros resolved under national law followed by an exequatur procedure.

Austria also provided official statistics.

‘According to data provided by the Austrian Ministry of Justice, 177 claims were filed under the European small claims procedure with Austrian courts of first instance in 2010. In 2009, there were 183 such cases, i.e. there is a decrease by 4 percent’.

1.2. Objective figures

The German report reveals that, according to the literature, only 0.25% of claims filed with German courts are within the scope of this provision of the European small claims procedure. Thus, the use of this instrument in German law is very restricted. This figure was published in book by Brokamp\textsuperscript{101}. This is confirmed in a work by Hess/Bittman, in

\textsuperscript{101} Das Europäische Verfahren für geringfügige Forderungen 2007, p. 149 note 552.
which the authors conclude that this new optional instrument has very limited practical relevance\textsuperscript{102}.

The Slovakian report indicates that 4\% of bailiffs interviewed had already had to deal with the optional instrument for small claims cases, while none of the judges interviewed had encountered it (which is not necessarily telling, since everything depends on the court to which they are subject).

The Swedish report reveals that ‘the Enforcement Authority has not received any application for enforcement concerning the ESCP’.

Finally, the English Minister of Justice provided unofficial statistics that reveal that in 2009/2010 there were ‘233 applications to issue a claim under the ESCP; and 139 applications to enforce orders granted under the ESCP’. These figures can be found in the academic report from the United Kingdom.

1.3. **Subjective assessment**

The Bulgarian report stated that this optional instrument must be the most unpopular of all the instruments analysed in this study, because in 2010 the Regional Court of Sofia, which is the most important regional court (Court of Appeals), had not encountered any case related to the European small claims procedure.

However, it should be noted that when less than 2 200 euros are at stake in the dispute, it is rarely economically advisable to go before an appeals court judge.

The Czech report estimated that there were no more than a few dozen cases in which the optional small claims instrument was used.

The Italian report specifies that in Italy there were 136 659 disputes concerning less than 2 782.28 euros\textsuperscript{103}. It is not known how many of these disputes are cross-border disputes, but it is probably only a small percentage. This means that there are only a very limited number of cases where the optional instrument related to small claims (which are under 2 200 euros) could be used.

The limited scope of this optional instrument explains its lack of practical application. Moreover, the absence of consultation with a lawyer for small claims (see Bulgarian, French reports) also explains why creditors do not think of using this optional instrument.

\textsuperscript{102} Die Verordnung zur Einführung eines Europäischen Vollstreckungstitels und eines europäischen Mahnverfahrens, IPRax 2008 p. 314.

\textsuperscript{103} www.giustizia.it.
## 2. COUNTRY-BY-COUNTRY SUMMARY OF RESPONSES TO QUESTION 4

<table>
<thead>
<tr>
<th>Member State</th>
<th>Table No. 4</th>
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<tbody>
<tr>
<td></td>
<td><strong>Do operators choose to use the European small claims procedure?</strong></td>
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<tr>
<td></td>
<td><strong>Were official or unofficial statistics concerning the use of this instrument published in your country? If so, what are they?</strong></td>
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<tr>
<td></td>
<td><strong>In the absence of statistics, in your opinion, what is the approximate percentage of use of this procedure relative to the national procedure? What analysis, research and/or documents did you use to form your opinion?</strong></td>
</tr>
<tr>
<td>Belgium</td>
<td>The lack of information also affects the use of this instrument in Belgium. A Belgian consumer rights association, Test-achat, recently claimed in a daily newspaper that this procedure was still too discreet and that it should be brought to the attention of the public, for example, by publishing an explanatory brochure.</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>Courts do not keep specific statistics on the subject and the public does not have access to official statistical data. When preparing this study, Bulgarian legal practitioners contacted and questioned the President of the largest regional Bulgarian court, the Regional Court of Sofia, and a judge from this court who also serves as a coordinator for implementing European legislation.</td>
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<td></td>
<td>During their interview with them, they were informed that for 2010, the Regional Court of Sofia did not receive any requests to initiate this procedure.</td>
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<tr>
<td></td>
<td>Knowing that the Regional Court of Sofia is the court where the most claims are filed in comparison with all other regional Bulgarian courts, they were able to conclude that this procedure was the most unpopular among all the OIs submitted for this study.</td>
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<tr>
<td></td>
<td>One of the main reasons is that this procedure is relatively new. Moreover, the websites of regional courts do not provide specific information on this procedure so that citizens are aware of the availability of this alternative. Attorneys and other professionals are aware of this procedure, but operators in Bulgaria who file these small claims with the Court generally do not have access to professional assistance (legal assistance) for their claims. Therefore, at this stage operators generally do not take advantage of the existence of this procedure.</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>Unfortunately, there is no data available on the use of the EEO, the European small claims procedure and the European order for payment.</td>
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<tr>
<td></td>
<td>However, the Czech Ministry of Justice and the Supreme Court were consulted and confirmed that, for now, no statistics were available and</td>
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103
there were no plans to collect this type of data in the medium term.

The only official statistics available are much more general and concern the procedure.

Officially, Czech legal practitioners estimate that each instrument may be used in several dozen cases per year.

<table>
<thead>
<tr>
<th>Germany</th>
<th>Academic response</th>
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<tbody>
<tr>
<td></td>
<td>According to the literature, only 0.25 % of claims filed with German courts are within the scope of this provision of the European small claims procedure. Thus, the use of this instrument in German law is very restricted.</td>
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<tr>
<td></td>
<td>This situation was confirmed by several authors, who concluded that this new optional instrument has very limited practical relevance.</td>
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<tr>
<td></td>
<td>However, other authors seem more optimistic about the use of this instrument. For example, Heger arrives at a more positive evaluation by noting the growing importance of cross-border activities. As a consequence, he concludes that there is an increase in the use of optional instruments from Europe. Unfortunately, he does not provide any concrete figures to support his allegations.</td>
</tr>
<tr>
<td></td>
<td>The Ministry’s response</td>
</tr>
<tr>
<td></td>
<td>No statistical data is available on the number of procedures initiated for small claims. It should be noted that the facts required for a reliable estimate have gone missing.</td>
</tr>
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</table>

| Greece | In must be noted that practitioners are just beginning to be aware of the new European small claims procedure. In the absence of statistics, it should be noted that in Greece, unlike other European countries like France, claims cannot be filed with the competent court via all means of communication (fax, email, etc.). Greece does not accept claims filed electronically. |
|        | The actual delivery of claims to the registry may be considered an obstacle for claims of less than EUR 2 200. |

| Spain | There are no statistics available. |
|       | However, after asking certain firms in Lleida and Barcelona, the impression is that this procedure is rarely used. |

| France | No official statistics were published concerning the use of the European small claims procedure. But it seems that this procedure is used very rarely by operators. |
|        | Of course, it is extremely difficult to determine the approximate percentage of use of the European small claims procedure, but it is
certainly less than 5 %.

An attorney, Maître Michaux, acknowledged that practitioners could use this OI ‘but only insofar as a law firm could economically accept a case that would generate too many costs in comparison with the interest of the case for the firm’.

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<th>Country</th>
<th>Description</th>
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<tbody>
<tr>
<td>Italy</td>
<td>The fact that this instrument is optional implies that creditors who demand amounts no greater than EUR 2 200 may choose between two procedures. On the one hand, creditors may base their claims on the national procedure to obtain a decision that could then be carried out in another Member State. On the other hand, they may choose to directly apply the European small claims procedure. The choice of the creditor would depend on other considerations related to the procedure and the basis of each procedure in regard to his particular case. Thus, the creditor could carry out a comparative evaluation between the procedural rules of the country corresponding to the competent court and the European procedure, by taking into account the possible effects in the event of opposition. There were 136 659 filed disputes with a value of no greater than EUR 2 782.28 and which were settled before the Justice of the Peace, while there were 471 460 disputes settled by ordinary courts in 2008. There were 506 150 filed disputes with a value of over EUR 5 000 that were settled by courts of first instance in 2008.</td>
</tr>
<tr>
<td>Cyprus</td>
<td>No information is available.</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>Under Article 143-1 of the new Code of Civil Procedure introduced by the Law of 13 March 2009 on European orders for payment and small claims procedures, the justice of the peace has jurisdiction over these claims. According to the activity report of the Justice of the Peace of Luxembourg for judicial year 2009-2010 and the statistics that will be published soon in the justice activity report 2010, the figures of which were provided to us by the documentation service of the Prosecutor, it seems that: Twenty-three small claims were filed with the Justice of the Peace of Luxembourg out of a total of 27 595 claims filed, and that the Justice of the Peace of Esch-sur-Alzette received 3 complaints based on the European small claims procedure. Unfortunately, the total number of claims filed was not available. Thus, this procedure is used very infrequently by operators and represents barely 0.08 % of claims filed.</td>
</tr>
<tr>
<td>Hungary</td>
<td>Certain operators seem to use the procedure, but it is extremely rare to invoke this procedure in a dispute. This is due to practitioners’ and operators’ general lack of knowledge on this subject and on using this OI.</td>
</tr>
<tr>
<td>Country</td>
<td>Information</td>
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<tr>
<td>Netherlands</td>
<td>No statistical proof on the use of this instrument was published in the Netherlands. The procedure is certainly used, but it is still difficult to find exact figures on its use because it has only been available since 2009.</td>
</tr>
<tr>
<td>Austria</td>
<td>According to data provided by the Austrian Federal Ministry of Justice, 183 requests were filed pursuant to the European small claims procedure before Austrian Courts of First Instance in 2009. There were only 177 in 2010, a 4% decrease. It is very difficult to determine the percentage of use of this procedure compared with the national procedure because the number of cross-border cases concerning less than 2 EUR 2 000 as well as the areas under Article 2 of the Regulation would have to be taken into account. More precise statistical data is not available.</td>
</tr>
<tr>
<td>Poland</td>
<td>No statistical data was published, whether official or private. In addition, the Ministry of Justice does not carry out institutional surveys on this subject. It is impossible to evaluate the quantitative effects (as a percentage) of the existing relationship between the small claims procedure and the summary procedure. In online databases (LEX, LEXPolonica, Legalis), which compile all the Polish judicial decisions handed down, only one decision was published in this field.</td>
</tr>
<tr>
<td>Portugal</td>
<td>There is no information available on the number of procedures initiated.</td>
</tr>
<tr>
<td>Slovakia</td>
<td>There was no official or unofficial statistical data published in Slovakia on this question. As a consequence, the number of European small claims procedures in Slovakia or the percentage of use of this procedure with regard to the national procedure cannot be determined. None of the judges who participated in this survey had handled a European small claims procedure. Given the number of claims presented to judges, one could suppose that the percentage of use of this procedure with regard to the national procedure is less than 1%. However, this procedure must be distinguished from the small claims procedure under Slovak law (there were 38,726 claims in 2009), since these claims, unlike those under the European small claims procedure, are limited to EUR EUR 500. Only 4% of Slovak bailiffs who participated in this survey indicated that they have handled an enforcement order issued under the European small claims procedure.</td>
</tr>
<tr>
<td>Sweden</td>
<td>The Ministry’s response The Swedish National Courts Administration does not have statistical data concerning the use of the European small claims procedure. The Administration has no further information on the subject. In any case,</td>
</tr>
</tbody>
</table>
the executing authority has not received any enforcement request concerning the European small claims procedure and, according to the Swedish Consumer Agency, knowledge of the European small claims procedure is limited.

**United Kingdom**

**The Ministry’s response**

According to this response, operators do choose to use the European small claims procedure.

There are no official statistics but the ministry was able to provide some unpublished statistical data. In 2009-2010, there were 233 claim requests under this procedure and 139 requests for enforcement of orders filed under the European small claims procedure.

**Academic response**

The United Kingdom has set up special procedures for handling small claims that are available for national and international disputes. However, this is not the case in other Member States: even if an applicant successfully obtains a decision, he or she could then be subject to additional procedures if the judgement must be enforced in another Member State.

The new procedure will apply to civil and commercial matters when the total value of the request does not exceed EUR 2 000. The British government called this threshold ‘unrealistic’, taking into account the possibility of ending the disproportionately high costs for claims just above this threshold.

The report from the House of Lords welcomes the European small claims procedure, which, while it is not limited to consumer-related claims, could provide concrete and immediate advantages for citizens and tangible advantages for individuals and companies throughout the European Union. The House of Lords provided a certain number of recommendations concerning the use of this procedure and the difficulties to be overcome. It explained that there were places where the text of the Regulation needed to be clarified ‘in order to ensure uniform application in an effective small claims system’.

When looking at the statistics provided by the Ministry of Justice, it can be seen that the number of national hearings concerning small claims dropped from 47 680 to 46 963 between 2005 and 2009.

In England and Wales, small claims procedures fall within the jurisdiction of county courts and the High Court of Justice (see annexes for more details).
CHAPTER 5: DO OPERATORS CHOOSE THE EUROPEAN ORDER FOR PAYMENT?

As before, rapporteurs were asked to report on official statistics, if they exist, or to provide an objective approximation of the percentage of use of this European Order for Payment while specifying on which analysis, research and/or documents this percentage is based.

This section analyses the answers one by one (1.) before presenting a table with a more detailed overview of the different answers by country (2.).

1. ANALYSIS OF THE RESPONSES

The figures put forth regarding the European order for payment are more difficult to interpret, given that two series of figures must be recorded:

– firstly, the European orders for payment issued in Member State A;
– secondly, the European orders for payment issued in another Member State B and enforced in Member State A.

This means that a use of the European Order for Payment may be counted twice, once by the issuing Member State B and once by the receiving (executing) Member State A.

Having made this clear, it should be recalled that there are very few official statistics for this instrument as well as for other optional procedural instruments. However, some objective figures are available, along with a few subjective impressions from reports.

1.1. Rare official statistics

There are many European Union countries with no statistics on the use of the European order for payment.

The Portuguese report announced that statistics of this kind for 2010 are being finalised.

It is Austria that gathers data that most closely resembles official statistics. The Austrian report notes the following:

‘In Austria applications for a European order for payment may be filed exclusively with the District Court for commercial matters (Bezirksgericht für Handelssachen, BGHfS). According to data provided by the court and by the Ministry of Justice, there were 2 177 claims for total value of EUR 25 560 000 (EUR 11 700 on average per case) filed in 2010; 1 676 claims for total value of EUR 17 292 200 (EUR 10 300 on average per case) in 2009 Statistical data concerning number of orders for payment issued under the national law are available. In 2010, for example, there were 469 852 orders for payments with 43 250 statements of opposition (9.2 %) issued by district courts (Bezirksgerichte); 19 867 orders for payments with 6 753 statements of opposition (34 %) issued by state courts (Landesgerichte); 16 853 orders of payments with 6 760 statements of opposition (40.1 %) issued by labour courts (Arbeitsgerichte).’

The report insists, and the authors fully share its opinion on this point, on the fact that the figures concerning the European Order for Payment must not be compared to figures from
national orders for payment (in particular, 469 852 in district courts) that do not concern cross-border disputes. The report concludes on an optimistic note: 'Accordingly, nearly all cross-border cases are dealt with under the Regulation (EC) No 1896/2006'.

In Luxembourg, there are only statistics for European orders for payment concerning amounts of less than EUR 10 000. The Justice of the Peace of Luxembourg received 171 claims under the procedure for the European order for payment. The Justice of the Peace of Esch-sur-Alzette received 12 claims under the European order for payment procedure and the Justice of the Peace of Diekirch received 7 requests based on the European order for payment procedure. Unfortunately, the total number of claims filed was not available. The Luxembourg report concluded that this procedure is used very infrequently since it represents barely 0.5% of claims filed.

Actually, as mentioned previously, it is not so much the percentage of European orders for payment compared to the overall number of orders for payment that is important. It is the percentage of European orders for payment compared to all cross-border disputes having implemented an order for payment.

1.2. Objective figures

After noting that this optional instrument concerns only cross-border reports, the German report indicates that in 2009, '150 new claims were filed per month' with the Court of First Instance (Amtsgericht) of Wedding (Berlin), which is the only court in Germany with jurisdiction for this kind of litigation.

It follows, certainly more subjectively, that, concerning cross-border contractual relationships within the European Union, the optional European Order for Payment is considered an ‘efficient new method in terms of claims’ and that ‘the German authors are generally convinced that the role of this procedure as an optional instrument will only increase in the years to come (Heger DStR 2009, p. 435).’

The figures from the German Ministry are less optimistic. The European order was chosen in 2000 cases in 2010, which corresponds to only 1% of cross-border disputes.

The figures provided by the Greek report are even lower. In the absence of official statistics, its authors contacted the Athens Court of First Instance, which handled 31 032 national orders for payment in 2010, versus 14 European orders for payment.

The English Minister of Justice reported that in 2009/2010 there were '95 applications to issue a claim under the EOP procedure; and 49 applications to enforce orders made under the EOP procedure'.

1.3. Subjective assessment

Certain reports do not even attempt to provide a subjective assessment, which is revealing. Others, like the Swedish report, cautiously report a dozen cases of European orders for

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104 The underlining is of the authors' doing.
105 The underlining is of the authors' doing.
106 See the press release of 24 November 2009.
   SUJECKI, Das elektronische Mahnverfahren, 2008.
payment to be enforced in Sweden versus 595 000 orders for payment, and around 35 order claims filed with ‘the enforcement authority’, whereas 1.2 million claims were filed for the Swedish procedure in 2010.

2. **COUNTRY-BY-COUNTRY SUMMARY OF RESPONSES TO QUESTION 5**

<table>
<thead>
<tr>
<th>Member State</th>
<th>Table 5</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Belgium</strong></td>
<td>Do operators choose to use the European order for payment?</td>
</tr>
<tr>
<td></td>
<td>Have official or non-official statistics been published with regard to the use of this instrument in your country? If so, what are they?</td>
</tr>
<tr>
<td></td>
<td>In the absence of statistics, what, in your opinion, is the approximate percentage of use of this European order for payment in comparison with the existing order for payment under national law? What analysis, research and/or documents did you use to form your opinion?</td>
</tr>
<tr>
<td></td>
<td>This optional instrument is promoted very little, which explains why litigants do not always use it. In addition, this text has caused several controversies, which explains the legal uncertainty surrounding its application. In practice, this procedure is used rarely.</td>
</tr>
<tr>
<td><strong>Bulgaria</strong></td>
<td>Courts do not keep specific statistics on the subject and the public does not have access to official statistical data. However, during an interview with the President of the District Court of Sofia, the legal practitioners who participated in this survey were informed that 5 European enforcement order claims were filed with this court in 2010. Nevertheless, it was stressed that the low number of claims could not be considered as an indication of the low popularity of this OI.</td>
</tr>
<tr>
<td></td>
<td>The use of this OI is not bound by its popularity, but by the specific needs of operators in each particular case.</td>
</tr>
<tr>
<td></td>
<td>Moreover, it should be mentioned that the District Court of Sofia has jurisdiction for examining cases concerning operators with head offices and an address in the cities and towns located within the district of Sofia, but it does not hold jurisdiction over disputes concerning operators with head offices and an address in the city of Sofia itself. In this regard, the number of cross-border disputes is also low.</td>
</tr>
<tr>
<td></td>
<td>It can be assumed that the number of requests is much higher in the city of Sofia. However, given that courts do not compile specific statistics on this subject, it is not possible to obtain a percentage (even an approximate one) for the use of this European procedure in comparison with the national procedure, which is accompanied by an exequatur procedure.</td>
</tr>
<tr>
<td>Country</td>
<td>Details</td>
</tr>
<tr>
<td>------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>As regards the European order for payment and the European small claims procedure: unfortunately, there are no official statistics available. Czech legal practitioners contacted the Ministry of Justice and the Supreme Court of the Czech Republic. They were informed that for now, no statistics were available and there were no plans to collect this type of data in the medium term. The only official statistics available are much more general and concern the subject of the procedure. Officially, Czech legal practitioners estimate that each instrument may be used in several dozen cases per year.</td>
</tr>
<tr>
<td>Germany</td>
<td><strong>Academic response</strong>&lt;br&gt; The scope is also very limited in this area, since the procedure applies only to claims arising from contractual relationships having a cross-border element. Therefore, this order does not constitute an OI in internal contractual relationships (free from any international element). However, as regards cross-border contractual relationships within the European Union, the optional European order for payment is considered an ‘efficient new method in terms of claims’. Indeed, in 2009, 150 new claims were filed per month with the Court of First Instance of Wedding (Berlin), which is the only court in Germany having jurisdiction over this kind of dispute. Even if this instrument does not (yet) have an important practical relevance, the German authors are generally convinced that the role of this procedure as an optional instrument will only increase in the years to come.</td>
</tr>
<tr>
<td>Greece</td>
<td>In the absence of official statistics, Greek legal practitioners having responded to this study contacted the Court of First Instance of Athens, the most important common law jurisdiction in Greece. There were 31 032 national orders for payment and 14 European orders for payment in 2010. In principle, debtors who receive a European order for payment do not lodge opposition. It should be noted that the European choice of a model without any evidence and without any real initial jurisdictional control, as well as the conditions for obtaining a European order for payment, do not generally pose problems in themselves. However, questions remain in regard to the transfer to ordinary proceedings, which itself is subject to the state law of the Member State of origin. Broadly, under Article 17(1) of Regulation 1896/2006 creating a European order for payment procedure, if opposition is lodged within...</td>
</tr>
</tbody>
</table>
thirty days after notification or service of the order to the respondent, the procedure shall continue before the court having jurisdiction in the Member State of origin, pursuant to the rules of ordinary civil procedure, unless the respondent has explicitly requested that the procedure be stopped. It is not possible to automatically transfer a case to the ordinary civil procedure under Greek law (see recital 24 of the Regulation).

More precisely, it is not possible to automatically refer a case to the court having jurisdiction in order to continue the procedure. The applicant or respondent must merely take the initiative. In addition, the authors note that the Court of First Instance of Athens ensures that the order for payment is delivered or notified to the respondent, pursuant to the minimum standards established under Articles 13, 14 and 15 of the said Regulation.

Spain

There are no statistics available. The most important company in Lleida reported that it only used this procedure once, as a respondent (the claimant was German).

France

No official statistics were published concerning the use of the European order for payment procedure. But it seems that the European order for payment procedure is very rarely used by operators. Of course, it is extremely difficult to determine the approximate percentage of use of this European procedure, but it is certainly less than 5 %.

A French lawyer, Maître Michaux, notes that ‘for practitioners, as soon as a new procedure appears (optional or not), the information is reported by the Ordre and taken into account, especially if it is a simplification. Take the simple example of the European order for payment: everyone knows it, the form is online, the commercial court (and probably the courts of first instance) applies it and, under these conditions, it must be used 100 % of the time’. He believes that a private individual seeking to enforce his claim would either go online and find the information or would obtain it from the court or, if he seeks legal counsel, the lawyer would use it automatically.

‘Either directly or through a lawyer, creditors would use the national or European order for payment, depending on the case. If they file the claim themselves at the Court, the Court will tell them which form to fill out, the internet is used fairly extensively and could even replace the habit of going oneself to a court to file a claim, lawyers are aware of this. In fact, practices adapt very quickly and it is becoming impossible to file pleadings based on anachronistic notions (initiate a long and costly competing procedure when another, European, directly usable procedure is available, launch an exequatur procedure for a European decision) because they will be refused by the courts. These procedures (small claims, European order for payment) received a lot of publicity and professionals know about them’.

Italy

No data is available on the use of this OI. However, it should be pointed out that, as previously mentioned, the Italian legal system already lays down a simplified procedure for national cases concerning credit
collection that are likely to be contested by debtors, pursuant to Article 633 of the French Code of Civil Procedure (Code de procedure civile). The Italian order for payment is extremely important in terms of figures. In 2007, the overall amount of decreti ingiuntivi (injunction decrees) (Article 633 of the Code of Civil Procedure) settled by the justice of the peace was actually 345,172 while the amount settled by the courts during the same period was 373,115.

Cyprus
No information available.

Luxembourg
In the Grand Duchy of Luxembourg, multiple courts have the power to grant injunctions (president of the district court, president of the labour court) under the terms of Article 49 of the new code of civil procedure as amended by the aforementioned Law of 13 March 2009 incorporating Regulation (EC) No 1896/2006.

The Justice of the Peace of Luxembourg received 171 claims based on the European order for payment. The Justice of the Peace of Esch-sur-Alzette received 12 claims based on this procedure, while the Justice of the Peace of Diekirch received 7 claims based on the European order for payment procedure. Unfortunately, the total number of claims filed was not available.

No statistics are available for European orders for payment exceeding EUR 10,000 and falling under the presidential jurisdiction of district courts, as well as for order for payment claims related to complaints falling under the subject matter jurisdiction of labour courts.

Thus, this procedure is used very infrequently by operators and represents barely 0.5% of claims filed.

Hungary
Certain operators seem to use the European order for payment, but this system is rarely applied during disputes. This is due to practitioners’ and operators’ general lack of knowledge on this subject and on using this OI.

Netherlands
No statistical proof on the use of this instrument was published in the Netherlands. The procedure is certainly used, but it is still difficult to find exact figures on its use because it has only been available since 2009.

Austria
I. European order for payment

In Austria, requests for obtaining a European order for payment may only be filed with the District Court for Commercial Questions (Bezirksgericht für Handelssachen, BGHfS). According to data provided by the court and by the Ministry of Justice, there were 2,177 claims in 2010 for a total value of EUR 25,560,000 (an average of EUR 11,700 per case); and 1,676 claims for a total value of EUR 17,292,200 (an average of EUR 10,300 per case) in 2009.

Statistical data is available on the number of orders for payment issued
by virtue of national law. For example, in 2010 there were 469,852 orders for payment with 43,250 statements of opposition (9.2 %) issued by district courts (Bezirksgerichte); 19,867 orders for payment with 6,753 statements of opposition (34 %) issued by state courts (Landesgerichte); 16,853 orders for payment with 6,760 statements of opposition (40.1 %) issued by courts with jurisdiction over matters concerning labour law (Arbeitsgerichte).

However, it is misleading to compare these figures with the number of orders for payment issued by virtue of Regulation (EC) No 1896/2006, since national orders for payment rarely concern cross-border disputes. As a result, nearly all cross-border disputes are handled under Regulation (EC) No 1896/2006.

The number of European orders for payment may be compared, for example, with the same category of requests in Germany. There were only 1,983 claims filed under the European order for payment procedure in 2010 and only 3,079 of these claims in 2009. Given that the population of Germany is ten times larger than that of Austria, this comparison shows that the European order for payment procedure is widely used in Austria.

II. Statements of opposition

The number of statements of opposition objecting to European orders for payment and ensuring that the case will be heard under the ordinary rules of procedure is rather low in Austria, with only 133 cases in 2010 (6.1 %).

<table>
<thead>
<tr>
<th>Country</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Poland</td>
<td>No statistical data was published, whether official or private. In addition, the Ministry of Justice does not carry out institutional surveys on this subject. It is impossible to evaluate the quantitative effects (as a percentage) of the existing relationship between the small claims procedure and the summary procedure. In online databases (LEX, LEXPolonica, Legalis), which compile all the Polish judicial decisions handed down, no decision was published in this field.</td>
</tr>
<tr>
<td>Portugal</td>
<td>Data is certainly available for 2010, but statistics for 2010 are still being finalised.</td>
</tr>
<tr>
<td>Slovakia</td>
<td>No official or unofficial statistical data was published in Slovakia. As a result, it is impossible to determine the number of European orders for payment issued or requested in Slovakia or the percentage of use of the European order for payment in comparison with the order for payment under national law. None of the judges who participated in this survey issued a European order for payment in 2010. Given the number of claims handled by a judge, it is possible to assume that the percentage of use of the European order for payment with regard to the order for payment under national law is less than 1 %.</td>
</tr>
</tbody>
</table>
Moreover, only 12% of bailiffs participating in this study indicated that they had ever handled a European order for payment during the course of their work.

**Sweden**

The Ministry’s response

A comparison shows that out of a total of 595 000 individual requests for enforcement in 2010, there are only around 10 that concern a European order for payment.

With regard to requests for European orders for payment, this procedure is used but on a very limited scale in comparison with the Swedish order for payment.

In 2010, only 35 claims for European procedures were filed with the competent authority, in comparison with 1.2 million claims for the Swedish procedure over the same period.

**United Kingdom**

The Ministry’s response

Operators almost never choose the European order for payment.

In 2009-2010, there were 95 claims filed by virtue of the European order for payment and 49 claims to enforce orders made under this European order for payment procedure.

Academic response

In England and Wales, county courts and the High Court of Justice have jurisdiction for issuing European orders for payment (for more details, see the Annexes).
CHAPTER 6: DO OPERATORS CHOOSE THE COMMUNITY TRADEMARK?

The questionnaire asked for official statistics from rapporteurs, or, in the absence of statistics, a subjective percentage, with details on what this percentage is based on.

This section analyses the answers one by one (1.) before presenting a table with a more detailed overview of the different answers by country (2.).

1. ANALYSIS OF THE RESPONSES

The advantage of the Community trademark is that official European statistics are available, provided by OHIM\textsuperscript{109}.

First, these statistics show that the Community trademark is a big success. According to the German report, ‘the Community trademark was considered an ‘exceptional success’\textsuperscript{110} and is justly considered ‘one of the most widely accepted tools’\textsuperscript{111} by operators’.

But while the Community trademark is perhaps the most successful optional instrument, it is used differently by operators in different countries (1.1). However, these statistics show that operators who register a trademark in the EU outside of their country of establishment use the Community trademark more and more often (1.2), at the expense of the international trademark (1.3).

1.1. Different success depending on the Member State

Overall, the OHIM statistics show a favourable growth in use of the Community trademark.

At OHIM, the number of annual applications for Community trademarks remained stable in 2009: after a drop of 1\% between 2007 and 2008, the 2009 level of applications caught up with the 2007 level. In May 2009, OHIM significantly reduced its filing fees (by around 40\%): this drop may largely account for the good overall results for the Community trademark.

The 2010 statistics show that the number of requests rose again: 98,217 requests in 2010, while only 88,209 requests in 2009\textsuperscript{112}.

The overall effective annual number of registered Community trademarks has almost always\textsuperscript{113} increased, from 577 in 1997 to 38,553 in 2001 and 89948 in 2009, and 100,803

\textsuperscript{109} For 2010, cf. also the comparative statistics OHMI/ Dépôt nationaux Annex 2:

\textsuperscript{110} VAN RADEN, Community Trademark Courts – German Experience, IIC 2003, p. 270 s. sp. p. 274.

\textsuperscript{111} PAGENBERG, Die Gemeinschaftsmarke, IIC 2001, p. 260 sqq.


\textsuperscript{113} With one exception: 38,553 in 2001, 35907 in 2002, and 34324 in 2003. After that time, it only increased.
in 2010. As a result, there were 698,734 Community trademarks registered in the EU in 2010\(^{114}\).

But the official OHIM statistics also show that the use of the Community trademark differs from one Member Country to another. This can be seen in the following graph:

![Percentage of Community trademark registration requests by country (2009)](image)

If only EU Member States are mentioned, this graph shows the following percentages in descending order: Netherlands 4.5 %, Austria 2.6 %, Sweden 2.1 %, Belgium 2 %, Poland 1.75 %, Denmark 1.22 %, Portugal 1.1 %, Ireland 0.9 %, Finland 0.89 %, Luxembourg 0.84 %, Czech Republic 0.55 %\(^{115}\).

As such, in 2009 Germany was in the lead for the use of the community trademark, while France was only in sixth place. The number of companies with their head offices in the United States that use the Community trademark can also be seen. Of course, this optional instrument may be used by non-European companies for trade within Europe.

In 2010, the United States were in first place with 19.91 %, ahead of Germany with 18.29 %, Great Britain with 11.58 %, Italy with 8.44 %, Spain with 8.29 % and France with 7.30 %, the Netherlands with 3.56 %, Austria with 2.14 %, Sweden with 2.13 % and Belgium with 1.68 %. Denmark (1.49 %) and Portugal (1.03 %) surpassed Poland

(1.01 %). Last are Ireland (0.98 %), Finland (0.93 %), Luxembourg (0.71 %) and Greece (0.43 %) (which replaced the Czech Republic in the table of statistics)\textsuperscript{116}.

Finally, for the first quarter of 2011 Germany (4,887) took the lead ahead of the USA (3,415) in the figures from the first quarter\textsuperscript{117}.

These statistical tables on the use of the Community trademark at a given point in time do not show how much the use of the Community trademark increased in certain EU countries.

Indeed, the number of Community trademarks is currently increasing more in certain Member States than in others.

The number of Community trademarks filed by French companies increased by 9.1 % in 2009. During the same year in France, the number of filings from European Union countries increased by 4.6 %, with the exception of the United Kingdom (-5.3 %) and filings from the United States (-11.9 %).

The Czech report notes an increase in the number of Community trademarks filed by Czech companies: ‘In 2004 14 trademarks were registered, in 2007 278 trademarks\textsuperscript{118} and last year it was 586 Community trademarks for Czech firms’\textsuperscript{119}.

Conversely, the figures are relatively low for Belgium and Luxembourg. The Luxembourg report explains this growing interest for Benelux trademark filing by fiscal measures ‘leading to tax exemptions as remunerations for the use of a copyright or as usage fees on a copyright for a trade name or mark as well as on computer software, a patent, a design or a model, implemented by the Luxembourg government in January 2008, which lay down an exemption for 80 % of income from intellectual property’.

Moreover, ‘the Law of 5 June 2005 on the promotion of development and innovation research also provides for support systems for the costs of obtaining intellectual property titles’.

This demonstrates once again that national legislators may jeopardise the chances of success of an optional instrument through measures in favour of national sections.

In Slovakia, the Community trademark has lost some ground since 2009 (147 applications in 2009 compared with 156 in 2008) and this decline was steeper in 2010 (89 applications). But this could be a result of the global economic crisis. In this case, it must be seen whether national marks weather the crisis better, because national trademark filings initially dropped (from 3821 in 2008 to 2850 in 2009) during the same period before increasing (to 2987 in 2010).


1.2. Increase in the number of Community trademark applications in cross-border cases

These statistics also demonstrate that there was a drop in the number of national trademark applications from foreign operators.

The fact that the number of national trademark applications did not drop in certain countries is not significant in the case of companies who had no intention of selling their product abroad. However, in certain States the gross percentage of Community trademarks compared to national trademarks is already quite significant.

For example, 12 to 17% of trademark applications filed in Bulgaria by Bulgarian operators were for a Community trademark. The Bulgarian report noted that ‘the number of Community trademark applications and registrations from Bulgarian operators (has) increase(d) since 2007 and in the same time the number (of) national mark applications and registrations (has) slowly decrease(d)’.

The Greek report also emphasises the fact that: ‘Applications from local operators have not substantially decreased before and after the establishment of the CTM; instead they may have actually increased. For example in 1990 there were 4033 trademark applications from local operators and this number has increased to 5233 in 2010. Despite this increase, in practice there is no doubt that large size Greek companies that export abroad certainly prefer to apply for CTMs, instead of making multiple separate applications in each Member State’.

In any event, it is even more telling that companies that want to sell their product in another Member State file national mark applications less often than in the past. This is shown in the table prepared by the IRPI for the INPI: the percentage of foreign applicants for French marks dropped from 11% in 1996 to 4% in 2009.

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121 Created in 1982 by CCIP, the Paris Chamber of Commerce and Industry and l’Université Panthéon-Assas (Paris II), the Intellectual Property Research Institute (Institut de Recherche en Propriété Intellectuelle) is one of the leading research centres in the field of intellectual property: see in particular Ms Quatravaux, statistical economist at the French Intellectual Property Research Institute (IRPI) http://www.inpi.fr/fr/l-inpi/observatoire-de-la-propriete-intellectuelle/statistiques-de-l-observatoire.html.
122 In France the National Industrial Property Institute (INPI) is in charge of receiving applications for industrial property rights (patents, trademarks and designs), reviewing them, issuing rights and monitoring the maintenance of rights. Each year the Intellectual Property Observatory, the economic research department of the INPI, publishes the main results on the number of applications for intellectual property rights and the number of rights issued by origin, by applicant, by technological area (for patents), by class (for trademarks and designs). The latest available results date back to 2009.
Table 6
Applications for French marks

<table>
<thead>
<tr>
<th>Year of application</th>
<th>1996</th>
<th>2000</th>
<th>2005</th>
<th>2009</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total number of trademarks filed</td>
<td>51,932</td>
<td>73,480</td>
<td>67,024</td>
<td>79,566</td>
</tr>
<tr>
<td>Total number of trademarks filed by French applicants</td>
<td>46,400</td>
<td>68,980</td>
<td>63,628</td>
<td>76,606</td>
</tr>
<tr>
<td>Percentage of French applicants</td>
<td>89 %</td>
<td>94 %</td>
<td>95 %</td>
<td>96 %</td>
</tr>
<tr>
<td>Percentage of foreign applicants</td>
<td>11 %</td>
<td>6 %</td>
<td>5 %</td>
<td>4 %</td>
</tr>
</tbody>
</table>

Source: INPI, Calculations: IRPI\(^\text{123}\)

This is also the conclusion of the German report, which states that in 2008:

‘70,000 trademark applications were filed with the German Patent and Trademark Office,\(^\text{124}\) of which only 5 % were foreign applications. This proportion suggests that international operators are rather reluctant to file national mark applications abroad. In practice, it seems that international operators are generally content to register their marks in their country of origin without necessarily pursuing a national registration in a foreign country (for example, in Germany). However, as shown in the aforementioned figures, they often register Community trademarks. This trend appears to be due to the attractiveness of this optional instrument, which allows for protection – through a single registration with OHIM – in 27 different States, an advantage that outweighs the financial aspect, given that the costs of registering a Community trademark (http://oami.europa.eu/ows/rw/pages/CTM7feesPayment/feesPayment.de.do) are much higher than the costs of a national application in Germany (http://www.dpma.de/marke/gebuehren/index.html).’

The Greek report is also to this effect: ‘Although there aren’t any official or unofficial statistics on the number of CTMs filed by local operators, it is interesting to see how much national trademark applications have decreased since the establishment of the CTM system. For example the number of trademark applications in Greece from foreign (non-Greek) operators in 1990 was 5300; foreign applications in 2010 were only 400. This dramatic decrease clearly proves how much successful and useful the CTM was for foreign applicants’.

\(^{\text{123}}\) Source: Ms QUATRAVAUX, aforementioned work.
1.3. Respective proportions of Community trademarks and ‘international trademarks’

Under trademark law, operators have the choice between a national mark, a Community trademark and the international trademark filing system called 'international trademark'.

The French report indicated the following125:

‘The WIPO recorded a 16 % drop in international trademark applications in 2009. In the statistics published by the WIPO, French applications dropped by 16.5 % and German applications by 13.6 %, but applications from the European Union increased by 3 %. This 3 % increase was for international trademark applications filed through OHIM by residents of the European Union. Unfortunately the exact nationality of applicants is unavailable for these applications, which represent 10.5 % of all trademarks filed at the WIPO, slightly more than the percentage filed by French applicants (3523 trademarks, or 10 %). Germany is the main country to use the international trademark, with 13.6 % of all trademark applications filed at the WIPO (4793 trademarks).

After Germany, OHIM and France, applicants from the United States represent the 4th largest group of international trademark applicants with 3201 requests (9.1 % of the total), which is a decrease of 13.1 % compared to 2008126.’

The Portuguese report indicates that applications for the international trademark (green line) experienced a sharper drop than the Community trademark during the global economic crisis (orange line)127.

In other words, if the Community trademark represents a risk for this optional instrument, another optional, efficient global system could be more advantageous for operators. This

126 Source: Ms QUATRAVAUX, IPRI, aforementioned work.
127 Source: INPI, OHIM and WIPO.
means that the optional instrument is ‘competing’ here, not just with national laws but with international (if not global) initiatives and that it must have some advantages compared to a worldwide application. The aforementioned statistics demonstrate that it holds up very well to this competition.

### 2. COUNTRY-BY-COUNTRY SUMMARY OF RESPONSES TO QUESTION 6

<table>
<thead>
<tr>
<th>Member State</th>
<th>Table 6(a)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Belgium</strong></td>
<td>Do operators choose the Community trademark?</td>
</tr>
<tr>
<td></td>
<td>Have official or non-official statistics been published with regard to the use of this instrument in your country? If so, what are they? In the absence of statistics, what do you think is the approximate percentage of use of the Community trademark compared to the possibility of registering national trademarks in multiple Member States of the European Union? What analysis, research and/or documents did you use to form your opinion?</td>
</tr>
<tr>
<td></td>
<td>Do you think that the Community trademark is sometimes used by operators who had never previously filed trademarks in countries other than their country of establishment?</td>
</tr>
<tr>
<td><strong>Belgium</strong></td>
<td>In Belgium, individuals who wish to register a trademark have the choice between adhering to the Benelux Trademark Law or the Community Trademark Regulation. The advantage of the Community trademark is that it covers the territory of all 27 Member States while the Benelux law covers only three territories. However, the Benelux procedure is less expensive and slightly faster than the Community procedure. These advantages and disadvantages mean that the Benelux trademark is currently used as often as the Community trademark. Between 1996 and 2010, 14,535 requests were filed, that is, 2.35% of all requests filed in the EU. In 2011, 139 requests have already been filed, that is, 2.66% of all requests filed in the EU.</td>
</tr>
<tr>
<td><strong>Bulgaria</strong></td>
<td>Bulgarian operators use the Community trademark from time to time. There are a great deal of official statistics on the number of applications and registrations on the website of the Office of Harmonisation for the Internal Market (OHIM) and the Designs Registration Office of the European Union. According to these statistics, there were 385 requests from Bulgaria in 2010, of which 274 named Bulgarian as the first language, and 305 Community trademarks were registered for Bulgaria. For 2009, the statistics are as follows: 302 applications, of which 208 named Bulgarian as the native language and 255 Community trademarks registered.</td>
</tr>
<tr>
<td></td>
<td>According to the official national statistics of the website of the Bulgarian Patent Office, 5140 trademark registration applications were filed under the national procedure in 2009 and 4860 applications in 2010, respectively.</td>
</tr>
</tbody>
</table>
No statistics were found on registrations by Bulgarians of national trademarks in the EU Member States under their national procedures.

Moreover, the Bulgarian Patent Office provided official statistics on the number of foreign candidates for the registration of Bulgarian trademarks, but these statistics do not distinguish between European candidates and other foreign candidates.

On the basis of the statistics mentioned above, it is possible to conclude that Bulgarian operators use the Community trademark relatively often.

Applications for Community trademarks represent 12 to 17 % of all mark applications by Bulgarian operators. The number of Community Trademark (CTM) applications and registrations by Bulgarian operators has increased since 2007. The number of applications for national trademarks and registrations for the same period has decreased slightly.

This points to the conclusion that operators are increasingly choosing the Community trademark over the national trademark.

Most Bulgarian operators who apply for the Community trademark have never registered a trademark before or have already registered a trademark in Bulgaria.

Czech Republic

According to OHIM statistics from 1997-2010, 2165 Community trademarks were registered for companies in the Czech Republic. These figures suggest that there is a growing demand from Czech companies. Czech companies registered for 14 Community trademarks in 2004, 278 in 2007 and 586 in 2010.

Applications for national trademarks remain dominant, but this number is decreasing. There were 9156 national applications in 2007, 8267 applications in 2008 and 7234 applications in 2009.

Germany

Academic response

The Community trademark was considered an ‘exceptional success’ and is justly considered ‘one of the most widely accepted tools’ by operators. According to the annual report 2008 of OHIM (Office of Harmonisation for the Internal Market), 15 500 mark applications were filed with OHIM by operators from Germany (which represent 19 % of all applications).

During the same period, 70 000 trademark applications were filed with the German Patent and Trademark Office, of which only 5 % were foreign applications. This proportion suggests that international operators are rather reluctant to file national trademark applications abroad. In practice, it seems that international operators are generally content to register their trademarks in their country of origin without necessarily pursuing national registration in a foreign country (for example, in Germany). However, as shown in the aforementioned figures, they often register Community trademarks. This trend appears to be due to the attractiveness of this optional instrument, which allows
for protection – through a single registration with OHIM – in 27 different States, an advantage that outweighs the financial aspect given that the costs of registering a Community trademark are much higher than the costs of a national application in Germany.

The Ministry’s response

The German legal experts wish to make reference to the study from the Max Planck Institute in Munich on the system of trademarks in Europe, which was presented in Brussels on 12 May 2011.

Greece

The Community Trademark (CTM) has proved to be a very effective tool, in particular because the centralised registration of trademarks has legal effects in all Member States, which reduces costs and human resources since it is no longer necessary to file trademark applications in each Member State. In general, the Community trademark system allows for resolving many problems and legal complexities caused by the principle of territoriality. The Community trademark is intended to be used by operators with a large portfolio of trademarks in many countries.

Some local operators use them and have benefited greatly from the CTM, mainly local manufacturers who export consumer goods to other Member States. Since the creation of the Community trademark system in 1994, the number of local trademark applications (in particular from foreign, non-local operators) has fallen considerably, which proves that the Community trademark has turned out to be more efficient, especially for foreign applicants. While there are no official or non-official statistics on the number of Community trademarks registered by local operators, it is interesting to see how the number of national trademark applications has fallen since the establishment of the Community trademark system. For example, 5233 trademark applications were filed in Greece by foreign (non-Greek) operators in 1990; in 2010 there were only 400 applications. This spectacular drop clearly demonstrates how useful the Community trademark has been for foreign applicants. The number of applications from local operators did not drop considerably before and after the creation of the Community trademark; it even increased. For example, in 1990 there were 4033 local trademark applications, increasing to 5233 in 2010. Despite this increase, there is no doubt that large Greek companies which export to foreign countries certainly prefer to file Community trademark applications rather than multiple separate applications in each Member State.

However, there are several very important legal differences between the CTM and national trademarks. One of the main differences is that national trademarks are only approved after an automatic search for prior rights, while Community trademarks are issued without a search for prior rights. Under the national mark system, a registration covers the search for prior rights and if it identifies any previous identical or similar versions to the national or Community trademark, the pending mark application being examined is rejected. Another very important
difference is that as long as national trademarks go through the review process, they are approved and registered and cannot be contested in civil courts when the owner of the trademark seeks legal protection. Instead, if legal motives for contesting the validity of the trademark exist, these motives must be invoked before the Trademark Committee through the annulment process. This provides a great deal of legal security to national trademarks, which is very important in Greece, since local courts and the legal system in general are not well-informed about trademark law and since there is a large discrepancy between the level of legal protection and awareness provided to trademarks by Greek civil courts and local courts in other Member States. In many cases, the Greek courts and the Greek Trademark Committee openly refused to apply ECJ case law to cases involving trademarks. In this kind of environment, the legal safety of the national trademark is at least a 'last refuge' for trademark owners, whose trademarks could otherwise be challenged before civil courts, which are not sufficiently familiar with the trademark laws of other Member States. From this point of view, it would be appropriate to exert pressure so that the case law of the Court of Justice is followed, mentioned and applied by a local court. Moreover, the highly detailed and effective guidelines from OHIM on trademarks (now known as the Manual of Trademark Practice) should also be strictly applied by local courts and the local Trademark Committee.

It seems unlikely that many operators have used the Community trademark without ever having registered a trademark in European countries other than their own country of establishment. Local operators would only choose the CTM if they seriously intended to export products or do business abroad. Otherwise, there are no incentives to use a Community trademark application rather than a national trademark. This is mainly because the cost of the Community trademark far exceeds the cost of national applications. As an example, the official taxes for the CTM are EUR 975 (3 classes), while the official taxes for a national application are only EUR 180 (3 classes). The professional fees for Community trademarks are also higher than the professional fees for national applications.

Spain

In 2009 the Alicante Court of Appeal ruled on 21 appeals concerning Community trademarks and designs (it should be noted that the Office of Harmonisation for the Internal Market is located in Alicante). The OHIM website provides statistics and publishes an official annual report. With specific regard to the Community trademark, the available data can be found and Community trademarks of Spanish origin represent less than 10 % of the total trade in registered marks, but the figures show a constant increase (3466 trademarks in 2000, while in 2009 there were 6960 trademarks). However, the comparison with the national trademark shows that the latter still prevails (42 437 national trademarks were registered in 2009).

France

A statistical economist at the French Intellectual Property Research Institute (IRPI) has announced the statistics published for all intellectual property (IP) rights.
First, she highlights that in France the National Industrial Property Institute (INPI) is in charge of receiving applications for industrial property rights (patents, trademarks and designs), reviewing them, issuing rights and monitoring the maintenance of rights. Each year the Intellectual Property Observatory, the economic research department of the INPI, publishes the main results on the number of applications for intellectual property rights and the number of rights issued by origin, by applicant, by technological area (for patents), by class (for trademarks and designs). The latest available results date back to 2009.

Created in 1982 by CCIP, the Paris Chamber of Commerce and Industry and l'Université Panthéon-Assas (Paris II), the Intellectual Property Research Institute (Institut de Recherche en Propriété Intellectuelle) is one of the leading research centres in the field of intellectual property. Made up of qualified legal practitioners and economists, the IRPI is a leading source of IP information and conducts research in the various fields of intellectual property, provides specialised training courses and contributes to debates on current issues in the field.

Choice of the Community trademark by national operators:

Statistics regarding registration applications for French trademarks rely on publication data and not on registration data as for the Community trademark. It should be noted that French trademarks are published only if they are admissible. In that case, they are published six weeks after being filed with the INPI.

Whether for obtaining a French trademark or in view of international extensions, the French trademark remains essential for French applicants, who continue not only to use it but also to use it more often than the Community trademark. In fact, since the creation of the Community trademark in 1996, the number of registration applications for French trademarks has continued to increase, even more so over the last year, mainly due to the creation of the auto-entrepreneur status. In 2009, 96 % of national trademark applicants were French, versus 89 % in 2006. Foreign applicants increasingly choose to file European applications.

However, the advantages of the Community trademark, which gives companies the right to use a single procedure for acquiring Community trademarks that are uniformly protected throughout all EU countries, are attracting more and more French applicants who choose to use it to protect their signs. Between 1996 and 2009, the number of French applications for Community trademarks quadrupled, jumping from 1 610 in 1996 to 6,589 in 2009. In 2009, France was in fifth place for the number of Community trademarks filed with OHIM (6 589), behind Germany (16 296), the United Kingdom (8,028), Italy (7 333) and Spain (6 960), the main patent-owning countries. It is in sixth place worldwide, with the United States (11 340) in second. France accounts for 7.5 % of European trademark applications, around two and half times less than Germany (18.5 %). Concerning changes in the number of Community trademark applications with OHIM, the number of...
Community trademarks filed remained stable in 2009: after a drop of 1% between 2007 and 2008, the 2009 level of applications caught up with the 2007 level. In May 2009, OHIM significantly reduced its filing fees (by around 40%): while this drop may largely account for the overall good results of the Community trademark, it does not explain the significant differences between the countries of origin of trademark applications. It is also interesting to note the changes in the number of international trademark applications.

A quick look at these statistics shows that national operators increasingly choose to use the Community trademark, which has achieved significant success. However, the number of national rights applications has not dropped and remains much higher than the number of Community trademark registrations (79,566).

The number of trademarks filed by French applicants increased by 9.1% in 2009. However, France is only in sixth place among users of the Community trademark (6,589 Community trademarks filed) and is the country of origin for 7.5% of filed trademarks.

The year 2009 was very mixed for the various countries using the Community trademark. As for France, the number of filings from European Union countries increased (+4.6%), with the exception of the United Kingdom (-5.3%). The number of Community trademarks filed from the United States dropped sharply (-11.9%), but with 11,340 registered Community trademarks, the Americans are the second most frequent users of the Community trademark, behind Germany. The WIPO recorded a 16% drop in international trademark applications in 2009. In the statistics published by the WIPO, French applications dropped by 16.5% and German applications by 13.6%, but applications from the European Union increased by 3%. This 3% increase was for international trademark applications filed through OHIM by residents of the European Union. Unfortunately the exact nationality of applicants is unknown for these applications, which represent 10.5% of all trademarks filed at the WIPO, a bit more than the percentage filed by French applicants (3,523 trademarks, or 10%). Germany is the main country to use the international trademark, with 13.6% of all trademark applications filed at the WIPO (4,793 marks). After Germany, OHIM and France, applicants from the United States represent the 4th largest group of international trademark applicants with 3,201 requests (9.1% of the total), which is a drop of 13.1% compared to 2008.

In general, Community applications have not taken the place of national applications. Companies with a policy of filing national applications continue to file alternative or cumulative trademarks, depending on the project, at national and Community level. In fact, filing Community trademarks is seen as an additional strategic tool and not as an overall trademark territory to replace national territories. The choice between a national right and a Community right is a commercial and industrial strategic choice for operators.

Several factors have an impact on the use of the Community trademark:
the fact that it is a single procedure (which allows for the issue of an industrial property right that is valid in a large number of countries). According to legal practitioners, another reason may be partially related to the reputation of quality that is generally associated with Community and European procedures.

Similarly, practitioners point out that, on the other hand, certain criteria may in fact push applicants to seek protection through national procedures alone:

- The market: Community or European protection is not systematically adapted to the target market, whether due to its overly broad dimension or to de facto situations that prohibit applicants from claiming protection in one of the countries of the Community.

- The procedures: the procedures for Community (or European) protection are generally more complex (review procedure, opposition procedure, the languages of procedures) and impose more strict conditions for protection than most national procedures. Applicants may find it in their best interest to avoid these procedures, depending on their objectives and the currency.

- Processing times: Therefore, the processing times for obtaining Community or European rights may be significantly longer, which must be taken into account for certain application strategies.

- The costs: the cost of protection is another factor. There are no economic advantages to Community or European rights except in comparison with the cumulative costs of four to five national applications, depending on the characteristics of the application.

Numerous tables are provided in the French report in support of these claims and are also available in the annexes.

Italy

The number of requests for Community trademarks in 2009 experienced a slow start due to the global economic recession (the number of requests dropped by 12 % during the first quarter compared to 2008). However, at the end of 2009 the total number of requests (88,200) was greater than the number of requests for the previous year (88,000, which was probably caused by the 40 % reduction in taxes for Community trademarks in May and the economic recovery in most markets during the second quarter of the year). Sustained growth in the annual number of Community trademark requests was thus maintained over time, as indicated by the graph provided by Italian legal practitioners, available in the Annex and covering the period from 2004 to 2009.

There are many advantages of OHIM’s actions aimed at improving e-business tools, increasing the transparency of the decision-making process and creating more efficient ways of working. In 2009, a single trademark department was created to process all procedures, from the moment a Community trademark request is received to when it is
The increased efficiency of the registration process will surely incite more applicants to use the Community trademark: the average time until the trademark is registered dropped from 16 months in 2003 to around seven months in 2009.

The statistics compiled at the end of 2010 confirm the sustained growth of the number of requests for Community trademarks. In particular, statistics in Italy show a preference for the use of this optional instrument in the field of trademarks. A table ranking the countries by their degree of use of this optional tool was also provided. It shows that there was a regular increase in the number of applications filed, the number of trademarks filed and the number of renewals.

<table>
<thead>
<tr>
<th>Country</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cyprus</td>
<td>No statistics were saved by the company registration and official receiver department (DRCOR) of the Republic of Cyprus on the use of the Community trademark in Cyprus. For Cypriot legal practitioners, the Community trademark is a better alternative to the direct registration of trademarks in each European country. It is clear that the Community trademark provides stronger registration than directly registering trademarks in the various EU countries.</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>It is no longer possible to file a national application in the Grand Duchy of Luxembourg. Trademark protection is provided for three countries, including Belgium and the Netherlands. A common application system is used in these three countries. The right to a Benelux trademark is acquired after the first filing with the Benelux Office for Intellectual Property (BOIP) or with the BOIP by way of the Ministry of the Economy and Foreign Trade. In the Grand Duchy of Luxembourg, the BOIP identified 854 trademark applications in 2010 versus 533 in 2009. According to the professionals who were interviewed, this growing interest for Benelux trademark filing is largely explained by fiscal measures ‘leading to tax exemptions as remunerations for the use of a copyright or as usage fees on a copyright for a trade name or mark as well as on computer software, a patent, a design or a model, implemented by the Luxembourg government in January 2008, which lay down an exemption for 80 % of income from intellectual property’. Moreover, ‘the Law of 5 June 2005 on the promotion of development and innovation research also provides for support systems for the costs of obtaining intellectual property titles’. According to the information the authors were able to gather from professionals in this area, holdings and companies in the banking sector are the main applicants for the Benelux trademark. They benefit from tax advantages, information which seems to be corroborated by the information and promotional department of the BOIP. Concerning the Community trademark, the authors used the 2011 statistics published on the OHIM website, which indicate that between 1997 and 2010, 4640 Community trademarks were filed by Luxembourg</td>
</tr>
</tbody>
</table>
operators, including 816 in 2010 (according to the statistics published for 2010). These figures show that the ratio of use of the Benelux/Community trademarks is 1:1. It can be concluded that some operators who had never previously filed a trademark in other European countries than their country of establishment did use the Community trademark, but the authors were unable to find statistics on this.

**Hungary**

No statistics were compiled by Hungarian authorities and national bodies. Ever since questions regarding the application of the Community trademark were asked, statistical data was gathered and registered by OHIM. They still need to be reviewed in order to provide detailed responses.

For statistics from 2010 and 2011 on requests related to the Community trademark, Hungarian legal practitioners refer to the OHIM website.

**Netherlands**

Dutch legal practitioners also refer to the statistics available on the OHIM website, broken down by country.

These statistics reveal that the Community trademark is very popular in the Netherlands. It is likely that operators use the Community trademark, but no statistics are available.

**Austria**

According to the data provided by the OHIM website, 2,556 Community trademark requests were filed by Austrian operators in 2010; 2,314 in 2009; 1,999 in 2008; 1,934 in 2007; 1,817 in 2006; 1,361 in 2005; 1,312 in 2004; 791 in 2003; 743 in 2002; 724 in 2001; 736 in 2000.

According to data available on the OHIM website, compared to the 10,388 international and national trademark applications filed in Austria in 2010, the number of Community trademark applications represented 24.6% of all applications filed during this period. In 2009, these figures were 11,732 and 19.7%; 14,617 and 14.6% in 2008; 15,353 and 11.8% in 2006; 16,385 and 8.5% in 2005; 16,024 and 8.1% in 2004; 17,281 and 4.6% in 2003; 17,258 and 4.3% in 2002; 19,458 and 3.7% in 2001 respectively.

This data clearly shows an increased interest in Community trademark registration.

**Poland**

Operators in Poland use the Community trademark. In 2010, Polish operators requested the registration of 1,773 Community trademarks. Only 24 of these applications were submitted with the help of the Polish Patent Office. The rest were submitted directly to OHIM in Alicante. This data was obtained on the OHIM website and from the Patent Office of the Republic of Poland. Of course, there are some operators who requested the registration of Community trademarks without ever having registered a trademark in European countries other than Poland. However, it is impossible to provide reliable statistics on this subject.

**Portugal**

When responding to the questionnaire, Portuguese legal practitioners provided a table of statistics on industrial property, in particular with regard to trademark applications filed by Portuguese nationals, EU residents and non-EU residents. Other statistics on the use of the
Community trademark by Portuguese residents are available on the OHIM website.

With regard to the last question, the National Institute acknowledges that it is possible but that no relevant statistics are available.

**Slovakia**

The official statistical data provided by the Office of Industrial Property of the Slovak Republic (PAPE), in particular the annual reports published by this office, indicate that applicants in Slovakia still prefer national trademarks. 3821 applications were filed in 2008, 2850 applications were filed in 2009 and 2987 applications were filed in 2010 (these figures include Slovak applicants as well as foreigners).

The number of Community trademarks registered by Slovak applicants with OHIM has increased in recent years. 17 applications were filed in 2004, 36 applications were filed in 2005, 90 applications were filed in 2006, 112 applications were filed in 2007, 156 applications were filed in 2008 and 147 applications were filed in 2009. Only 89 applications were filed in 2010, but this slight decrease could also be considered a side effect of the global economic crisis.

There was a decrease in the number of international trademark applications filed the WIPO (242 applications were filed in 2004, 218 applications were filed in 2005, 295 applications were filed in 2006, 225 applications were filed in 2007, 199 applications were filed in 2008, 134 were filed in 2009 and 146 applications were filed in 2010).

While the percent ratio of Community trademark applications compared to international trademark applications filed by Slovak applicants was only 7 % in 2004, in 2005 it was 16 %, in 2006 it was 31 %, in 2007 it was 50 %, in 2008 it was 78 %, in 2009 it was 110 % and in 2010 it was 61 %. Thus, if Slovak applicants intend to register marks abroad, they prefer the Community trademark.

It should be assumed that each applicant has different individual priorities that affect their choice of trademark application. It seems that the most important criteria concerns countries where applicants want to sell their products or provide services (particularly whether they are merely Member States or third countries).

If the amount invested is considered crucial, applicants are likely to opt for a Community trademark application. However, if the territorial scope of trademarks may potentially be extended to third countries, an international trademark application is clearly preferable.

Whether or not a trademark application is filed in other countries than the candidate’s country of origin depends first and foremost on the applicant’s export interest and on the prospect of using these trademarks in the markets covered by the trademark protection. However, once the trademark is registered in the country of origin, it may, in principle, also be registered in a foreign country if it complies with the relevant laws.
<table>
<thead>
<tr>
<th>Sweden</th>
<th><strong>The Ministry’s response</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>No official Swedish statistics are available with regard to the use of the Community trademark. However, they refer to the statistics available on the OHIM website, which indicate that the number of Swedish users has increased steadily. In 1997, 713 Swedish applications were filed with OHIM, while there were 2,071 in 2010. At the same time, the number of national requests filed with the Swedish Companies Registration Office also increased. Thus, it is difficult to draw conclusions on how the 'optional instrument' affected applicants' behaviour. To do so, a survey of users would probably be required. It was further noted that the OHIM statistics on international trademark registrations under the Madrid Protocol show a significant correlation between the EU's adherence to the protocol and the number of applicants designating Sweden. The figures justify the conclusion that European users of the Madrid Protocol preferred to designate the EU/OHIM instead of designating different Member States.</td>
<td></td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>United Kingdom</th>
<th><strong>The Ministry’s response</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>There was no response to this question.</td>
<td></td>
</tr>
</tbody>
</table>

**Academic response**

The United Kingdom adopted the *Trademark Act* (TMA) on 31 October 1994. Changes to the national law were required due to European law, which is, incidentally, rather widely criticised (for more details see the Annexes).

The register of designs is located in the Newport Patent Office and contains a digital register of trademarks and trademark transactions. The website of the United Kingdom’s Patent Office allows visitors to carry out searches easily and covers all applications and registrations made in the United Kingdom as well as the international registrations designated by the European trademark registry and filed in the United Kingdom. Applications may be filed directly with the European Union agency responsible for registering trademarks and designs (OHIM).

The Community trademark is widely used in the United Kingdom. Between 1996 and 2010, 100,273 applications were filed. This percentage represents 16.18% of EU applications and 10.85% of applications worldwide. This puts the United Kingdom in third place after the United States and Germany.

(The team responding to this question based their response on a graph showing the list of States ranked in terms by number of applications. It will be included in the Annex).

No county court has the authority to take action for filing a trademark under the provisions of the 1994 TMA. County courts had this authority
under the 1938 TMA and, as indicated by the DTI, jurisdiction over filed trademarks will be given at least to the patent departments of county courts.

The Patent Office should hear requests concerning declarations of invalidity and applications for revocation but will not handle infringement complaints. Complaints regarding CTM infringements must be brought before a CTM court. The High Court of Justice is considered the CTM court in England and Wales. Some infractions are also considered breaches of the TMA itself, the Trade Descriptions Act or common law.

Several Scottish decisions were noted with regard to the Community trademark. The two most important cases are *Bravado Merchandising Services Ltd v Mainstream Publishing (Edinburgh) Ltd* (called the ‘Wet Wet Wet case’) of 1996 and *Allied Domecq Spirits and Wine Limited v Murray McDavid Limited* of 1997. The first case was decided by Lord Macfayden, who provided useful advice on how section 11 of the TMA ought to be used. With this case, it is interesting to note the procedural and jurisdictional differences between the High Court’s methods for applying the provisions of the TMA and those of the Scottish courts.
CHAPTER 7: DO OPERATORS CHOOSE THE COMMUNITY DESIGN AND MODEL?

The question on designs was posed in the same way as the other questions. Official statistics were requested or, in the absence of such statistics, rapporteurs were asked to provide their subjective opinion while specifying which analysis, research and/or documents the indicated percentage was based on.

This section analyses the answers one by one (1.) before presenting a table with a more detailed overview of the different answers by country (2.).

1. ANALYSIS OF THE RESPONSES

Official European statistics are available from OHIM and, as with the Community trademark, it can be seen that Community designs have been successful.

The German report notes the following:

‘According to the OHIM statistics, the role of this OI is comparable to that of the European mark. Around 19,000 requests were filed in 2008 by German operators, which represents 26% of the total number of requests (source: OHIM annual report, see above).

Over the same period, the German Patent and Trademark Office noted that around 30,000 applications for new designs were filed by German operators (source: annual report of the German Patent and Trademark Office, see above) and around 10,000 applications were filed by foreign operators. In conclusion: the Community design (even more than the Community trademark) has been a great success in practice and might even make the national instrument rather obsolete (see: annual report 2008 German Patent and Trademark Office, p. 51)’. 128

The overall statistics should be considered first (1.1) before insisting on the differences between countries (1.2).

1.1. Overall statistics on Community designs

The number of Community designs has increased significantly since the system’s implementation in 2003 until 2007, when it dropped due to a reduction in the number of American and Japanese designs filed with OHIM.129

Table 7

<table>
<thead>
<tr>
<th>Year of filing</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
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<tbody>
<tr>
<td>Total number of trademarks filed</td>
<td>40</td>
<td>53</td>
<td>63</td>
<td>69</td>
<td>77</td>
<td>77</td>
<td>69</td>
</tr>
<tr>
<td></td>
<td>640</td>
<td>892</td>
<td>648</td>
<td>279</td>
<td>237</td>
<td>073</td>
<td>449</td>
</tr>
</tbody>
</table>

Source: OHIM, calculations: IRPI

The number of applications increased again in 2010, with 74,688 applications filed\(^\text{130}\). During the first quarter of 2011 the statistics show that 20,357 applications were filed\(^\text{131}\).

As with the trademarks, it was noted that operators returned to using national trademarks during the economic crisis (2009). In fact, while the annual number of Community designs dropped significantly in 2009 (from 77,073 to 69,449), the number of national models dropped only slightly (for example, in France: 80,533 applications in 2009 instead of 83,468 in 2008).\(^\text{132}\)

The percentage of foreigners who filed national designs did not seem to change significantly after the arrival of the optional European instrument. This figure remained stable at 3 % in 2003, as in 2009.

### 1.2. Comparative statistics by country

As with trademarks, OHIM compiles a ranking of countries with regard to the use of Community designs, called ‘TOP 25’.

<table>
<thead>
<tr>
<th>Percentage of community design registration requests by country (2009)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Allemagne</td>
</tr>
<tr>
<td>25,4%</td>
</tr>
</tbody>
</table>

Germany is the top country for Community designs and is far ahead of Italy and France. In 2009, France accounted for 9.0 % of Community design applications, three times less than Germany (25.4 %).

Germany remained in the lead for Community design applications in 2010 and the first quarter of 2011 (5,096 applications).

\(^{129}\) Analysis based on official statistics provided by Ms Quatravaux, economist-statistician at the Institute for Research on Intellectual Property (IRPI).


\(^{132}\) See Table 5 of the French report.
The German report shows that in 2008, 19,000 Community design applications were filed by German operators, while at the same time 30,000 national design applications were filed, including 10,000 by foreign operators. These figures speak for themselves: Community designs represent nearly 2/3 of national models.

The Portuguese report also shows that the number of national designs is very close to the number of Community designs.

Source: INPI, OHIM

The statistics for Slovakia also reveal a strong interest in Community designs. In 2009, 225 Community designs were registered and only 94 designs were registered by the national intellectual property office (67 from Slovaks, 12 of which were already registered abroad, including 9 in an EU Member State). However, it should be noted that 2009 was a remarkable year in this regard. There were fewer Community design applications filed in 2008 (134 applications) and 2010 (84 applications).

However, the number of Community designs filed remains low in some European countries:

- In Belgium, 8,956 Community design applications were filed between 1996 and 2010, representing 2.17% of all applications filed in the European Union. In 2011, 123 requests have already been filed, or 2.45% of all requests filed in the EU.

- In Bulgaria, the rapporteurs noted the following statistics:

  'Pursuant to these statistics for the year 2010 there were 124 registered Community designs from Bulgaria, for 118 of which Bulgarian was designated as first language. 121 of them were submitted by foreign owners through Bulgarian representatives. For the year 2009 the analogical statistics are as follows\textsuperscript{133}: 135 registered Community designs, 118 of which with Bulgarian as a first language.\textsuperscript{134} 116 of them


\textsuperscript{134} OHIM, Statistics of Community Designs 2009, 12.01.2010, p. 10,
were submitted by foreign owners through Bulgarian representatives (...).\textsuperscript{135} The number of registered Community designs for Bulgaria did not change significantly during the last two years’.

- In the Czech Republic, there were 3,400 Community designs registered between 2003 and 2010, of which 570 were registered in 2010.

- Only 195 Community designs were filed in Luxembourg in 2010 (versus 200 in 2009).

- In 2010, 2350 Community designs were registered in Poland.

The competition with the Community design as a result of the Hague Agreement, which allows for designs to be registered internationally, can also be noted.

The Bulgarian report notes the following:

‘However, the Hague Agreement gives Bulgarian operators the possibility to receive protection in more than one country all over the world. As specified above, Bulgarian statistics show that in 2009 there were only 3 Bulgarian applicants seeking protection of their design outside Bulgaria through the procedure under the Hague Agreement. This is indicative of the relatively low interest for Bulgarian operators to receive protection of their designs outside Bulgaria – either under the Hague Agreement or with a Community design. For only four years of applicability for Bulgaria (compared to 14 years since Bulgaria joined the Hague Agreement\textsuperscript{136}) the Community design may be deemed a success in Bulgaria as well’.

Finally, it can be seen that certain internal procedures may have an influence on the success of the optional instrument

Thus, designs are registered mainly through the national procedure in France (97 % of designs were registered through the INPI in 2009). A new, simplified filing procedure that was set up in 1994 allows applicants to file with fewer presentation requirements, which contributed to this situation even though the lapse rate for these simplified requests is very high. This simplified procedure has continued to be used since 2003, the year in which the Community system was implemented.

Therefore, the success of an optional instrument also depends on internal legislative contexts. Operators will choose the most efficient, secure and least expensive system.

The optional instrument is a true instrument for healthy competition among rights.


## 2. COUNTRY-BY-COUNTRY SUMMARY OF RESPONSES TO QUESTION 7

<table>
<thead>
<tr>
<th>Member State</th>
<th>Table 7(a)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Do operators choose the Community design?</td>
</tr>
<tr>
<td></td>
<td>Have official or non-official statistics been published with regard to the use of this instrument in your country? If so, what are they?</td>
</tr>
<tr>
<td></td>
<td>In the absence of statistics, what, in your opinion, is the approximate percentage of use of Community designs in comparison with the situation in which designs are registered several times in several EU Member States? On what analysis, research and/or documents is your opinion based?</td>
</tr>
<tr>
<td></td>
<td>Do you think that Community designs are used by operators who had not in the past registered designs in European countries other than the country where they are based?</td>
</tr>
</tbody>
</table>

### Belgium
- Between 1996 and 2010, 8,956 requests were filed, or 2.17% of all requests filed in the EU. In 2011, 123 requests have already been filed, or 2.45% of all requests filed in the EU.

### Bulgaria
- Operators in Bulgaria only occasionally opt for the European design. There are official statistics on the number of requests and registrations on the OHIM website. According to these statistics for 2010, 124 Community designs were registered by Bulgaria, including 118 for which Bulgarian was designated as the first language. 121 of these were submitted by foreign owners through Bulgarian representatives. For 2009, the statistics show that there were 135 Community designs registered, of which 118 designated Bulgarian as the first language. 116 of these were submitted by foreign owners through Bulgarian representatives.

There are also national statistics for 2009 on national registration applications under the national procedure (295, including 292 by Bulgarian applicants) and under the Hague Agreement procedure (35, including 3 by Bulgarian applicants). 268 national designs and 48 designs pursuant to the Hague Procedure were registered in 2009. Given the aforementioned statistics, it can be concluded that, in general, there are not a great deal of applications for Bulgarian designs (under the national procedure or under the Community and international procedures). The number of Community designs registered for Bulgaria did not change a great deal over the past two years. Most Community designs registered do not have Bulgarian owners and are only registered with the help of Bulgarian representatives for the business needs of international operators on the territory of the Republic of Bulgaria. However, the approximate percentage of use of Community designs is quite high in comparison with national patent requests, which decreased slightly since 2007 (dropping from 371 in 2007 to 295 in 2009). This trend also indicates that operators are increasingly Bulgarian and prefer to register a Community design rather than use the national procedure.
No statistics were found on how many Bulgarians registered national patents in multiple Member States of the EU in accordance with their national procedures. However, the Hague Agreement allows Bulgarian operators to benefit from protection in more than one country throughout the world. As previously indicated, the statistics show that in Bulgaria in 2009 there were only three Bulgarian applications who sought to protect their patent outside of Bulgaria through the procedure laid down under the Hague Agreement. This indicates a relatively low level of interest by Bulgarian operators for benefiting from protection for their inventions outside of Bulgarian territory, whether under the Hague Agreement or with Community designs.

Therefore, after only four years of application in Bulgaria (as compared to the 14 years since which Bulgaria has joined the Hague Agreement), the Community design may be considered a success in Bulgaria.

<table>
<thead>
<tr>
<th>Country</th>
<th>Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Czech Republic</td>
<td>According to OHIM statistics for 2003-2010 there were 3400 Community patents registered for Czech businesses, including 570 in 2010. The national model is still preferred by Czech companies. There were 1107 requests in 2008 and 1325 requests in 2009.</td>
</tr>
<tr>
<td>Germany</td>
<td><strong>Academic response</strong></td>
</tr>
<tr>
<td></td>
<td>According to the OHIM statistics, the role of this OI is comparable to that of the European mark. Around 19,000 requests were filed in 2008 by German operators, which represents 26% of the total number of requests. Over the same period, the German office of trademarks and patents noted that around 30,000 applications for new designs were filed by German operators and around 10,000 were filed by foreign operators. In conclusion, the Community design (even more than the Community trademark) has been a great success in practice and might even make the national instrument rather obsolete.</td>
</tr>
<tr>
<td></td>
<td><strong>The Ministry’s response</strong></td>
</tr>
<tr>
<td></td>
<td>No data available.</td>
</tr>
<tr>
<td>Greece</td>
<td>It seems that there are no statistics available on the Community design.</td>
</tr>
<tr>
<td></td>
<td>The Community design system leads to a reduction in costs in the event of multiple registrations in multiple Member States. From this point of view, it is very efficient. Local operators usually choose national registrations because they are less expensive. Only operators who export choose the Community design. From a legal standpoint, there are no significant differences between a Community design system and status and a national patent.</td>
</tr>
</tbody>
</table>
It does not seem possible that there are operators who opt for the Community design after having registered national patents in other Member States. Normally, operators who choose the Community design have a portfolio of patents filed in multiple countries. That being said, it is certain that operators with a significant export business and cross-border activities opt for the Community design instead of filing multiple national designs.

<table>
<thead>
<tr>
<th>Spain</th>
<th>According to OHIM statistics, the number of Community design applications increased from 3226 to 3802 between 2004 and 2009. However, national designs are used much more often (3504 in 2004 and 13141 in 2009).</th>
</tr>
</thead>
</table>
| France                 | A statistical economist at the French Intellectual Property Research Institute (IRPI) has announced the statistics published for all intellectual property (IP) rights. Concerning designs registered under the national procedure (French designs), she emphasises that the national procedure for registering designs is used mainly by French applicants, who accounted for 97% of all designs filed in 2009 with the INPI. A new, simplified filing procedure that was set up in 1994 allows applicants to file with fewer presentation requirements, which contributed to this situation even though the lapse rate for these simplified requests is very high. This proportion has barely changed since 2003, the year in which the Community system was set up (as indicated in Table 5 in the French response to the questionnaire). Concerning designs registered under the Community procedure (Community designs), she emphasises that the number of Community designs has increased significantly since the system's implementation in 2003 until 2007, when it dropped due to a reduction in the number of American and Japanese designs filed with OHIM French designs followed the same pattern, but to a lesser degree. Between 2003 and 2009, the number of Community designs of French origin more than doubled, from 2,850 in 2003 to 6,235 in 2009 (as shown in Table 6 in the French response to the questionnaire). With 6,235 designs registered, France is in third place behind Germany (17,623) and Italy (9,900) but ahead of the United States (4,237), the United Kingdom (3,986) and Spain (3,802) (as shown in Graph 4 in the French response to the questionnaire). France accounted for 9.0% of Community design applications, three times less than Germany (25.4%). For 2010 reference is made to the comparative statistics available on the OHIM website. In short, these statistics show that national operators use Community designs more and more often, although this trend seems to have levelled off over the past three years. The number of national rights applications has not dropped and remains much higher than the number of Community designs.
design registrations (80,533 national design registrations versus 6,235 registrations of Community designs by French residents).

As with the Community trademark, practice shows that, in general, Community applications have not taken the place of national applications. Companies with a policy of filing national applications continue to file alternative or cumulative trademarks, depending on the project, at the national and Community level. In fact, filing Community trademarks is seen as an additional strategic tool and not as an overall trademark territory to replace national territories. Once again, the choice between a national right and a Community right is a commercial and industrial strategic choice by the operator (concerning the advantages of this right versus the development of the Community trademark. However, it should be noted that there is no electronic procedure for registering national designs).

<table>
<thead>
<tr>
<th>Country</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Italy</td>
<td>The number of Community designs registered in 2009 was influenced by the global recession. At the end of the year, the total number of requests was lower than the previous year (4% lower than in 2008). However, there was a positive reaction at the end of 2009. During the fourth quarter of 2009, the number of applications exceeded the number of applications registered during the third quarter of 2008, increasing from 18,660 to 19,560. While the number of Community designs registered partially overcame the obstacles imposed by the economic crisis, there was never a constant increase in the number of designs filed, even in 2010. This result was also possible due to the simplified procedure resulting from the introduction of new e-filing tools for Community designs (between 60 to 70% of Community design applications are now filled out online) and due to the increased speed of registration. In fact, e-filing applications are now processed much more quickly. Around 6% of applications are processed within 48 hours. Between 40 and 45% are processed within one week.</td>
</tr>
<tr>
<td>Cyprus</td>
<td>No statistics were compiled on the Community design. However, for Cypriot legal practitioners, it is better than filing individual applications in each Member State. With regard to national designs requests, there were 243 applications in Cyprus for design protection (data was up to date at the end of 2009).</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>According to information and statistics from 2010 published on the OHIM website, there were 195 Community designs filed by Luxembourg operators. There were 200 filed in 2009, according to the same source. The statistics portal of the Grand Duchy of Luxembourg indicates that there were 987 Benelux designs filed in 2009, but these statistics do not break down the results by country of residence.</td>
</tr>
<tr>
<td>Hungary</td>
<td>The Hungarian legal practitioners refer to the data on the OHIM website for 2010 and 2011 statistics on the Community design in Hungary.</td>
</tr>
<tr>
<td>Country</td>
<td>Description</td>
</tr>
<tr>
<td>-----------</td>
<td>-------------</td>
</tr>
<tr>
<td>Netherlands</td>
<td>Dutch legal practitioners also refer to the data on the OHIM website for statistics on the Community design in the Netherlands. These statistics reveal that the Community trademark is very popular in the Netherlands. It is likely that operators use the Community trademark in the manner described, but the legal practitioners emphasise that no statistics are available.</td>
</tr>
<tr>
<td>Austria</td>
<td>As indicated by OHIM, 2217 requests for a Community design were filed by Austrian operators in 2009. On 31 December 2010 2023 new applications had been submitted by Austrian operators. Unfortunately, no data is available on the overall number of design requests registered in 2009 or 2010. As a consequence, it is impossible to draw conclusions on the percentage of use in Austria.</td>
</tr>
<tr>
<td>Poland</td>
<td>Operators use Community designs in Poland. In 2010 Polish operators requested the registration of 2 350 Community designs. Only 19 of these applications were submitted with the help of the Polish Patent Office. The rest were submitted directly to OHIM in Alicante. This data was obtained on the OHIM website and from the Patent Office of the Republic of Poland. Of course, there are some operators who requested the registration of Community designs without ever having registered a trademark in other European countries than Poland. However, it is impossible to provide reliable statistics on this subject. As previously mentioned, this opinion is also based on the interview given by legal practitioners who responded to the questionnaire to one of the members of the National Patent Council.</td>
</tr>
<tr>
<td>Portugal</td>
<td>Portuguese legal practitioners who responded to the questionnaire attached a table and a graph to their response concerning the available data (used by the National Institute of Industrial Property) concerning Community designs. They are included in the Annexes. They also refer to the data on the OHIM website for information on the use of the Community trademark by Portuguese applicants. In regard to the latter question, they point out that the national institute admits that it may be possible, but there is no data available on this situation.</td>
</tr>
<tr>
<td>Slovakia</td>
<td>The official statistics provided by the IPO, in particular their annual reports, indicate that operators are much more interested in seeing their designs registered as Community designs by OHIM than as national or international designs. For example, 94 designs were registered by the IPO in 2009 (67 of which were filed by Slovak applicants), 12 applicants had their designs registered abroad (9 of these designs were registered in EU Member States) and up to 225 Community designs were registered by OHIM. Given that the percent ratio between the number of designs filed abroad and the number of applications filed with the IPO by Slovak applicants is 18 %, the percent ratio between the number of designs registered by OHIM and the number of national designs registered by the IPO is 93% (80 of 86).</td>
</tr>
</tbody>
</table>
of designs applied in EU Member States is 2.500 %

The following design applications were filed by Slovak applicants with the IPO: 118 requests were filed in 2004, 104 requests were filed in 2005, 80 requests were filed in 2006, 77 requests were filed in 2007, 85 requests were filed in 2008 and 67 requests were filed in 2009. Statistics for 2010 are currently unavailable, but a total of 96 requests were filed by Slovak and foreign applicants, which is comparable to the previous year.

The following design applications were filed by Slovak applicants with the OHIM: 33 requests were filed in 2004, 65 requests were filed in 2005, 147 requests were filed in 2006, 97 requests were filed in 2007, 134 requests were filed in 2008, 225 requests were filed in 2009 and 84 requests were filed in 2010.

The Slovak legal practitioners also attached a table (available in the Annex) that includes these figures. The statistics provided by the IPO also indicate that Slovak applicants were interested in having their designs registered in Australia, China, Japan, New Zealand, Russia and the United States in particular, in addition to EU Member States.

In the EU, the applications filed by Slovak applicants with national authorities are for the Czech Republic and Germany in particular.

International design protection is regulated by the Hague Agreement of 1925 concerning the international deposit of industrial designs. The Slovak Republic did not sign this agreement. However, since the EU acceded to the Geneva Act of the Hague Agreement, Slovak applicants may also benefit from this international system as EU citizens. Designs may be registered outside of Slovak territory via a single international application. This application allows the applicant to obtain protection throughout the EU zone as well as in signatory States of the Hague Agreement and/or the Geneva Act.

However, the IPO’s statistics clearly show that there is increased interest in registering designs through OHIM, i.e. registering Community designs, despite the increased registration costs, which are offset by their maintenance costs.

<table>
<thead>
<tr>
<th>Country</th>
<th>The Ministry’s response</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sweden</td>
<td>No official Swedish statistics are available with regard to the use of the Community design. However, they refer to the statistics available on the OHIM website, which indicate that the number of Swedish users has increased steadily since OHIM became interested in this issue. A corresponding drop in the number of national applications can be seen.</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>There was no response in regard to this subject.</td>
</tr>
</tbody>
</table>
Academic response

The United Kingdom has used the Community design since it was introduced by the UK Statutory Instrument 2007 No 3378 concerning the Designs (International Registrations Designating the European Community), which entered into force on 1st January 2008.

According to the statistics on Community designs in 2011 between 2003 and 2010 the United Kingdom produced 35,427 Community designs, which represents 8.57 % of EU production and 6.71 % of designs worldwide. Between 2003 and 2010 the UK was the fifth largest producer of Community designs after Denmark, Italy, France and the United States with 6.63 % of worldwide production. In January 2011 the United Kingdom had already produced 425 Community designs. Therefore, the United Kingdom is now the fourth largest producer of Community designs after Denmark, Italy and France.

The team responding to this question relied on a graph showing a list of States ranked in terms of the number of applications. It will be included in the Annex.
CHAPTER 8: DO OPERATORS OPT FOR THE EUROPEAN PATENT?

Rapporteurs were asked to provide official statistics. It must be pointed out that some rapporteurs misunderstood the question as relating to the unitary patent, which meant they responded by saying that this does not yet exist.

This section analyses the answers one by one (1.) before presenting a table with a more detailed overview of the different answers by country (2.).

1. ANALYSIS OF THE RESPONSES

The European patent dealt with here is the only one that currently exists, i.e. the European patent laid down at the Munich Convention. This is therefore simply an optional instrument of procedure which provides for a European system of issuing a patent, which then applies like a group of national patents.

Official statistics on this are available from the European Patent Office (EPO). For example, the 2008 EPO annual report indicates that 145,000 European patents were registered that year, while this figure was 134,542 for 2009. However, the number of patent applications requested in each Member State varies greatly.

For example, of the 145,000 European patents registered in 2008, 26,500 were the result of applications made in Germany. A total of 62,000 new patents were registered at the German Patent and Trademark Office in the same period, of which 13,000 originated from outside Germany. The French report also points to the success of the European patent in France:

‘The introduction of the European patent has largely contributed to fewer national patent applications being filed, in France and other European countries alike. As a matter of fact, companies outside of France have, at the same time, gradually chosen to use the European route over the French counterpart, filing their application with the EPO and then validating the title in France after the European patent has been granted. This can be seen from the statistics, which show that foreign applicants, who in the early 1990s made up over a quarter of French patent applications, only accounted for 11% in 2009; French applicants now represent 89% of all applicants opting for the French route.’


138 Sources:

Analysis using official statistics provided by Ms Quatravaux, statistical economist at the French Intellectual Property Research Institute (IRPI).
Table 8

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Total number of patents filed</td>
<td>16 638</td>
<td>15 896</td>
<td>17 351</td>
<td>17 275</td>
<td>16 106</td>
</tr>
<tr>
<td>Total number of patents filed by French applicants</td>
<td>12 378</td>
<td>12 419</td>
<td>13 790</td>
<td>14 327</td>
<td>14 297</td>
</tr>
<tr>
<td>Percentage of French applicants</td>
<td>74 %</td>
<td>78 %</td>
<td>80 %</td>
<td>83 %</td>
<td>89 %</td>
</tr>
<tr>
<td>Percentage of foreign applicants</td>
<td>26 %</td>
<td>22 %</td>
<td>20 %</td>
<td>17 %</td>
<td>11 %</td>
</tr>
</tbody>
</table>

Source: INPI, Calculations: IRPI

It is therefore apparent that, from 2000 to 2009, the percentage of foreign applicants of national patents continued to fall, while conversely, the number of European patents filed with the EPO by French citizens continued to increase (from 4 909 in 1990 to 8 929 in 2009).

Graph showing the trend in applications filed using national and European routes

Source: INPI, OEB
In 2009, the order of countries filing European patents was as follows:

<table>
<thead>
<tr>
<th>Country</th>
<th>Percentage of European patents applied</th>
</tr>
</thead>
<tbody>
<tr>
<td>États-Unis</td>
<td>24.5%</td>
</tr>
<tr>
<td>Allemagne</td>
<td>18.7%</td>
</tr>
<tr>
<td>Japon</td>
<td>14.8%</td>
</tr>
<tr>
<td>France</td>
<td>6.6%</td>
</tr>
<tr>
<td>Pays-Bas</td>
<td>5.0%</td>
</tr>
<tr>
<td>Suisse</td>
<td>4.4%</td>
</tr>
<tr>
<td>Royaume-Uni</td>
<td>3.6%</td>
</tr>
</tbody>
</table>

France accounted for 6.6% of European patent applications, three times less than Germany (18.7%). The Netherlands accounted for around 5% of applications (which suggests to the Dutch rapporteur that it is fairly popular in this country), while this figure was 3.6% for the United Kingdom.

On the other hand, the European patent applications filed by operators located in Spain accounted for around 1% of the total in 2009 (1,258 Spanish applications among the 134,542 European patents). However, these figures must be compared with the 3,712 national patents registered in Spain in the same year.

The European Patent is also used in Sweden, but the number of European patents validated in Sweden (requested by operators of any country) is far greater than the number of European patents filed by Swedish operators, as shown in the statistics from the Swedish patent office.

**Table 8a**

<table>
<thead>
<tr>
<th>Month/Year</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
</tr>
</thead>
<tbody>
<tr>
<td>In total</td>
<td>8455</td>
<td>6798</td>
<td>12077</td>
<td>13225</td>
<td>12317</td>
<td>10892</td>
<td>11980</td>
<td>10565</td>
<td>10063</td>
<td>9185</td>
<td>8844</td>
<td>638</td>
</tr>
<tr>
<td>Originating from Sweden</td>
<td>236</td>
<td>227</td>
<td>339</td>
<td>487</td>
<td>470</td>
<td>397</td>
<td>413</td>
<td>447</td>
<td>419</td>
<td>356</td>
<td>382</td>
<td>30</td>
</tr>
</tbody>
</table>

Similarly, other Member States have made only minimal use of the European procedure of granting patents.

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141. The table shows (penultimate line) European patents validated in Sweden between 2000 and 2012, and the last line shows European patents validated in Sweden whose application was filed by Swedish operators.
In Bulgaria, for example, only 17 'European' patent applications were filed in 2009 and only 5 were granted (compared with 243 applications for the national patent filed in the same year).  

In 2006, the Czech Republic saw 82 European patents filed compared with 264 national patents; in 2007, there were 96 European patent applications compared with 227 national patent applications; while in 2008, there were 111 European patent applications compared with 227 national ones. It is clear that European patent applications are continuing to increase at a gradual pace.

The Greek report states that 'since the adhesion of Greece to the European Patent Convention in 1987, there are about 74 000 European Patents filed by foreign applicants that have been extended and validated in Greece as well, through the European Patent Office'. However, the report also indicates that very few Greek operators opt for the European patent since it costs far greater than the national patent. The rapporteur stresses the urgent need to have international jurisdiction in this area to deal with patent disputes to avoid forum shopping and vast numbers of litigation proceedings.

In Luxembourg in 2009, 293 applications were made, but not a single European Patent was granted.

In Austria, 1 504 European patent applications were filed by Austrian operators in 2009; 1 503 in 2008; 1 386 in 2007; 1 146 in 2006; 1 072 in 2005; 1 000 in 2004; 1 001 in 2003; 929 in 2002; 813 in 2001 and 812 in 2000.

Polish operators filed 173 European patent applications in 2009.

The Portuguese report shows the number of applicants opting for the European patent to be similar to the number opting for the international PCT procedure.

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144 Statistics published by the EPO.
This is the final point to be made on this topic. As has been seen with other industrial property titles, the European patent granting procedure is in competition with its international counterpart. In other words, the European patent faces competition from the PCT (Patent Cooperation Treaty), which allows for an international patent granting system.

This is underlined in the Bulgarian report: 'The similar numbers of applications for European patents and for patents under the PCT show the similar nature of these two international treaties giving the opportunity to receive protection in more than one country with a single application (but the PCT Treaty gives the chance to receive protection in countries all over the world). Therefore, following the example of the Community trademark and design, the introduction of a unitary and autonomous Community patent would probably lead to more positive results.'

The Slovak report paints a similar picture, with statistics to support this:

Table 8b

<table>
<thead>
<tr>
<th></th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
</tr>
</thead>
<tbody>
<tr>
<td>Patent applications filed with IPO</td>
<td>215</td>
<td>155</td>
<td>193</td>
<td>240</td>
<td>167</td>
<td>176</td>
<td>236</td>
</tr>
<tr>
<td>Patent applications filed with foreign national offices</td>
<td>61</td>
<td>86</td>
<td>79</td>
<td>82</td>
<td>85</td>
<td>78</td>
<td>NA</td>
</tr>
<tr>
<td>European patent applications filed with EPO</td>
<td>12</td>
<td>16</td>
<td>21</td>
<td>19</td>
<td>28</td>
<td>25</td>
<td>NA</td>
</tr>
<tr>
<td>Patent applications filed with WIPO on the basis of the Patent Cooperation Treaty</td>
<td>19</td>
<td>25</td>
<td>24</td>
<td>33</td>
<td>29</td>
<td>21</td>
<td>27</td>
</tr>
</tbody>
</table>
‘It follows from the statistical data above that the percentage ratio between patent applications filed with EPO and patent applications filed directly with foreign national offices is approximately the same as the percentage ratio between applications based on the Patent Cooperation Treaty and patent applications filed with foreign national offices, i.e. around 30 %’.

Another factor must be taken into consideration when examining European patent statistics. Low figures for any given country do not necessarily indicate a disinterest among operators in this country for the optional instrument for the procedure of patent granting. These figures could equally indicate that operators in this country are not creating as many inventions as is the case in other countries, or that operators do not need to protect their inventions outside of their country as this would cost more than they could hope to gain from the respective invention. Comparing the PCT and European patent figures for a given country is significantly more useful as this reveals the chosen route of operators who require protection beyond their national borders.

### 2. SYNOPTIC COUNTRY-BY-COUNTRY TABLE OF RESPONSES TO QUESTION 8

<table>
<thead>
<tr>
<th>Member State</th>
<th>Table 8c</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Do operators opt for the European patent?</td>
</tr>
<tr>
<td></td>
<td>Have official statistics been published in your country on the use of this instrument? If so, what are they?</td>
</tr>
<tr>
<td></td>
<td>Where there are no such statistics, what approximate percentage of patents do you think are European patents as opposed to national patents filed in several Member States? What analysis, research and/or documents do you base your estimate on?</td>
</tr>
<tr>
<td></td>
<td>Do you think that the European patent is used by some operators who have not filed a patent in any other European countries aside from where their organisation is based?</td>
</tr>
</tbody>
</table>

**Belgium**

It all depends on how much protection is sought by the patent holder. If the patent is only used in Belgium, the Belgian patent is obviously sufficient. If the patent holder seeks broader protection, it would be better for them to use the European system which centralises the procedure, rather than file separate applications in each Member State.

The adoption of Regulation relating to the unitary patent (formerly known as Community patent) is eagerly awaited. A draft Regulation was already adopted in December 2009. A unitary patent would drive innovation, growth and competition, necessary to develop the internal market. Enhanced cooperation between ten Member States has been launched at the very least.

**Bulgaria**

Operators in Bulgaria only occasionally opt for the European patent. The European Patent Office (EPO) provides official statistics on the number of applications and the numbers of registrations. According to
these statistics, 17 applications were filed in Bulgaria in 2009 and 5 were granted. At total of 1 049 European patents were validated in Bulgaria. In the same year, Bulgarian operators filed 243 national patent applications and 20 international patent applications under the Patent Cooperation Treaty (PCT). These figures show that Bulgarian operators prefer the national route. The similar number of European patents and patents filed under the PCT shows that the very aim of these two international treaties is to allow for protection in more than one country with a single application (but the PCT Treaty allows for protection in all countries). Consequently, following the example of the Community trademark and design, the introduction of the unitary and autonomous Community patent would probably be more popular.

<table>
<thead>
<tr>
<th>Country</th>
<th>Statistics</th>
</tr>
</thead>
<tbody>
<tr>
<td>Czech Republic</td>
<td>In 2006, Czech companies filed 82 European patent applications; there were 96 applications in 2007, and 111 in 2008. With regard to national patents, the Czech National Industrial Property Office granted 264 patents to Czech companies in 2006, 227 in 2007, 239 in 2008, 239 in 2008 and 376 in 2009 to national Czech companies.</td>
</tr>
<tr>
<td>Germany</td>
<td><strong>Academic response</strong></td>
</tr>
<tr>
<td></td>
<td>The 2008 annual report from the European Patent Office (EPO) indicates that 26 500 patents requested in Germany were registered with the EPO out of 145 000 registrations in total.</td>
</tr>
<tr>
<td></td>
<td>A total of 62 000 new patents were registered at the German Patent and Trademark Office in the same period, of which 13 000 originated from outside Germany.</td>
</tr>
<tr>
<td></td>
<td>Statistics from the German Patent and Trademark Office show that operators outside Germany are responsible for a large portion of patents. Nevertheless, the European instrument has enjoyed a degree of success, as can be seen from the statistics at a European level.</td>
</tr>
<tr>
<td></td>
<td><strong>The Ministry’s response</strong></td>
</tr>
<tr>
<td></td>
<td>The European patent cannot be considered as an optional instrument in the same ways as national patents. Patents granted by the European Patent Office must be validated in each country to be enforceable in that country. Following validation, they are treated the same as national patents. It is therefore not helpful to compare the national and European systems based on patent applications.</td>
</tr>
<tr>
<td>Greece</td>
<td>The 'European patent' laid down at the 1973 Munich Convention covers both EU Member States as well as many non-EU states. However, the European patent does not fall under Community law nor is it implemented by the European Union. It is by no means a unitary patent. There are however legislative discussions on establishing a unitary Community patent system. The personal view of the questionnaire respondent is that the Community patent is not needed given that the European patent is already in place and is proving to be extremely effective and successful. Furthermore, the European Patent</td>
</tr>
</tbody>
</table>
Office has developed vast amounts of expertise, which has extensively helped patent law practitioners and benefited patent holders.

Statistically, the only available data seems to be that since Greece joined the European Patent Convention in 1987, there have been around 74,000 European patents filed by foreign candidates, which have then been extended and validated in Greece via the European Patent Office. Unfortunately, it seems that no statistics are available on the number of European patents filed with the local Greek authorities by operators. It can be reasonably deduced that the number must be extremely low because there are only a few local operators actively engaged in scientific research who would need to file patents permanently and on a continuous basis.

Most local operators dealing with development patents prefer to file national patents in Greece alone. After they have been granted, most of these patents do not lead to significant commercial exploitation. It costs significantly more to file and maintain a European Patent than a national patent. However, the few local operators who are actively engaged in scientific research have a patent portfolio, most probably granted under the European patent system (as opposed to the national patent system) since it is the only way of achieving patent protection in more than one country simultaneously by filing a single patent.

On a Community level, it is important to create a European Patent Court, i.e. to create a single court with international power to deal with patent law disputes, other than the national courts. As has been reported, patent disputes always give ways to parallel and simultaneous judicial procedures regarding patent validity in several different countries. This means a dispute in each country where the patent has been filed and protected. This incurs considerable costs and more often than not, the court rulings differ from one another. Furthermore, this situation leads to extensive forum shopping and numerous ways of delaying the judicial process, e.g. by initiating judicial proceedings in an inappropriate court which delays the proceedings set up by the patent holder in the appropriate court. This situation is the result of the territoriality principle which applies to patent law and European patents. A single European patent court could remove all of these unwanted complexities.

Spain

The statistics show that although the number of patents filed in Europe increased from 100,692 in 2000 to 134,542 in 2009, patents requested in Spain represent less than 1% (525 in 2000 and 1,258 in 2009). By comparing this with the number of national patents registered in Spain (3,000 in 2000 and 3,712 in 2009), we are forced to conclude that the European patent route is still used far less than the national counterpart.

France

A statistical economist at the French Intellectual Property Research Institute (IRPI) has announced the statistics published for all intellectual property (IP) rights.
With regard to patent applications for the national route (French patents) during the last 20 years, the number of French patent applications filed directly with the INPI increased moderately up to 2007 before falling in 2008 and 2009 as a result of the global financial crisis.

The introduction of the European patent has largely contributed to fewer national patent applications being filed, in France and other European countries alike. As a matter of fact, companies outside of France have at the same time gradually chosen to use the European route over the French counterpart, filing their application with the EPO and then validating the title in France after the European patent has been granted. This can be seen from the statistics which show that foreign applicants, who in the early 1990s made up over a quarter of French patent applications, only accounted for 11% in 2009; French applicants now represent 89% of all applicants opting for the French route.

With regard to patent applications using the European route (European patents), the number of European patents filed with the EPO by French applicants has more than doubled between 1990 and 2009 (as can be seen in table 2 showing the French response to the questionnaire). This reveals the growing interest among French applicants for this type of protection, even if the proportion of applications from France has fallen due to further European countries entering the patent system. During this same period, the number of patent applications made in France by French applicants has increased far less (as shown in figure 1 showing the French response to the questionnaire). In 2009, France was second among the major countries filing for the European patent, with 8929 European patents filed with the European Patent Office (EPO), far behind Germany (with 25107). It ranked fourth on a global scale, behind the United States (with 32966), Germany and Japan (with 19933), but ahead of the Netherlands, Switzerland and the United Kingdom (see figure 2 of the questionnaire in the annex).

France accounts for 6.6% of European patent applications, three times less than Germany (18.7%). Furthermore, during the last two years under investigation (between 2008 and 2009), European patent applications filed by French applicants fell by 1.3%, a much smaller decrease than that recorded for European patents (-8.3%).

In short, the European patent has experienced tremendous success since it was launched, and many applicants now use it. Filing a European patent application generally follows what is deemed to be a priority application made in the form of a national patent application. We can therefore see that the proportion of European patent applications compared with the number of French patent application is very large (8929 European patent applications to 16166 national applications in 2009). Community trademark developments are mentioned as contributing to this success. It must nevertheless be pointed out that, to the extent that the commercial strategy of filing a patent application is centred on the national territory alone, the
existence of the European patent itself is not likely encourage research into additional protection.

However, considering the globalisation of markets and competition, it is possible that the existence of the European patent has helped some applicants, who used to rely on national patents alone, to access a form of protection that extends beyond national borders.

<table>
<thead>
<tr>
<th>Country</th>
<th>Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Italy</td>
<td>Statistics are available on the use of the European patent in Italy. The number of applications filed with the European Patent Office (EPO) has exceeded those filed with the national patent office. Of the 1 116 906 European patent applications filed with the EPO between 1999 and 2008, 36 324 were filed in Italy, meaning the country accounted for 3.3% of applications published by the EPO. Italy therefore occupies eighth place in the international rankings. Furthermore, the average annual growth rate for patent applications in Italy is 4.6% per year, higher than that in other European countries (Great Britain 2.9%, Germany 3.8%, France 4%). Most patents production in Italy originates from companies, which published 86.6% of patents from 1999 to 2008. The remainder is divided among individual inventors (9.8%), research centres and universities (2.2%), and non-Italian candidates (1.4%).</td>
</tr>
<tr>
<td>Cyprus</td>
<td>Cypriot legal practitioners clarify that the Community patent has not yet been introduced by EU Member States.</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>According to the 2009 statistics published on the European Patent Office website, 293 applications were made in Luxembourg, but not a single European Patent was granted. There seems to be no statistics available for the Benelux patent after 2002 (these are not given as they are irrelevant). It is therefore not possible to answer this question.</td>
</tr>
<tr>
<td>Hungary</td>
<td>To make a general comment, it is noted that a Community patent does not currently exist. Following the ratification of the Treaty of Lisbon, all instruments which formerly referred to the 'Community' must be renamed 'EU Instrument'. The survey should therefore focus its questions on examining EU patents. This type of patent does not however currently exist. Part of the patent framework, the litigation agreement, is currently pending before the ECJ. The only existing patent framework that is currently in place in the EU relates to measures for enhanced cooperation.</td>
</tr>
<tr>
<td>Netherlands</td>
<td>Statistics show that nearly 7 000 European patent applications are filed by the Netherlands, making the European patent very popular.</td>
</tr>
<tr>
<td>Country</td>
<td>Information</td>
</tr>
<tr>
<td>---------</td>
<td>-------------</td>
</tr>
<tr>
<td>Austria</td>
<td>Currently, only statistics for 2001-2009 are available. According to the European Patent Office, 1 504 European patent applications were filed by Austrian operators in 2009; 1 503 in 2008; 1 386 in 2007; 1 146 in 2006; 1 072 in 2005; 1 000 in 2004; 1 001 in 2003; 929 in 2002; 813 in 2001 et 812 in 2000. Unfortunately, there are no statistics on the global number of Community patent applications for the period from 2001 to 2009. It is therefore impossible to draw conclusions as to the percentage use in Austria.</td>
</tr>
<tr>
<td>Poland</td>
<td>Operators use the European patent. Polish operators filed 173 European patent applications in 2009. There are currently no statistics on patent applications for 2010. It is however indicated that 88 applications were filled via the Polish Patent Office in 2010 (56 on paper and 32 electronically). It is likely that the same number of applications or more were filed directly with the EPO in Munich. These statistics are taken from the EPO website and the Patent Office of the Republic of Poland. Although there are operators who have filed for a European Patent after having never filed a patent application in any country other than Poland, it is impossible to provide reliable statistics to show this. As before, this opinion is also based on responses given to the editors of the Polish report by a member of the National Board of Patents.</td>
</tr>
<tr>
<td>Portugal</td>
<td>Portuguese rapporteurs have included a table and graph in their response that present the available statistics, used by the National Industrial Property Institute and relating to patent applications. These can be found in the annex. With regard to the last question, the National Institute admits that this could happen, but there are no statistics available on this situation.</td>
</tr>
<tr>
<td>Slovakia</td>
<td>The statistics provided by the IPO indicate that there is more or less equal interest for registering patents via the EPO (European patent application) and via the WIPO (international patent application), based on applications filed by Slovak candidates. However, Slovak applicants are more interested in direct registrations via the national patent offices. Slovak legal practitioners then included a table, available in the annex, which lays down the statistics relating to the applications filed between 2004 and 2010. These statistics indicated that the percentage ratio of patent applications filed with the EPO to those filed directly with the national patent offices is more or less the same as that for applications based on the Patent Cooperation Treaty and patent applications filed with foreign national patent offices (around 30%). With regard to patent applications filed abroad, Slovak applicants have</td>
</tr>
</tbody>
</table>
mainly filed patent applications in the United States, Czech Republic, Germany, Russia and Japan.

<table>
<thead>
<tr>
<th>Country</th>
<th>The Ministry’s response</th>
<th>Academic response</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sweden</td>
<td>European patents are very popular with users. Figures from the Swedish Patent Office (laid down in a table in the annex) indicate that the number of European patents validated in Sweden between 2000 and 2010. One figure in the table indicates the number of European patents validated in Sweden that were requested in there. Patent protection for a European patent is restricted to the territory of each state where the patent is validated. The European patent has allowed for the patent protection to be more accessible by way of a centralised system; it is easier to gain patent protection in several states for less than it would cost for individual applications filed with each national patent office. It is however difficult to judge the effect of the European patent on the number of European patents filed. The London Agreement will probably also effect the number of patents validated in the countries which have adopted it, please refer for example to the academic report carried out on the validation systems and Swiss patent systems under the London Agreement. A table is given (in the annex) presenting the figures for the period from 2007 to 2009 in order to illustrate the choice of instruments by Swedish patent applicants.</td>
<td>The European patent is used in the United Kingdom, accounting for half of all applications made in 2009. The team who answered this question used a graph representing the percentage of states ranked by the proportion of patents filed; this graph can be found in the annex. In 2009, 4,821 European patent applications were filed in the UK and 1,646 patents were granted. Compared with 2008, fewer patents were granted than in 2009: to be precise, 1,969 patents were granted which represents a fall of 16.4% in 2009. The cost incurred by translation and the procedural expense that must be met to implement the patent in each jurisdiction are considered by legal practitioners completing this questionnaire as a disadvantage for European innovation.</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>The Ministry’s response: There is no response available on this topic.</td>
<td></td>
</tr>
</tbody>
</table>
CHAPTER 9: DO OPERATORS USE THE EUROPEAN COMPANY

As before, official statistics have been sought first and foremost, and only where there are no statistics available have rapporteurs been asked to give a subjective account of what they think is the approximate percentage use of this grouping, in comparison to similar national groupings.

This section analyses the answers one by one (1.) before presenting a table with a more detailed overview of the different answers by country (2.).

1. ANALYSIS OF THE RESPONSES

1.1. Global statistics and hard data

It seems that some ministries published statistics on the European Company or statistics that include said Company. Therefore, the Austrian report mentions it, and so too does the Portuguese report145. However, official statistics from certain ministries do not distinguish as to whether the company is European or not. This is the case in Slovakia.

However, hard data is available owing to several factors:

– Firstly, many states have trade and companies registers, irrespective of how they are described. This is particularly true in Greece, Bulgaria, Spain, France, Germany, the Netherlands and Slovakia146.

These different registers allow for reliable statistics.

– Secondly, the Worker Participation website records all European Companies created in Europe147. According to the website, the number European Companies (SE) has risen from 435 in February 2010 to 735 in February 2011 to 802 on 10 May 2011 and 958 on 29 October 2011148.

– Finally, and most importantly, the European Commission has published the planned report, five years after texts on the European Company entered into force149. This report entitled ‘REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL, The application of Council Regulation 2157/2001 of 8 October 2001 on the Statute for a European Company (SE)150 was compiled by the Commission following the external

146 See the Slovak Business Register website: www.orsr.sk.
147 See the listing of SEs compiled by the European Trade Union Institute (ecdb.worker-participation.eu) and the ‘Study on the operation and the impacts of the Statute for a European company’ 2008/S 144-192484, E & Y, 9 December 2009.
study, a public consultation and a conference, further increasing the reliability of its statistics\textsuperscript{151}.

- The report indicates that as of 25 June 2010 595 SEs were registered in the EU/EEA. It reveals that the number of SEs has increased exponentially since 2004. SEs have been created in 21 of the 30 EEA states, of which 70\% are in Czech Republic and Germany. Very few SEs have been created in States in southern Europe, excluding Cyprus.

### Table 9

<table>
<thead>
<tr>
<th>Member State where the SEs registered office is located</th>
<th>Total</th>
<th>Number of SEs</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Normal SE</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Micro SE</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Empty SE</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Employees ? SE</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Shelf SEs</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Activated Shelf SEs</td>
</tr>
<tr>
<td>Czech Republic (CZ)</td>
<td>281</td>
<td>25</td>
</tr>
<tr>
<td>Germany (DE)</td>
<td>134</td>
<td>74</td>
</tr>
<tr>
<td>Netherlands (NL)</td>
<td>24</td>
<td>8</td>
</tr>
<tr>
<td>United Kingdom (UK)</td>
<td>23</td>
<td>2</td>
</tr>
<tr>
<td>Slovakia (SK)</td>
<td>22</td>
<td>2</td>
</tr>
<tr>
<td>France (FR)</td>
<td>19</td>
<td>9</td>
</tr>
<tr>
<td>Luxembourg (LU)</td>
<td>16</td>
<td>3</td>
</tr>
<tr>
<td>Austria (AT)</td>
<td>14</td>
<td>7</td>
</tr>
<tr>
<td>Cyprus (CY)</td>
<td>12</td>
<td>5</td>
</tr>
<tr>
<td>Belgium (BE)</td>
<td>9</td>
<td>3</td>
</tr>
<tr>
<td>Sweden (SE)</td>
<td>9</td>
<td>2</td>
</tr>
<tr>
<td>Ireland (IE)</td>
<td>7</td>
<td>1</td>
</tr>
<tr>
<td>Norway (NO)</td>
<td>5</td>
<td>3</td>
</tr>
<tr>
<td>Estonia (EE)</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>Liechtenstein (LI)</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>Hungary (HU)</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>Latvia (LV)</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Denmark (DK)</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Poland (PL)</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Portugal (PT)</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Spain (ES)</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Bulgaria (BG)</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Finland (FI)</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Greece (EL)</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Iceland (ICE)</td>
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<td>0</td>
</tr>
<tr>
<td>Italy (IT)</td>
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<td>0</td>
</tr>
<tr>
<td>Lithuania (LT)</td>
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</tr>
<tr>
<td>Malta (MT)</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Romania (RO)</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Slovenia (SI)</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>595</td>
<td>151</td>
</tr>
</tbody>
</table>

This table is taken from the Commission report to the European Parliament and to the Council on the application of Regulation 2157/2001 of 8 October 2008 on the Statute for a European Company\textsuperscript{152}.

\textsuperscript{151} The external study from the Ernst & Young cabinet, the consultation report and the conference are available at the following address: http://ec.europa.eu/internal_market/company/se/index_en.htm.
1.2. Number of SEs differs greatly among Member States

There are significant differences. The countries can be divided into three groups:

- In the first group of countries, the SE does not yet exist. The reports therefore show that there are countries where there are no SEs: this is the case in Greece, Bulgaria, Spain (as of September 2010) and in Portugal (as of April 2009). The Polish reports state that a single SE was registered in Poland.

- In a second group of countries, the SE is progressing but the statistics are still low. The Swedish Ministry of Justice indicates that six SEs were registered in Sweden. On 24 February 2011, 21 SEs were registered in France whose registered office had been transferred to France. The Cypriot report indicates 21 SEs in Cyprus. This figure is similar to that for Luxembourg where 15 SEs were recorded in December 2009. According to the Dutch report, 19 SEs were registered in the Netherlands. The Austrian Ministry of Justice puts the number of SEs at 24 as of 1 January 2011. This figure of 24 SEs is also found in the university report for the United Kingdom (23 in the Commission report, later changed to 24 on 31 March 2010. Finally, 30 SEs were recorded in Slovakia, according to figures.

These figures remain very low. By way of comparison, the 15 SEs registered in Luxembourg must be viewed in light of the 73,838 public limited companies established in Luxembourg during the same period. Similarly, the 21 SEs in France must be compared with the 60,000 public limited companies (SA) and 120,000 simplified joint stock companies (SAS) in the country. Furthermore, the 30 SEs registered in Slovakia must be compared with the 7,500 limited companies registered there. We will see however that the SE is more useful for companies wishing to enter other Member State markets; we should not perhaps compare the number of SEs with the total number of companies in a Member State, but rather just with the number of companies involved in cross-border business, or even with the number of multinational companies registered in this Member State.

- Finally, a third group of Member State differs from the others in that there are a sizeable number of SEs registered in these countries. This third group includes Germany and the Czech Republic, which are home to 70% of SEs in the EEA. There are 344 SEs in the Czech Republic.

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153 The aforementioned Ernst & Young report pp. 159.

154 The list of SEs registered or transferred to France:
- EUROFINS SCIENTIFIC SE; INNOVATIS & CIE SE; VIEL ET COMPAGNIE-FINANCE SE; SCOR SE; SCOR GLOBAL P & C SE; SCOR GLOBAL LIFE SE; LIMAGRAIN CENTRAL EUROP SE; EPEX SPOT SE; PHILIPPE AUGUSTE SE; BERCY CHARENTON SE; EQUINOX II SE; ARDANOS HOLDINGS SE; MARCEL POURTOUT SE; SWORD GROUP SE; SCOR GLOBAL INVESTMENTS SE; UNIBAIL RODAMCO SE; SNVIB SE; BURGEAP IGIP HOLDING SE; SNVIC SE; PIERRE ET VACANCES IMMOBILIER HOLDING SE; MUTAVIE SE.


Furthermore, in January 2011, 160 European Companies (public limited) were registered in Germany out of a total of 753\(^{157}\). Comparing these figures with those from 2009 when there were 80 European Companies registered in Germany of a total of around 250\(^{158}\), we can see a rapid growth of SE numbers.

We do need to put these figures into context a little:

- Firstly, the number of 160 SEs registered in Germany must be compared with the 1 032 million joint stock companies registered in 2009 under the German trade register\(^{159}\), of which 14 were public limited companies\(^{160}\).

- Secondly, a large number of SEs in the Czech Republic and Germany are 'shelf' SEs.

In its aforementioned report, the European Commission gives the number of shelf SEs and gives a possible explanation:

*The high number of shelf SEs in certain Member States, in particular the Czech Republic and Germany, also help to explain the high number of SEs in these two Member States*\(^{161}\). Reportedly, the creation of shelf SEs by professional providers in these countries could be explained by the fact that the system of shelf companies available for sale is common there\(^{162}\) and meets specific business needs. According to the outcomes of the public consultation, companies buy shelf SEs mainly to save time and costs and avoid a complex and uncertain formation procedure. A number of the respondents mentioned that shelf SEs also make it possible to create an SE without having to fulfil a burdensome cross-border element or go through the negotiations on worker participation. The possibility of avoiding severe requirements is particularly important for smaller companies\(^{163}\).

The Czech and German reports also underline the phenomenon of shelf SEs, 'off the shelf' companies ready to be offered to the operator. The German report reveals that 'German legislation allows for the setting up of 'shelf companies' (Vorrats-Gesellschaften) overseen by large law firms and/or accountancy firms with a view to 'market' them to operators. This figure must therefore be put into perspective.'

This undoubtedly puts into perspective the global number of registered SEs that do not represent SEs in terms of activity.

Nevertheless, if in these two countries, there are people who are willing to create shelf SEs and to sell them as a turnkey product, this is because they believe in the strong potential of this 'product'!

Some authors have explained the difference noted between the various countries as follows\(^{164}\): Member States have in general applied the SE options in such a way as to align the SE rules with the national rules for companies. However, some Member States have

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\(^{157}\) Source: http://ecdb.worker-participation.eu (1 January 2011).

\(^{158}\) V. WAGNER, Europäische Gesellschaftsformen, AnwBl 2009, pp. 412.


\(^{161}\) 'However, these two country also have the highest numbers of SEs in operation'.

\(^{162}\) 'According to outcomes of the public consultation, this is not the case in France and Italy, where there are hardly any shelf companies and therefore the instruments find little use'.


\(^{164}\) See the university report for the United Kingdom which cites the external study requested by the European Commission and conducted by Ernst & Young (herein referred to as 'E&Y study'): http://ec.europa.eu/internal_market/consultations/docs/2010/se/study_SE_9122009_en.pdf.
created more exceptions than others. A comparative analysis of the flexibility of the rules applicable to the SE and those which apply to companies ruled exclusively by national law shows that the United Kingdom, Denmark, Belgium and Greece have adopted the most flexible approach with regard to the SE, while Romania, Bulgaria, Slovenia, Portugal, France and Cyprus have adopted the least flexible approach, which undoubtedly has an impact on the use of the optional instrument. This simply reinforces the idea that the more the optional instrument is independent from national laws, the greater the chances of success.

2. COUNTRY-BY-COUNTRY SUMMARY OF RESPONSES TO QUESTION 9

<table>
<thead>
<tr>
<th>Member State</th>
<th>Table 9a</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>DO OPERATORS USE THE EUROPEAN COMPANY?</strong></td>
<td></td>
</tr>
<tr>
<td>Have official statistics been published in your country on the use of this instrument? If so, what are they?</td>
<td></td>
</tr>
<tr>
<td>Where there are no such statistics, what do you think is the approximate percentage use of this grouping, compared with similar national groupings? What analysis, research and/or documents do you base your estimate on?</td>
<td></td>
</tr>
<tr>
<td><strong>Belgium</strong></td>
<td>Implementing this type of company is complicated for various reasons. As a result, operators prefer other types of companies. Furthermore, the Regulation is flawed in certain areas, which could also drive companies to choose other types of companies. Firstly, the Regulation requires a hierarchy of norms. The Regulation is applicable; the statute and national laws can be used only where the Regulation fails to make provisions. This means, therefore, that SEs must juggle different legislations. In the event of an international transfer or merger, the quantity of internal documentation to be taken into consideration would require companies to seek advice, which would greatly increase the costs of such operations. Secondly, the rules on worker participation laid down in the Regulation are complex. Therefore, this requirement is an obstacle for companies when forming this type of company. Thirdly, the Regulation does not provide for a tax system specific to European Companies. Fourthly, the margin for statutory independence is very limited. Finally, the Regulation includes the requirement that European Companies have their registered office and their administrative headquarters in the same place. This requirement could provoke criticism because it prevents European Companies from freely transferring their registered office from one country to another. This rule is not in line with current needs for company mobility.</td>
</tr>
<tr>
<td><strong>Bulgaria</strong></td>
<td>Until early 2011, no SEs were registered in Bulgaria. This conclusion is made on the basis of on-line registrations with the Bulgarian trade register. The Bulgarian Registry Agency website has published official statistics on the different types of company on the trade register for 2008, 2009 and 2010. The statistics do not include SEs as there are none in Bulgaria.</td>
</tr>
</tbody>
</table>
Czech Republic

There are currently 344 European Companies registered and active in the Czech Republic. This number is very high given that 595 SEs were registered in UE/EEA states as of 25 June 2010. The vast majority (around 70%) of these companies are set up in the Czech Republic or Germany.

This surprising statistic can be explained by the fact that these companies are often established as being companies 'served on a plate', seen as a 'commercial product'.

Germany

Academic response

In January 2011, 160 European Companies (public limited) were registered in Germany out of a total of 753. Comparing these figures with those from 2009 (when there were 80 European Companies registered in Germany of a total of around 250), we can see a rapid growth in SE numbers.

However, we must take into consideration, by way of comparison, that 1,032 million joint stock companies were registered in the German trade register in 2009, of which 14,000 were public limited companies. In conclusion, although this OI seems to be particularly appreciated in Germany (160 of 753), we should emphasise that German legislation allows for the setting up of 'shelf companies' (Vorrats-Gesellschaften) overseen by large law firms and/or accountancy firms with a view to 'marketing' them to operators. This figure must therefore be put into perspective.'

The Ministry's response

Operators chose the European Company. According to an unofficial statistic published by the European Trade Union Institute for Research, 154 SEs were established in Germany in November 2010.

Greece

There are no official or unofficial statistics on the number of European Companies registered in Greece. The SE register is local and held by the same administrative service which holds the register for companies limited by shares (public limited companies), which is the Department of Enterprise in each municipality. There are 13 municipalities in Greece. There is also a central register held by the Department of Enterprise of the Ministry of Commerce. According to verbal information from this department, there are no SEs registered in Greece.

In accordance with recent legislation, all legal entities in business law, including SEs which are expressly mentioned in law, are registered with the General Trade Register, which has not yet however started its activities, despite this having been decided. Therefore, as long as the General Trade Register is not in operation, public limited companies and SEs will continue to be registered with the Department of Enterprise in each municipality.

An SE cannot be considered as 'equivalent' to all entities under local
law. This is because the SE is aimed at meeting the needs of partners in different Member States, who are involved in cross-border activities. This is not the intended aim of entities under local law. Therefore, the fact that there are reportedly still no SEs registered in Greece is mainly due to the limited involvement of local companies in cross-border cooperation activities with partners located in other EU Member States (reference is also made to the analysis given in the response to the question on the EEIG).

Notwithstanding the above, the SE greatly resembles the company limited by shares (public limited companies), governed by Regulation 2157/2001 and implemented by the Greek law 3412/2005, and also resembles the Greek law on public limited companies, which addresses any shortcomings in the Regulation. In accordance with article 4 of the Regulation, the SE has a minimum subscribed capital of EUR 120 000 while Greek public limited companies have a minimum share capital of EUR 60 000. Furthermore, the Greek public limited company has a two-tier administration system, while the SE allows you to chose between one or two levels of administration. The main advantage of the SE is that it is possible to transfer the registered office to another Member State without dissolving the company or changing the legal entity of the SE itself and, consequently, without leading to tax complications, in particular with regard to hidden reserves. In this respect, establishing an SE can act as a vehicle or as a way of transferring the head office of a Greek company to another Member State. This can be particularly important in the case of regulated commercial companies (credit, financial institutions, investment institutions or insurance companies) who choose to be regulated by supervisory authorities in another country while continuing to operate in Greece. In this respect, SEs could be accused of abusing the system in order to avoid certain supervisory authorities.

The major difference between the SE and the Greek public limited company is that the SE is subject to Directive 2003/72 on the role of employees (implemented into Greek law by the Presidential Decree 44/2008), while the same rules do not apply to Greek public limited companies and other entities under local law.

Since the SE is not intended to replace the local company 'limited by shares', and since there are still many differences in the structure of limited companies (despite the harmonisation of the Public Limited Company Act), it would be a good idea to support an initiative to draft uniform Community legislation on public limited liability companies which would be the same for all Member States.

Spain

The Spanish Statistical Institute (INE) and the Central Trade Register Database website both provide statistics on the establishment of trading companies in Spain. In September 2010, statistics show that there were no European Companies among the 2 156 companies that were founded. This may be explained by the fact that 98% of companies in Spain are Limitadas sociedades, or limited liability companies (small companies, while a Sociedad Anónima, or corporation, requires a capital
France

There have been no official statistics published in France on this legal entity, which is only rarely chosen by French companies. Nevertheless, the Chamber of Commerce and Industry in Paris published a survey of this entity in Europe in early 2010 which was completed using statistics compiled and published by the Worker-Participation website. The adoption of this entity continues to increase in Europe, with the number rising from 435 in February 2010 to 735 in February 2011. In France, 12 companies opted for the SE at the beginning of 2010 along with 5 Dutch companies who transferred their registered office to France. In early 2011 four new companies chose this statute. On 14 February 2011 there were a total of 21 registered SEs whose registered office had been transferred to France. To measure where the SE sits in the context of French companies, we should point out that there were also 60 000 public limited companies and 120 000 simplified joint stock companies.

The legal practitioners who completed the questionnaire supplied a list of the SEs registered in or transferred to France and this list can be found in the annex.

One of the legal practitioners added: 'The low number of SEs formed should not cause alarm and can be explained by various phenomena, including, in particular, the delayed transposition of the SE Statute into the national legal system (particularly in France), as well as the set-up time for an SE (between 6 and 12 months, taking into account the collective bargaining relating to worker participation). BASF, Scor, Allianz, Suez, Nordea and Porsche are among the top companies which have announced their conversion to SE or have already converted.

It is also interesting to point to some statistics relating to the initial stages of SE to define the expectations and problems. Firstly, it seems that this instrument has been most popular in northern states (Germany, Sweden, Netherlands), which were the first to welcome SEs. As such, Germany is home to 40% of all SEs formed. Southern states, including France, seem to be more hesitant at the moment; the same can also be said for England. Secondly, the SE is popular with banking and insurance companies, which makes sense considering these two service sectors have always been the main target of European mobility, be it the free movement of capital or the freedom of service provision. That said, there are other sectors that also use the SE: cosmetics industry (Yves Saint Laurent in Belgium), transport industry (Eurotunnel in Belgium). While the Czech Republic currently records the majority of SE registrations, this does not offer a true reflection of the situation here since many of these SEs are 'empty' and awaiting investors.'

Italy

The Statute of the European Company was adopted by Regulation 2157/2001 of 8 October 2001. The SE Regulation is supplemented with Directive 2001/86/CE on employee participation in the SE. Although the deadline for adapting the national legislation to the European legislation...
on the SE was fixed to 8 October 2004, Italy only implemented the aforementioned Directive with the Legislative Decree 188/2005 and does not exercise the power granted in article 9 of the Regulation to enact ‘the provision of laws adopted [...] in implementation of Community measures relating specifically to SEs’. Consequently, the rules relating to this optional instrument have been added to the national rules to effectively coordinate the European rules and integrate them with national rules, which is required.

Cyprus
Since introducing Cyprus to the concept of the European Company (SE) in 2006, only 12 companies have registered. This shows that the concept of the SE has not popular with the business community in Cyprus.

Luxembourg
A total of 15 European Companies have established their registered office in the Grand Duchy of Luxembourg, according to statistics from the Ministry of Justice, which were provided by lawyer Jean-Paul Spang during a conference on cross-border mergers in December 2009 organised by the University of Luxembourg at the Chamber of Commerce in Luxembourg. Confirmation of these statistics has been requested from Ms Hélène Massart (head of the Business Department at the Ministry of Justice) Awaiting her response, the Luxembourg rapporteurs think however that these figures seem to reflect reality.

After consulting *Mémorial C, recueil des sociétés et associations*, we can determine that around 73 838 public limited companies have established their registered office in Luxembourg.

Consequently, we can say that operators chose to use the European Company only based on clear assumptions.

Hungary
Hungarian operators have rarely used the European Company. There are seven SEs established in Hungary, of which only six are operational (aggregate data of Hungarian firms, in: Céghírnök (Firm Herald) XX, No. 3. (2010): 8-9 pp.).

Netherlands
There are official statistics on company registrations, such as those published in JOUE. From 2004 to 2008, 19 SEs were registered in the Netherlands, making the SE relatively popular compared with other countries. Compared with other Dutch legal forms of companies, however, the SE is used only in a small percentage of cases.

Austria
Only 24 European Companies have been registered since 1 January 2011 according to statistics made available by the Austria Ministry of Justice. Compared with a total of 200 823 registrations, European Companies account for 0.011% of all companies registered in Austria.

Poland
No statistics have been published on SEs. That said, information from the Central Statistical Office of Poland (GUS) indicates that only one SE was registered whose registered office was in Poland (AMCA Europejska Spółka Akcyjna with its registered office in Brzeg Dolny). The SE is a
company which is currently mainly used by international companies. The option to form an SE is fairly new and there have not been very many on the Polish market, but it is foreseeable that this number will increase. As a specific company which can have its head office in an EU Member State and operate simultaneously in other Member States, the SE can, for example, operate subsidiaries – as is the case for BP (British Petroleum).

<table>
<thead>
<tr>
<th>Portugal</th>
<th>Official statistics from the Ministry of Justice do not mention any registration of a European Company in 2009. The study on the operation and the impacts of the Statute of the European Company by Ernst &amp; Young puts the number of SEs registered in Portugal at zero as of 15 April 2009 and attempts to explain this situation. Data on SEs cannot be made available in the official statistics when the figure is zero, but also for other reasons; for example, when the data allows for the identification of a single person or legal entity.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Slovakia</td>
<td>Operators only rarely use the European Company. There are currently 30 European Companies in Slovakia. European Companies are not recorded separately in the statistics held by the company register published by the Ministry of Justice. No statistics specific to European Companies have been published. Relevant information is available only on the companies register website. The limited company under the Slovak Commercial Code may be considered as an equivalent national grouping. According to data available on the companies register website, there are around 7 500 public limited companies in Slovakia. This means that the percentage of European Companies is insignificant. Furthermore, only a low percentage of the 30 European Companies are currently operational.</td>
</tr>
</tbody>
</table>
| Sweden | The Ministry’s response
There are six European Companies registered in Sweden, three of which are operational. |
| United Kingdom | The Ministry’s response: There is no response available on this topic. Academic response
The SE was introduced by Regulation 2157/2001,1 which applies directly in the United Kingdom. The Department of Trade and Industry has issued secondary legislation to facilitate the implementation of the Statute in areas such as the details of the registration or the dissolution of an SE where the Regulation is silent. As tax is not explicitly covered by the European Company Statute, HM Revenue and Customs has issued a technical note covering the
provisions which are necessary to accommodate mergers to form SEs in UK tax law.

Experiences have shown that applying the European system creates a certain number of practical problems. ‘The European Company system is not a uniform legal system in the European Union. The European Regulation also contains various references to national law and this uncertainty originates from the cross-over and interrelations between the rules that apply directly to the Regulation and national law. Furthermore, the unequal distribution of SEs within the EU shows that the Regulation is not sufficient enough to meet the needs of companies in 27 Member States.’

According to the European Commission report, 23 SEs have been formed in the United Kingdom. As of 31 March 2010, only 24 SEs were held on the UK register.

In general, as shown in a European Commission study, Member States have attempted to align SE rules with national rules, with variations according to the Member States. An analysis of the flexibility of the rules applicable to the SE compared with those which apply to national companies shows that the United Kingdom, Denmark, Belgium and Greece have adopted the most flexible approach with regard to the SE, while Romania, Bulgaria, Slovenia, Portugal, France and Cyprus have adopted the least flexible approach, which undoubtedly has an impact on the use of the optional instrument.

A comparison of this assessment with the distribution of SEs by country (the United Kingdom with 23 SEs, Belgium with 9, Portugal with 1 and Romania and Slovenia with none) shows that there may be a certain correlation. On the other hand, the fairly high degree of flexibility in Greece (where there are no SEs), Denmark (2 SEs) and, to a certain extent, Spain (1 SE) and Italy (no SEs) does not correspond with the low number of SEs in these countries; particularly, when we compare these with countries such as France (19 SEs) and Cyprus (12 SEs) which have a fairly low degree of flexibility and a relatively high numbers of SEs.

The study also assessed the flexibility of SE rules in each Member State. This assessment is based on the way the Member States have implemented the options put forward by the SE Statute within national legislation where the SE Statute refers to them explicitly. This analysis shows that Luxembourg, Italy and the United Kingdom have the most flexible rules with regard to the SE.

The team who answered this question using a graph representing the list of states ranked by the number SEs formed and their implementation; this graph can be found in the annex.
CHAPTER 10: DO OPERATORS CHOOSE TO USE THE EUROPEAN ECONOMIC INTEREST GROUPING?

To answer this question, rapporteurs were asked to provide official statistics, if they existed. Only where no statistics existed were they asked to give a subjective view on the use of this instrument in European countries.

This section analyses the answers one by one (1.) before presenting a table with a more detailed overview of the different answers by country (2.).

1. ANALYSIS OF THE RESPONSES

1.1. Statistics or hard data

There are few official statistics on this topic. Agencies which hold trade registers sometimes publish statistics.

The Bulgarian report indicates that official statistics have been published on the Bulgarian Registry Agency website.\(^{165}\)

Even where no official statistics are available, registers to record or register EEIGs allows easier access to information regarding their number. It seems that EEIGs are sometimes registered on the general trade and company register (Bulgaria, Czech Republic, Slovakia\(^{166}\)) and sometimes on a separate register. In Greece, for example, a separate and local register is held by the secretariat of each court of first instance.

There is also a website with an abundance of information on EEIGs:

http://www.libertas-institut.com/uk/EWIV/portal.htm\(^{167}\)

This website reveals that 2,072 EEIGs were formed in 2011 and 306 were dissolved. There are therefore 1,766 remaining.

1.2. Number of EEIG differs greatly among Member States

A table showing the number of EEIGs by European country can be accessed at http://www.libertas-institut.com/de/EWIV/statistik.pdf.

As with the European Company, countries can be divided into three categories to present the situation as of January 2011\(^{168}\):

- Firstly, there are countries where the EEIG is virtually or entirely non-existent.
- This is the case for countries which have none (Bulgaria, Cyprus, Slovenia and Lichtenstein), only one (Estonia, Latvia, Poland and Romania, or less than five (three in Finland, four in Hungary\(^{169}\), three in Lithuania and two in Malta).

\(^{165}\) http://www.registryagency.bg/?page_id=30.

\(^{166}\) www.orsr.sk.

\(^{167}\) Site edited by the European Institute GmbH.

\(^{168}\) The statistics given are taken from the table from the European Institute. Any difference with the statistics given in the national report is point out in the note at the bottom of the page.

\(^{169}\) The Hungarian report shows six EEIGs (Reference/Source: Magyarországi cégek összesített adatai (Aggregate data of Hungarian firms), Céghírnök (Firm Herald) XX, No. 3. (2010): pp. 8-9).
Secondly, there are countries where the EEIG is beginning to be used but the figures remain low (between 5 and 49): 32 in Austria, six in Czech Republic\textsuperscript{170}, five in Denmark, 14 in Greece, 10 in Ireland, 31 in Portugal, 27 in Sweden\textsuperscript{171}, six in Slovakia\textsuperscript{172}.

Finally, countries in the third category are those which have started to have a significant number of EEIGs (more than 50): 355 in Belgium, 265 in Germany, 171 in Spain\textsuperscript{173}, 256 in France, 160 in Italy, 69 in Luxembourg\textsuperscript{174}, 130 in the Netherlands\textsuperscript{175} and 210 in the United Kingdom\textsuperscript{176}.

The aforementioned figures must be interpreted in relation to statistics from each country.

The German report draws attention to the fact that – contrary to French law, for example – the German legal system does not acknowledge the true concept of the EEIG in national law\textsuperscript{177}.

Similarly, the Greek report states:

'It would be rather inaccurate and misleading to describe the EEIG as 'equivalent' to any national law grouping or legal form (corporate or unincorporated). This is mainly because the EEIG is destined to facilitate partners from different EU Member States, who need to work and cooperate together across national frontiers. So, there are two basic characteristics of an EEIG that make it unique, in comparison to local law legal forms: (a) that its members are from different EU Member States and (b) that such members operate together across national frontiers. None of the local groupings, legal entities and other legal forms is destined to serve the same needs and purposes. So, from this point of view, it would be misleading to compare EEIGs with local law groupings and legal forms.'\textsuperscript{178}

It is also stated in the German report that the EEIG is useful\textsuperscript{178} in ‘a very narrow range of applicability’\textsuperscript{179}.

However, the French report shows that there is real interest in forming an EEIG:

'The EEIG is actually chosen by some large European groups to engage in certain cooperation projects in sensitive economic sectors: aeronautical, energy, transport, banking, etc. The EEIG is the best suited legal form for large companies who want to pool together their resources to develop their research and development activities, in particular [...] Other sectors are interested in this form of company. The EEIG is an appropriate and flexible tool, when it comes to exchanging information or technologies, conducting market studies or responding to invitations to tender before launching a project in an EU Member

\textsuperscript{170} The report mentions five EEIGs, see the Administrative register of economic entities of the Ministry of Finance, http://wwwinfo.mfcr.cz/ares/ares_es.html.cz; the European Institute website states six.

\textsuperscript{171} The Swedish Ministry of Justice indicates that 29 SEs were registered in Sweden.

\textsuperscript{172} One of these EEIGs is in liquidation according to the Slovak report.

\textsuperscript{173} The Spanish report put the number of EEIGs between 2005 and 2006 at 46, while statistics from the European Institute refers to EEIGs between 1989 and 2011.

\textsuperscript{174} The Luxembourg report states 81 EEIGs based on research laid down in Mémorial C, recueil des sociétés et associations, in which operators are obliged to publish statutes of theirs EIGs. It is possible that the difference with the number of 69 given by the European Institute could be explained, firstly, by the fact that Mémorial C may not mention EEIG dissolutions which are included in the statistics from the European Institute (eight for Luxembourg between 1989 and January 2011, and secondly, by the registration of a number of new EEIGs in the first quarter of 2011.

\textsuperscript{175} The Dutch report refers to 195 EEIGs, but this number was reduced above to take into account the 65 dissolution of EEIGs registered in the Netherlands. It should also be noted that 65 dissolutions is fairly high.

\textsuperscript{176} http://www.libertas-institut.com/de/EWIV/statistik.pdf.

\textsuperscript{177} See also Wagner, Europäische Gesellschaftsformen, AnwBl 2009, pp. 410.

\textsuperscript{178} Cf. Also Wagner, Europäische Gesellschaftsformen, AnwBl 2009,410,

\textsuperscript{179} 'Circle of action'.
State or in a third State or grouping methods of production or distribution. The EEIG covers all business sectors, including liberal professions.

Globally, the EEIG is a legal instrument that is perfectly suited to joint European ventures [...]. Indeed, the EEIG is an appropriate structure for all cooperative joint venture categories, i.e. those which aim to coordinate the competitive conduct of companies that remain autonomous. [...] Similarly, the EEIG is very much suited to joint ventures created to carry out individual projects'.

The Luxembourg report also shows that there are nearly as many EEIGs in Luxembourg as EIGs, a very positive sign for the optional instrument.

However, in other countries, such as Portugal, the national instrument is far more popular when comparing a cooperative grouping under national law and the EEIG optional instrument.

'Please find below the available data in the national registry on the European Economic Interest Grouping and an equivalent grouping under national law – agrupamento complementar de empresa.'

<table>
<thead>
<tr>
<th>Year - 2009</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal Nature</td>
</tr>
<tr>
<td>Complementary Company Grouping*</td>
</tr>
<tr>
<td>EEIG – European Economic Interest Grouping</td>
</tr>
</tbody>
</table>

*ACE – Agrupamento Complementar de Empresas

Source: Estatísticas da Justiça

180 Sources: Catherine Cathiard and Arnaud Lecourt, La pratique du droit européen des sociétés, Analyse comparative des structures et des fusions transfrontalières, Coll. Pratique des affaires, Joly Editions, Lextenso Editions, 2010

181 Examples of cross-border EEIGs as cross-border cooperative bodies between local groups established in the following different areas: promotion of a cross-border ski area: GEIE Sud Mont-Blanc (GEIE registered in France) study, financial and spatial planning: GEIE Observatoire transfrontalier de l’Eurocité Bayonne-San Sebastian (GEIE registered in Spain).
### 2. COUNTRY-BY-COUNTRY SUMMARY OF RESPONSES TO QUESTION 10

<table>
<thead>
<tr>
<th>Member State</th>
<th>Table 10a</th>
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<tbody>
<tr>
<td><strong>DO OPERATORS CHOOSE TO USE THE EUROPEAN ECONOMIC INTEREST GROUPING?</strong></td>
<td></td>
</tr>
<tr>
<td>Have official statistics been published in your country on the use of this instrument? If so, what are they?</td>
<td></td>
</tr>
<tr>
<td>Where there are no such statistics, what do you think is the approximate percentage use of this grouping, compared with similar national groupings? What analysis, research and/or documents do you base your estimate on?</td>
<td></td>
</tr>
<tr>
<td><strong>Belgium</strong></td>
<td>Following the example of the Regulations on the European Company and the European Cooperative Society, the EEIG Regulation is not complete in that it refers to national legislations for any areas that is not covered by it. These types of groupings that are formed must therefore take into considered all of the following rules: Regulation 2137/85; the contract for the formation of a grouping; supplementary provisions to Regulation 2137/85 if the parties have not exercised the principle of 'autonomy of the will'; the law of 12 July 1989, the Belgian Company Code and common law.</td>
</tr>
<tr>
<td>This means that companies which opt for such a grouping should be able to juggle with European legislation as well as with legislation from different Member States. It is expected that the EEIG will be subject to the law of the registered office laid down in its statutes. Other disadvantages of this type of grouping include that the business activities must be similar to the pre-existing activities of the members in the grouping. Furthermore, members are personally liable for company debts.</td>
<td></td>
</tr>
<tr>
<td>However, the grouping has the advantage of offering companies a cooperation instrument with legal personality. Members retain a certain degree of legal and financial independence, which is also an advantage. The difficulties stated will therefore influence whether companies decide to use this form of grouping.</td>
<td></td>
</tr>
<tr>
<td><strong>Bulgaria</strong></td>
<td>Until early 2011, no EEIGs were registered in Bulgaria. This conclusion is made on the basis of registrations made on-line with the Bulgarian trade register. The Bulgarian Registry Agency has published official statistics relating to the different type of entities registered in the trade registered for 2008, 2009 and 2010. As the EEIG does not exist in Bulgaria, it does not feature in the statistics.</td>
</tr>
<tr>
<td><strong>Czech Republic</strong></td>
<td>There are currently only five EEIGs registered in the Czech Republic. These figures therefore show that use of this instrument is fairly limited.</td>
</tr>
<tr>
<td>Germany</td>
<td><strong>Academic response</strong></td>
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<tr>
<td></td>
<td>The authors refer to a 'a very narrow range of applicability' with regard to the use of the EEIG. Of the 1700 European economic interest grouping registered across Europe, around 265 are originate in Germany. In this respect, we must draw attention to the fact that – contrary to French law, for example – the German legal system does not acknowledge the true concept of the EEIG in national law.</td>
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<table>
<thead>
<tr>
<th>Greece</th>
<th><strong>The Ministry’s response</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Operators use the EEIG. According to unofficial data from the European EEIG Information Centre, the number of EEIGs established in Germany rose to 326 (of which 61 are dissolved) in January 2011.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Greece</th>
<th><strong>Academic response</strong></th>
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<tbody>
<tr>
<td></td>
<td>There do not seem to be any statistics (official or otherwise) on the number of EEIGs registered in Greece. EEIGs are recorded in a separate and local register (non-centralised), which is held by the secretariat of each court of first instance. According to Greek law, each court of first instance exercises jurisdiction in a specific geographical area; this is why each EEIG is registered in an appropriate register held by the secretariat of each court of first instance in the geographical area where it (the EEIG) has its head office. There are 63 courts of first instance in Greece. There are seven EEIGs registered in the register held by the court of first instance in Athens and two of these have been dissolved. There are five EEIGs registered in Piraeus.</td>
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<tr>
<th>Greece</th>
<th><strong>Academic response</strong></th>
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<tr>
<td></td>
<td>It would be rather incorrect and misleading to describe the EEIG as being 'equivalent' to a national grouping or to a legal form (natural or legal entity). This is primarily because the EEIG is aimed at facilitating cross-border cooperation among partners from different Member States. Therefore, there are two fundamental characteristics of a EEIG which makes it unique compared with existing legal forms under national law: it member are from different EU Member States and its members operate together beyond national borders. No local grouping, legal entity or other legal form is aimed at meeting the same needs and objectives.</td>
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<tr>
<th>Greece</th>
<th><strong>Academic response</strong></th>
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<tr>
<td></td>
<td>Notwithstanding the above, the main characteristics of the EEIG resemble what Greek law refers to as 'syndication' ('κοινοπραξία'). This is mainly because the objective of the EEIG is not to engage in its own commercial activities, but rather to allow its members to operate their own companies. According to Greek law, this is the characteristic at the heart of syndications. Furthermore, EEIGs are also similar to the local law relating to partnerships in general, since EEIG members are jointly and severally liable to creditors for an unlimited time.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Greece</th>
<th><strong>Academic response</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Under Greek law, all EEIGs have legal personality. Also under Greek law, EEIGs are regulated (in addition to Regulation 2137/1985) by Presidential Decree 38/1992, as well as by the provisions laid down in the Greek Civil Code regarding 'non-stock corporations' (i.e. article 741 to 784). This means that the EEIG largely resembles a company under</td>
</tr>
</tbody>
</table>
Greek law, except that the EEIG is not focused on its own economic activities.

A major advantage of the EEIG is the flexibility of being financed by its members (it should be noted that members are permitted to contribute with their services and expertise). Other advantages include the absence of capital requirements and the capacity to transfer the registered office from one Member State to another.

Companies and local entrepreneurs very rarely make use of EEIGs. This is due to the limited participation of local partners in cross-border activities in cooperation with partners from other EU Member States. Nevertheless, this does not mean that the EEIG is very effective legal form for achieving its supposed aims. It must be noted that since 2005, Greece has adopted a new law regarding the formation of a general trade register, where all traders are registers. Although the EEIG is not a trading company, because it does not engage in its own economic activities but rather serves the companies and facilitates the economic activity of its members, EEIGs must be registered with the general trade register. Although laws are in force, however, the general trade register is not yet operational to this effect.

With regard to tax, article 40 of Regulation 2137/85 specified that EEIG members (and not the EEIG itself) are taxed on all profit made, in accordance with local laws and the local tax Regulations.

In conclusion, it is interesting to note that EEIGs are not exempt from adhering to national and European legislation on competition. The formation of a EEIG, according to circumstance, could therefore be qualified as merging, or as an agreement or concerted practice.

Spain
According to statistics, 891 Spanish groupings were formed between 2005 and 2009, compared with only 46 European groupings. Although this is only a modest figure, it is higher than that among European companies. This may be explained by the fact that the European grouping favours cross-border economic cooperation and this is particularly useful for SMEs.

France
French rapporteurs note that the simple and flexible structure of the EEIG meets the cooperative needs of SMEs. Since the Regulation creating the EEIG was published in 1989, over 800 EEIGs have been formed in EEA countries, bringing together over 3 000 partners. Among the EEIGs, 683 are exclusively or primarily composed of SMEs. Furthermore, 287 EEIGs were formed in France from 1989 to 2011 (25 were dissolved during the same period) and France is ranked third for the number of EEIG formed, behind Belgium (454 EEIGs formed and 99 dissolved) and Germany (326 formed and 61 dissolved).

The EEIG is actually chosen by some large European groups to engage in certain cooperation project in sensitive economic sectors: aeronautical, energy, transport, banking etc. This business to business cooperation within the common mark appeals to these groups in so far
as there is an equivalent to the EEIG in nearly all Member States legislation, which means it can be used and understood at Community level. Above all, the EEIG is the most suited legal form for large companies who want to pool together their resources to develop their research development activities, in particular. The increase in capital requirements, particular in times in crisis, to allow innovation and rapid development of sectoral and geographical markets, making it necessary to use this very flexible and tool adapted for intended cooperation projects. Furthermore, this cooperation between innovative companies usually takes place without any loss of independence, which is often the deciding factor.

Other sectors are interested in this form of company. The EEIG is an appropriate and flexible tool, since EEIGs involve exchanging information or technologies, conducting market studies or responding to invitations to tender before launching a project in an EU Member State or in a third State or, more importantly, when EEIGs involve grouping methods of production or distribution. The EEIG covers all business sectors, including liberal professions.

Globally, the EEIG is a legal instrument that is perfectly suited to joint European ventures. The notion of a joint venture is similar to that for the EEIG since a EEIG is generally defined as an entity whose origin is essentially contractual, which is of an associative nature, grants rights to independent participants and is of a limited duration. A joint venture is a legal instrument of an essentially contractual nature (the EEIG is based on a contract for the formation of a grouping and there is almost complete freedom in the stipulations) and is established with a view to pooling means and resources, and sharing losses and expenses. Each member acts independently and may participate in the operation of the grouping; the grouping activities are limited, given its auxiliary character with regard to the activity of its members.

Indeed, the EEIG is an appropriate structure for all cooperative joint venture categories, i.e. those which aim to coordinate the competitive conduct of companies that remain autonomous. To this extent, the EEIG will permit members to pool their resources in a defined market, without abandoning their independence and, most importantly, without being required to commit themselves indefinitely. Furthermore, the contractual nature of the grouping offers members flexibility and a legal structure which they can tailor to meet their needs.

Similarly, the EEIG is very much suited to joint ventures created to carry out individual projects. For example, this grouping will be very useful for organising research development projects, by dividing the intellectual process among various participating members, from product definition to marketing, for example. Using this structure is also popular for successfully implementing policies or State programmes when relevant companies from several Member States come together, each one assuming the role of project manager for executing the programme, together with EEIG members to ensure their own involvement is managed to achieve effective execution of the
Several examples of cross-border EEIGs are then mentioned as cross-border cooperative bodies between local groups established in different areas. These statistics can be found in the annex.

<table>
<thead>
<tr>
<th>Country</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Italy</td>
<td>The intended aim of the European Economic Interest Grouping is to facilitate or develop the economic activities of its members by pooling resources, activities or abilities.</td>
</tr>
<tr>
<td></td>
<td>According to the DG of Enterprise and Policy, the Regulations were mainly aimed at SMEs. Nevertheless, the true nature of companies which seek to collaborate is very varied. If we look at the statistics and compare them with general data on the use of EEIGs at a European level, only 183 EEIGs have been established in Italy since 1991 and 23 have been dissolved. However, SMEs represent the most important group for production. In 2007, there were around 160 EEIGs compared with the 448,047 economic entities across the world. A reason for this may be the administrative costs given that there are informal methods of achieving the most coveted commercial objectives that are more cost-effective, and given that these solutions may also be less widely known.</td>
</tr>
<tr>
<td>Cyprus</td>
<td>The present Regulation in Cyprus is in the process of being implemented and is currently under judicial review by the Law Office of the Republic of Cyprus.</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>Operators based in the Grand Duchy of Luxembourg who decide to use the corporate form of the economic interest grouping generally choose to use the European Economic Interest Grouping.</td>
</tr>
<tr>
<td></td>
<td>No official statistics have been published on the use of this instrument in the Grand Duchy of Luxembourg. However, based on research from the <em>Mémorial C, recueil des sociétés et associations</em> journal, there are currently 76 economic interest groupings and 81 European Economic Interest Groupings in the Grand Duchy of Luxembourg, putting the approximate percentage of these groupings at 106.6% compared with national groupings. This source seems to be relevant to the extent that there is a legal requirement for economic interest grouping and European Economic Interest Groupings to publish their statutes in <em>Mémorial C, recueil des sociétés et association</em>.</td>
</tr>
<tr>
<td>Hungary</td>
<td>Hungarian operators have rarely used the European Economic Interest Grouping. There are a total of six EEIGs established in Hungary and currently six are in operation.</td>
</tr>
<tr>
<td>Netherlands</td>
<td>Statistics on the use of the EEIG in the Netherlands show that 195 EEIGs in total were set up in the country between 1989 and 2010. We</td>
</tr>
</tbody>
</table>
can deduce from this that the EEIG is not a very popular instrument among companies. No doubt as a result of its limitations, including the fact that the EEIG can not be a 'profit centre'.

**Austria**

Only 32 European Economic Interest Groupings have been registered since 1 January 2011 according to statistics made available by the Austria Ministry of Justice. Compared with a total of 200 823 registrations, European Economic Interest Groupings account for 0.015 % of all companies registered in Austria.

**Poland**

No statistics have been published on EEIGs. Information from the Central Statistical Office of Poland (GUS) nevertheless indicates that only one EEIG was registered whose registered office was in Poland (EXPO GEIE doux with its registered office in Łomianki).

The EEIG does not seem to be very important in the Polish market, given that operators could use it only after Poland entered the EU and, at that time, Polish and foreign companies already cooperated on a fairly broad scale.

**Portugal**

To answer this question, Portuguese legal practitioners who responded to this questionnaire included a table with available data from the national register on the European Economic Interest Groupings and on the equivalent grouping under national law, l'Agrupamento complementar de Empresa. These can be found in the annex.

**Slovakia**

Operators only rarely use the EEIG. There are currently 6 EEIGs in Slovakia, one of which is in liquidation. EEIGs are not shown in the statistics held by the company register published by the Ministry of Justice. No statistics specific to EEIGs have been published. Relevant information is available only on the companies register website. The law governing Slovak companies does not include national groupings similar to EEIG. In general, the national grouping that is closest to the EEIG is generally the partnership, as far as companies are concerned. The statistics available on the companies register website show that there are 2 369 partnerships in Slovakia. This means that the percentage of EEIGs is insignificant.

**Sweden**

The Ministry’s response

There are 29 European Economic Interest Groupings registered in Sweden.

**United Kingdom**

The Ministry's response: The ministry gave no response.

**Academic response**

In the United Kingdom, the texts (statutory instruments) entered into force on 1 July 1989, the date when the Regulation entered into force (European Economic Interest Grouping Regulations 1989 (SI 1989/638) (‘the 1989 Statute’); and texts for Northern Ireland dated 1989 (SI
The Regulation application had to be reported when it was acknowledged that the national legislation would have to be modified. It was indeed necessary for this Regulation to be complemented by national laws as certain options were at the discretion of Member States and an administrative structure was required to oversee the EEIG national application. Tax provisions were also required and were integrated into UK law in the form of the 1990 Finance Act (FN4) with retrospective effect from 1 July 1989.

Consequently, the UK has used the EEIG since 1989.

The first British EEIG was registered in London on 25 September 1989, followed by another on 3 October 1989 and a third on 15 December 1989. At the beginning, the EEIG has generated a great deal of interest among universities and authors but it has also met with a certain degree of scepticism from the companies for which it was created.

However, the EEIG is a fairly expensive method of expanding into other Member States; the Regulation does not require any capital injection for the grouping to form it, although members can decide among themselves to offer a sum of money to contribute to the success of their projects. Among the Member States, Great Britain is more the exception that the rule since it requires a minimum financial contribution from members towards shared capital, limited to two pounds sterling only.

The EEIG offers a definite advantage: it is immediately recognised in all EU Member States and it is less expensive (this advantage is particularly significant in Great Britain where registration tax is the same as that for creating a company; 50.00 pounds sterling, for information). The European Institute GmbH provides statistics on this subject and shows that 209 EEIGs were created in the United Kingdom between 1989 and 2010. It also shows that certain years were better than other; for example, 31 EEIGs were established in 1997 (mostly in Cardiff), compared with a single grouping in 2009.

Article 6 of the Regulation states that a grouping must be registered in the same country as that laid down in its official address and states that the registration must conform with Article 39 (1). In England, Wales and Scotland, the appropriate register is the company registers in Cardiff and Edinburgh. EEIGs are located in each part of the United Kingdom: there are some in Edinburgh, Cardiff, Southampton, Belfast or London.

An example of the EEIG in the United Kingdom is the Concord EEIG – a group of architects, quantity experts, structural and construction engineers, urban planners and related disciplines from independent companies in the United Kingdom and Ireland, which was created in 2007. Collectively, the grouping comprises offices in 25 places and 370 employees. The Concord grouping resembles a large partnership
exercise, which gives the International Organization for Standardization (ISO) 9001:1994 advice on quality relating to property as well as to the development of British marketplaces. The headquarters of the grouping is located in Pendlebury, Manchester, England.

According to one the rapporteurs of the English questionnaire ‘EEIGs have becomes an established part of the EU’s commitment to creating structure which make the scope for manoeuvre of SMEs more accessible and open, and with it the European Economic Area,’ However, the number of registration is extremely low compared with the total number of SMEs within the EEA. For example, there are four million in Great Britain alone.
CHAPTER 11: ARE THE OPERATORS CHOOSING TO USE THE EUROPEAN COOPERATIVE SOCIETY?

As before, the rapporteurs were asked to produce official statistics as a priority, and, only in the absence of thereof, to indicate an approximate percentage of the use of this association compared with national associations of the same kind.

We will present an analysis of the responses (1.), followed by a more detailed summary showing the different responses from each country (2.).

1. ANALYSIS OF THE RESPONSES TO THE CONSULTATION

Although, the co-operative sector in Europe represented around 300 000 businesses employing 2.3 million workers in 2007\(^{182}\), it seems that the European Cooperative Society is struggling to get off the ground.

In a study published in 2010, entitled 'Study on the implementation of the Regulation 1435/2003 on the Statute for European Cooperative Society\(^{183}\), the success of the SCE was examined.

The following table is an extract from this study:

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\(^{182}\) Explanatory memorandum of the French draft law n° 411 introduced on 14 November 2007: http://www.assemblee-nationale.fr/13/projets/pl0411.asp (French only). This explanatory memorandum adds that 'in France, this sector represents 21,000 businesses or: 700,000 employees; 200 billion euros of turnover; 9 out of 10 farms that are part of a co-operative; 60 % of bank deposits; and 25 % of retail trade'.

\(^{183}\) Study led by Antonio Fici, EURICSE (European Research Institute on Cooperative and Social Enterprises), University of Molise: http://www.expertisepunt.be/sites/default/files/Study %20on %20the %20implementation %20of %20the %20Regulation %201435 %202003 %20on %20the %20Statute %20for %20the %20European %20Cooperative %20Society %20(SCE).pdf.
The study concluded that, in Europe, of the 17 SCEs that existed as of 8 May 2010, there were 2 in Belgium, 1 in Germany, 2 in Hungary, 5 in Italy, 1 in Lichtenstein, 1 in the Netherlands, 3 in Slovakia, 1 in Spain, and 1 in Sweden.

This information comes from various national registers where SCEs must be declared and registered. These registers are as follows:

<table>
<thead>
<tr>
<th>Country</th>
<th>Number of SCEs</th>
<th>Branches</th>
</tr>
</thead>
<tbody>
<tr>
<td>AUSTRIA</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>BELGIUM</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>BULGARIA</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>CYPRUS</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>CZECH REP</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>DENMARK</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>ESTONIA</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>FINLAND</td>
<td>0</td>
<td>1 branch of an Italian SCE</td>
</tr>
<tr>
<td>FRANCE</td>
<td>0</td>
<td>1 branch of an Italian SCE</td>
</tr>
<tr>
<td>GERMANY</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>GREECE</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>HUNGARY</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>ICELAND</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>IRELAND</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>ITALY</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>LATVIA</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>LIECHTENSTEIN</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>LITHUANIA</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>LUXEMBOURG</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>MALTA</td>
<td>0</td>
<td>1 branch of an Italian SCE</td>
</tr>
<tr>
<td>NETHERLANDS</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>NORWAY</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>POLAND</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>PORTUGAL</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>ROMANIA</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>SLOVAKIA</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>SLOVENIA</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>SPAIN</td>
<td>1</td>
<td>1 branch of an Italian SCE</td>
</tr>
<tr>
<td>SWEDEN</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>UK</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td><strong>TOTAL NUMBER OF SCEs</strong></td>
<td><strong>17</strong></td>
<td></td>
</tr>
</tbody>
</table>


The Hungarian report states that there is only one SCE currently active in Hungary: Reference/Source: 'Magyarországi cégek összesített adatai' (Aggregated data of Hungarian firms), Céghírnök (Firm Herald) XX, No. 3. (2010): pp. 8-9.
Table No 11 A

<table>
<thead>
<tr>
<th>Country</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AUSTRIA</td>
<td>Commercial register</td>
</tr>
<tr>
<td>BELGIUM</td>
<td>Register of legal entities - <em>Belgian Official Journal</em></td>
</tr>
<tr>
<td>BULGARIA</td>
<td>Commercial register</td>
</tr>
<tr>
<td>CYPRUS</td>
<td>Register for cooperative societies</td>
</tr>
<tr>
<td>CZECH REPUBLIC</td>
<td>Commercial register</td>
</tr>
<tr>
<td>DENMARK</td>
<td>Register held by Danish Commerce and Companies Agency</td>
</tr>
<tr>
<td>ESTONIA</td>
<td>Commercial register</td>
</tr>
<tr>
<td>FINLAND</td>
<td>Trade register held by the National Board of Patents and Registration</td>
</tr>
<tr>
<td>FRANCE</td>
<td>Trade and companies registry</td>
</tr>
<tr>
<td>GERMANY</td>
<td>Register of co-operative societies</td>
</tr>
<tr>
<td>GREECE</td>
<td>Registry of public limited companies and limited liability companies</td>
</tr>
<tr>
<td>HUNGARY</td>
<td>Register of enterprises</td>
</tr>
<tr>
<td>ICELAND</td>
<td>Register of cooperative societies</td>
</tr>
<tr>
<td>IRELAND</td>
<td>Registrar of friendly societies</td>
</tr>
<tr>
<td>ITALY</td>
<td>Register of enterprises held by the Chambers of commerce</td>
</tr>
<tr>
<td>LATVIA</td>
<td>Register of enterprises</td>
</tr>
<tr>
<td>LIECHTENSTEIN</td>
<td>Register of companies held by the Office of land and public registration</td>
</tr>
<tr>
<td>LITHUANIA</td>
<td>Register of legal entities</td>
</tr>
<tr>
<td>LUXEMBOURG</td>
<td>Commerce and companies register</td>
</tr>
<tr>
<td>MALTA</td>
<td>Register of cooperative societies held by the Cooperative board</td>
</tr>
<tr>
<td>NETHERLANDS</td>
<td>Commercial register</td>
</tr>
<tr>
<td>NORWAY</td>
<td>Register of business enterprises</td>
</tr>
<tr>
<td>POLAND</td>
<td>Register of enterprises within the National Court Register</td>
</tr>
<tr>
<td>PORTUGAL</td>
<td>Commercial register</td>
</tr>
<tr>
<td>ROMANIA</td>
<td>Trade register</td>
</tr>
<tr>
<td>SLOVAKIA</td>
<td>Business register</td>
</tr>
<tr>
<td>SLOVENIA</td>
<td>Business register</td>
</tr>
<tr>
<td>SPAIN</td>
<td>Commercial registrar</td>
</tr>
<tr>
<td>SWEDEN</td>
<td>Register of SCEs held by the Swedish companies registration office (<em>Bolagsverket</em>)</td>
</tr>
<tr>
<td>UNITED KINGDOM</td>
<td>Register of SCEs held by the Financial Service Authority (Great Britain); Register of SCEs held by the Registrar of Credit Unions (Northern Ireland)</td>
</tr>
</tbody>
</table>

The country where the operators have formed the most SCEs (i.e. 5) is Italy.

Since 8 May 2010 the figures have changed very slightly, as shown by the national reports included in the annex to the present study.
There are still no SCEs in Bulgaria\textsuperscript{186}, the Czech Republic (while there are 15,702 CSs)\textsuperscript{187}, Greece, Spain, Austria, Poland, or Portugal (while there are 5,529 cooperatives and 99 practising secondary cooperatives in Portugal).

The German Ministry of Justice counted 2 SCEs in Germany in February 2011 (which is one more than in May 2010). The Luxembourgian report found that there was one registered SCE during its research in the Mémorial C (Recueil des sociétés et associations); whereas there are 271 cooperative societies under Luxembourgian law, 6 cooperatives established as public limited companies, and 21 foreign law cooperatives. The Slovak report refers to 5 SCEs registered on the "Business Register website"\textsuperscript{188} (as opposed to 3 in May 2010), whereas there are 125 co-operatives in Slovakia.

Even with an additional 4 SCEs, the total number only reached 21, which is still a very small number.

2. SUMMARY OF RESPONSES (COUNTRY BY COUNTRY) TO QUESTION NO 11

<table>
<thead>
<tr>
<th>Member State</th>
<th>Table No 11 B</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Are the operators choosing to use the European Cooperative Society?</td>
</tr>
<tr>
<td></td>
<td>Have the official or non-official statistics been published with regard to the use of this instrument in your country? If yes, what are they?</td>
</tr>
<tr>
<td></td>
<td>In the absence of these statistics, in your opinion, what is the approximate percentage of the use of this association, compared with national associations of the same kind?</td>
</tr>
</tbody>
</table>

Belgium

As with the SE, the numerous references to national law, the absence of provisions on fiscal matters, and the complex rules on employee involvement might detract from the proper functioning of the Regulation.

Bulgaria

Until early, there was not a single SCE registered in Bulgaria. This conclusion was reached on the basis of the online records of the Bulgarian trade register. Official statistics are published on the website of the Registry Agency concerning the different types of entities registered on the trade register for the years 2008, 2009, and 2010. As there are still no SCEs in Bulgaria, they are not included in the statistics.

Czech Republic

To date, there are no European Cooperative Societies registered in this country, whereas there are 15,702 active cooperative societies established under national law.

\textsuperscript{186} http://www.registryagency.bg/?page_id=30 (Bulgarian only).
\textsuperscript{187} See the Administrative register of economic entities of the Ministry of Finance: http://wwwinfo.mfcr.cz/area/area_es.html.en.
\textsuperscript{188} www.orsr.sk/Default.asp?lan=en.
### Germany

**Academic response**

According to some authors, this type of society is of no great practical importance, especially since the appropriate instruments already exist at a national and European level.

**The Ministry's response**

This response highlights the fact that, in February 2011, there were 2 SCEs in Germany.

### Greece

Although there are no official or non-official statistics available, there do not seem to be any SCEs registered in Greece. However, in accordance with local law, SCEs must be registered with the general trade register, which has not yet begun to operate. SCEs are similar to Local Cooperative Societies.

Once again, the SCE cannot be considered an 'equivalent' of the Local Cooperative Society. Primarily, this is because the SCE must include members from at least two different Member States, therefore it cannot serve the needs of local parties who do not intend to carry out cross-border operations and transactions.

### Spain

As mentioned in a previous response, it is not possible to establish a European Cooperative Society in Spain prior to the promulgation of law 3/2011.

### France

The French cooperative society, according to Law n°47-1775 of 10 September 1947, is present in a number of important business sectors: mainly agriculture, craft trades, and construction, i.e. the civil economic sectors. As a result, the European Cooperative Society does not seem to be a very attractive option for commercial operations. This impression must be corrected.

In fact, cooperative society status is open to all branches of business. It provides access to multiple forms of societies depending on which type of cooperative is chosen. Consequently, there are now four main bodies of cooperative societies: user cooperatives (such as consumer cooperatives, rent-controlled housing cooperatives, and co-ownership cooperatives), entrepreneur and business cooperatives (including agricultural cooperatives, craft cooperatives, but also in the commercial domain, covering maritime traders cooperatives, and transport cooperatives, etc.), and employee and bank cooperatives (such as le Crédit coopératif, la Caisse d’épargne, le Crédit Agricole, and le Crédit Mutuel). There is no proof of the economic importance of these sectors. In France, cooperative societies represent about 21 000 businesses generating EUR 200 000 billion of turnover. Within the banking sector, the cooperative system represents up to 60% of bank deposits. The creation of a European Cooperative Society is, therefore, an opportunity for the cooperative sector in general. The explanatory memorandum of the draft law n°411 bearing various
provisions for adapting company law to community law noted that, in Europe, the cooperative sector actually represents 300,000 businesses employing 2.3 million workers.

There seem to be no statistics about these associations other than those mentioned in the previous responses.

Italy

A study on the implementation of the Regulation relating to cooperative society status shows the number of European Cooperative Societies set up in each State on 8 May 2010. As shown below, 5 of the 17 existing SCEs were established in Italy. Despite the fact that Italy has the highest number of SCEs compared with other European countries, the study highlights some negative aspects that make the European cooperative format less attractive for national players. The main negative element that could impede the development of the SCE in Italy is the complexity of the Regulation. In particular, the complexity of the Regulation’s sources, and the relationship between these sources and national legislation. This opinion is shared by some national specialists. In addition, the procedures required to start up the society are complex and the involvement of workers required by Directive 2003/72/CE is also difficult. Finally, there are no particular advantages to setting up an SCE instead of a national cooperative society operating abroad. Also, there is a distinct lack of information about the characteristics, the advantages, and the existing experiences of the SCE.

In Italy, any operator wishing to use the SE, the EEIG, or the SCE is obligated to register the society or the association on the official business register (Registro delle Imprese). This public register is kept and managed by the Chambers of Commerce and, since the expressions 'EC', 'SCE', and 'EEIG' must be included in the implementation of these instruments, the exact number of these OI can be found easily by consulting the register.

A publication released on 12 September 2010 showed that 4 of the 14 existing SCEs in Europe were Italian.

Cyprus

There is no information available on this issue.

Luxembourg

The operators working in the Grand Duchy of Luxembourg who decide to use the social form of the cooperative are not choosing the European cooperative form.

Having found no official published statistics concerning the use of this instrument in the Grand Duchy of Luxembourg, the research for this questionnaire focused on the study Mémorial C, recueil des sociétés et associations. To date, there is only one European cooperative set up in the Grand Duchy of Luxembourg.

As part of this research, around 271 cooperative societies under Luxembourghian law, 6 cooperative societies set up in the form of
public limited companies and 21 foreign law cooperative societies were identified.

This source seems pertinent inasmuch as there is a legal obligation for the cooperative societies to publish their status in the Mémorial C, recueil des sociétés et des associations.

<table>
<thead>
<tr>
<th>Country</th>
<th>Details</th>
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<tbody>
<tr>
<td>Hungary</td>
<td>Hungarian operators almost never use the European Cooperative Society. However, as an SCE was established in Hungary, it can be said that this instrument is now being used.</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>Apparently, no statistical proof on the use of this instrument has been published in the Netherlands. The instrument is definitely used in the Netherlands, but it is difficult to give exact numbers on this subject.</td>
</tr>
<tr>
<td>Austria</td>
<td>On 1st January 2011 the data made available by the Austrian Ministry on this subject were still very limited. According to this data, up to this date, no European Cooperative Societies have been registered in Austria.</td>
</tr>
<tr>
<td>Poland</td>
<td>No statistical data relating to SCEs have been published. However, according to information from GUS (Polish Central Statistical Office), there are no SCEs in Poland. Nevertheless, the ability to create SCEs is a relatively new possibility and so it is necessary to wait for the idea of the European Cooperative Society to become better known. There is no reference to any SCEs in the Polish Court of Registration. Nevertheless, it is possible to find information in Polish on the internet about how to create an SCE (Europejska Spółdzielnia SCE Flandria).</td>
</tr>
<tr>
<td>Portugal</td>
<td>Official data are only available for the year 2009, and, up to this date, no European Cooperative Societies were registered in Portugal. The study on the implementation of Regulation 1435/2003 confirms that no SCEs were registered in Portugal up to 8 May 2010. It also attempts to provide a possible explanation for this. As regards national cooperatives, Portuguese lawyers subsequently provided data, in the form of a table, which are available in the national Register for the year 2009. This table can be found in the annex.</td>
</tr>
<tr>
<td>Slovakia</td>
<td>Slovak operators use the European Cooperative Society to a small extent. At present, there are 5 SCEs in Slovakia. However, SCEs are not distinguished in the statistics of the Business register published by the Ministry of Justice. No specific statistical data about SCEs have been published. The pertinent information is only available on the Business register’s website (<a href="http://www.orsr.sk/Default.asp?lan=en">www.orsr.sk/Default.asp?lan=en</a>).</td>
</tr>
</tbody>
</table>
A cooperation as part of the Slovak Commercial Code can be considered an association that is equivalent to this instrument under national law. From the data available on the Business Register website, it emerged that there are 125 cooperatives in Slovakia. Thus, the percentage of SCEs is negligible.

**Sweden**

**The Ministry’s response:** There is one SCE registered in Sweden.

**United Kingdom**

**The Ministry’s response:** No response has been given to this question.

**Academic response**

In a consultative document from June 1992 the government of the United Kingdom expressed its doubts about whether European legislation was required on this matter. The UK has been hostile to this idea from the start.

Having responded to this question, the team relied on a graph showing a list of States ranked in terms of the number of SCEs created, which is published in the annex, as well as the references of several studies, one of which is about the application of the Regulation relating to cooperative society, which gives details on the SCEs created in each country of the European Union.

It should be noted that no SCEs have been created in the United Kingdom. The legal structure of the European Company may not be particularly attractive for national players.

In addition, the use of terms such as 'association' and 'mutual organisation' creates an issue because these expressions do not correspond to any concept that exists in UK law. In 2001 the government was not fully convinced of the need for such a law and it wanted to be sure that this instrument would be well suited to the needs of the sectors concerned, for example for the members of cooperatives or other organisations. In 2001 a study was conducted by the *HM Treasury* with a view to understanding the advantages and disadvantages that the SCE could have for businesses, compared with pre-existing laws.

The formation of an SCE remains completely optional, which means that compliance costs would only be applicable to British organisations that have chosen to form an SCE.
CHAPTER 12: ARE COUPLES CHOOSING TO USE THE OPTIONAL FRANCO-GERMAN MATRIMONIAL PROPERTY SYSTEM?

After asking the rapporteurs whether couples are choosing to use the optional Franco-German matrimonial property system, the rapporteurs were also questioned about whether any discussion was taking place in European States, other than France and Germany, about the possibility of joining the Franco-German agreement on the optional matrimonial property system.

We will present an analysis of the responses (1.), followed by a more detailed summary showing the different responses from each country (2).

1. ANALYSIS OF THE RESPONSES TO THE CONSULTATION

In reality, neither France nor Germany has yet ratified the Franco-German agreement that these two countries have signed\(^{189}\). Therefore, no couple in the state can have chosen this optional matrimonial property system.

However, more interestingly, the responses, which show that this optional matrimonial property system remains largely unknown in other Member States, suggest that it is unlikely that other European countries will join this agreement. There were a large number of reports on the lack of debate about the possibility of joining this agreement in their countries (in particular, in the Czech Republic, Greece, Luxembourg, Hungary, the Netherlands, Austria, Poland, Portugal, and Sweden).

Similarly, the Bulgarian report pointed out that 'the Franco-German agreement has not been subject to debate during the latest process of amendment of the Bulgarian Family Code\(^{190}\)'. So, even at the time of a reform of family law, the existence of this optional matrimonial property system, derived from the Franco-German agreement, cannot be mentioned.

In relation to this, the Spanish report recounts the existence of a newspaper article on this agreement\(^{191}\).

Finally, few States are engaged in any real debate about whether to join this agreement.

However, in Italy, where some people seem to be in favour of such an optional matrimonial property system, this debate is taking place\(^{192}\). The Franco-German agreement is also in the process of being evaluated by the Slovak Ministry of Justice with a view to determining whether to join this agreement. However, the Slovak report indicates that:

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\(^{189}\) The agreement shall enter into force on the first day of the month following the exchange of instruments of ratification (agreement, article 20: Defrénois 2010, legal and fiscal act no 219, p.514.). For an analysis of this agreement, see P. Simler, 'The new optional Franco-German matrimonial property system of participation in matrimonial assets': Family Law 2010, study no. 8.

\(^{190}\) Valid as of 1 October 2009; Promulgated in State Gazette i. 47 of 23 June 2009, last amendments published in State Gazette i. 100 of 21 December 2010.

\(^{191}\) http://www.elmundo.es/elmundo/2010/07/16/union_europea/1279304978.html (Spanish only).

If the Slovak Republic were to accede to this agreement, the relevant national rules would have to be amended so as to exclude the application of the mandatory matrimonial property scheme under the Civil Code in cases where couples opted for the optional matrimonial property scheme under the agreement.

The fact remains that the spouses who would want to choose this optional matrimonial property system could do so, regardless of their nationality, most notably by establishing their first habitual residence in France or Germany.\(^{193}\)

In reality, this optional instrument is still much too new for the previous remarks to be truly significant.

### 2. SUMMARY OF RESPONSES (COUNTRY BY COUNTRY) TO QUESTION NO 12

<table>
<thead>
<tr>
<th>Member State</th>
<th>Table No 12</th>
</tr>
</thead>
</table>
| Belgium            | Are couples choosing to use the optional Franco-German matrimonial property system?  
                    | If the first question does not concern you, is there a discussion about whether to join the Franco-German agreement on the optional matrimonial property system in your State?  
                    | No response has been given to this question.                                  |
| Bulgaria           | Bulgarian couples are not in a position to choose whether to use the Franco-German matrimonial property system.  
                    | In addition, the Franco-German agreement was not subject to discussion during the last amendment procedure of the Bulgarian Family Code. |
| Czech Republic     | In the Czech Republic, this matter has not been discussed and is almost completely unknown. |
| Germany            | Academic response                                                           |
|                    | This agreement has not yet been transposed into national law.               |
|                    | The Ministry’s response                                                     |
|                    | The agreement has not been ratified. It is not yet possible to choose the matrimonial property system. |

\(^{193}\) It can be the first habitual residence of either spouse after marriage, accompanied by the choice to favour the law of this habitual residence (Article 3 of the Hague Convention of 14 March 1978 on the law applicable to matrimonial property systems) or the first habitual residence of the couple after marriage without the choice to favour the applicable law (Article 4 of the aforementioned Convention).
<table>
<thead>
<tr>
<th>Country</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Greece</td>
<td>As regards the Franco-German optional matrimonial property system, most couples are not aware of its existence, and therefore they are not using it at the moment. In Greece, there has not yet been public discussion on the adoption of this matrimonial property system.</td>
</tr>
<tr>
<td>Spain</td>
<td>Firstly, it should be noted that these participation systems are rarely taken up in Spain. This relates to only three rulings in the most consulted legal database, the Westlaw-Aranzadi database. Spain has not joined the agreement between France and Germany. Moreover, the possibility of joining this agreement was not discussed. Only one newspaper, ('El Mundo') made a reference to it in general terms.</td>
</tr>
</tbody>
</table>
| France | The optional matrimonial property system is the result of the agreement of 4 February 2010 and is in the process of ratification. Although the freedom of matrimonial agreements already allows couples to adopt the key clauses proposed by the agreement, it is nevertheless too early to establish any figures on this point.  

To date, however, the interest of the practitioners in this optional system should be underlined. As a result of this interest, it can be assumed that this system will be recommended, particularly for Franco-German couples. In fact, this system will become the most important asset to be known by as many French practitioners as German ones. This will lead to the resolution of some of the difficulties often encountered by Franco-German couples. These difficulties appear, for example, when the couple, having adopted French rights arising from the sharing of acquired matrimonial assets, then decide to acquire a property in Germany during the marriage. Entry of the property rights in the land register in the name of both spouses does not allow third parties to measure the exact scope of the rights of each spouse in community property.  

To get an idea of the number of couples affected, reference is made to data from the Ministry of Justice accompanying the presentation of the agreement of 4 February 2010. In France, 14.59% of marriages performed in 2006 involved couples of different nationalities. Moreover, in France, Franco-German marriages represented 2% of marriages involving persons of different nationalities performed in 2003.  

However, if Franco-German couples have a special interest in adopting this common system, other couples, for whom the matrimonial property system comes under French law or German law, can adopt it as well.  

In this respect, it should be noted that the model of participation in matrimonial assets is rarely adopted in France, because it is not advised by public notaries due to problems with assets relating to the evaluation of the participation claim. The simplified rules for the evaluation of the claim, as proposed by the common matrimonial property system, could thus attract more spouses to this system. However, it is still too soon to make a judgement. |
<table>
<thead>
<tr>
<th>Country</th>
<th>Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Italy</td>
<td>In Italy, the experience of the Franco-German system was discussed and noted as an important example of the steps necessary for the harmonisation of Family law. Given the growing number of couples of different nationalities in the EU, the arrival of the optional instruments could lead to a deliberate convergence aiming to overcome national legislation. In this way, there would be no need for national legislators to modify their own legislation and they could, therefore, maintain their particular features. At the same time, the parties could have the option to choose a framework that is more appropriate to their actual expectations. This could represent an even greater incentive, given that contracts on matrimonial systems are often not taken up in Italy. As a result, couples do not consult systems other than legal systems, even if they are not adapted to suit couples of different nationalities. From this point of view, there are proposals for the ratification of a Franco-Italian system.</td>
</tr>
<tr>
<td>Cyprus</td>
<td>No response has been given to this question.</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>No information was found on the possible use of the optional Franco-German system by couples. According to the results of the research, among parliamentary work and the consultations, as well as among various publications issued by different parliamentary groups and political parties, to date, there is no discussion on whether to join the Franco-German agreement on the optional matrimonial property system.</td>
</tr>
<tr>
<td>Hungary</td>
<td>At this stage, it would be pertinent to mention that the codification of the new Civil Code is under way in Hungary at the moment. It was the opinion of legislators (codifiers) over the past decade that alternative matrimonial property systems should be introduced and their use encouraged in the new book relating to Family law introduced in the new Civil Code. This could be important in terms of the relevance of the effect this OI will have on Hungarian family and matrimonial law in the future. In general, such an advantageous position for an OI in the EU is of great importance for the harmonisation of the law within the EU and could lead to the formation of one common Civil law.</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>Apparently, there has been no discussion on this subject in the Netherlands.</td>
</tr>
<tr>
<td>Austria</td>
<td>There are no cases of couples using this specific matrimonial property system in Austria.</td>
</tr>
<tr>
<td>Poland</td>
<td>This instrument is unknown in Poland. As a result, there has been no debate on its possible use.</td>
</tr>
<tr>
<td>Country</td>
<td>Response</td>
</tr>
<tr>
<td>--------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Portugal</td>
<td>This instrument is not in force in Portugal.</td>
</tr>
<tr>
<td>Slovakia</td>
<td>The Franco-German agreement is currently being evaluated by the Ministry of Justice in order to determine if the Slovak Republic should join this agreement or not. The preliminary results of this evaluation show that the matrimonial property system established by the agreement is not compatible with Slovak law. The French and German matrimonial property systems as such are quite different from Slovak law, for instance, Slovak law does not recognise prenuptial agreements. If the Slovak Republic did join this agreement, the relevant national rules would need to be amended in order to exclude the application of the obligatory matrimonial property system under the Civil Code in cases where the couples have chosen the optional matrimonial property system under the agreement.</td>
</tr>
<tr>
<td>Sweden</td>
<td><strong>The Ministry’s response:</strong> The Franco-German matrimonial property system does not apply in Sweden and there has been no debate on the possibility of joining this agreement.</td>
</tr>
<tr>
<td>United Kingdom:</td>
<td><strong>The Ministry’s response</strong> No response has been given to this question. <strong>Academic response</strong> This instrument is not known in the United Kingdom. There is currently no debate on this subject. As a result, couples do not use this matrimonial property system at the moment.</td>
</tr>
</tbody>
</table>
CHAPTER 13: WHAT ARE THE REASONS BEHIND THE ADOPTION OR REJECTION OF THE OPTIONAL INSTRUMENT?

This is a fundamental question, because it may help to explain why certain optional instruments are successful while possibly others failed.

We will present an analysis of the responses (1.) followed by a more detailed summary showing the different responses from each country (2.).

1. ANALYSIS OF THE RESPONSES TO THE CONSULTATION

In the mass market, when choosing a product, the consumer will compare it with others and choose the one which offers the best value for money and is best suited to their situation. There may be a product that fulfils all these requirements, but if the consumer is not familiar with it, he/she will not choose it.

Similarly, it is only natural that the two terms of the option are compared in order for the operators to determine whether or not to choose the optional instrument (1.1.). However, there are reasons that do not stem from this comparison, which may lead the operator to choose or reject the OI (1.2.).

1.1. Reasons based on a comparison of the two terms of the option (external causes)

1.1.1. Scope of the instrument

Firstly, the fact that the optional instrument has a larger scope than the national branch of the option plays a part in the operators' choice. This is particularly true for trademarks and designs, even for the granting of European patents.

The fact that the Community trademark covers 27 States, whereas the national right only covers one, is a key factor when choosing the optional instrument.

Most reports also identify that once an operator wishes to protect a patent in more than one EU country, it will be more useful for the operator to use a European patent (see Belgian and Bulgarian reports, for example). It would also be more appropriate to have a unitary right, which is something that most countries want.

The Bulgarian report highlighted 'the value to business of intellectual property rights which offer protection across the entire territory of the European Union by means of a single legal system.'

The German report adds that 'since the protection of intellectual property is only effective at an international level, it is clear that the operators use these OIs frequently.'

Therefore, this element relating to territorial scope is often in favour of the optional European instrument which frequently covers an area bigger than the national section of the option.
1.1.2. Legal certainty

The argument that the national section of the option offers more legal certainty than the optional instrument is less favourable for the optional instrument. Yet, this argument is often highlighted in the different reports.

For example, regarding the European Enforcement Order, the Belgian report showed that there were several problems involved in the application of the optional instrument in Belgium. These create uncertainties about whether the absence of the defendant can be likened to the fact that he/she does not contest the claim, under article 3.1 b of the Regulation, on the identification of authorities responsible for certification, or whether Belgium has satisfied the minimum conditions of Article 19 of the Regulation 805/2004 which makes provision for a review procedure. The Belgian rapporteur concluded:

'It can be said that the legislator and the majority of the legal theory and case law are in favour of the substitution of the Regulation for the existing standards. If no legislation is adopted quickly, the legal practitioners may be at risk of abandoning the Regulation and turning to the Brussels I Regulation, which makes provision for a procedure, albeit more expensive, that is more secure in its application.'

The German report also emphasises this lack of legal certainty in the European Enforcement Order:

'In German discussions, more emphasis is placed on the deficit of legal security due to the absence of an exequatur procedure, which is one of the main disadvantages of the European instrument.'

It is necessary to admit here that the first section of the option, originally from the national enforcement order and the exequatur procedure of the Brussels I Regulation, is very secure, because it has been subject to autonomous interpretations by the EU Court of Justice ECJ for many years.

For this reason, the Italian report adds: 'Commentators consider that it could have been foreseeable that national practitioners still continue to prefer, even for cases in which the European order could be used, the use of acknowledged instruments such as the one provided by art. 38 and following of Reg. 44/2001 (exequatur).'</n
The same problems exist for the European Order for Payment. The Belgian report points to several remaining uncertainties on the identification of the author of the claim and on the question of who shall serve/notify the Order for Payment.

197 The underlining is of the authors' doing.
Therefore, the legislator's intervention is eagerly awaited. The rapporteur has deduced from this that: 'In fact, some may be wary of using the European Order for Payment since the Courts and tribunals do not yet have a fixed position on the fundamental points of the procedure'.

Another example of the use of this legal uncertainty argument can be taken from the European Commission's report, which has already been cited in reference to the European Company. It notes that, 'According to another trend, in general, countries which only authorise the dual system of business administration have a larger number of SEs than those which only authorise the one-tier system. Also, very few SEs are set up in countries that already authorise the two systems. However, according to certain responses provided during public consultation, the adoption of a management structure not provided for in the national legislation of the country where the SE is registered, could be a source of legal uncertainty or practical problems'.

Of course, this factor must be put into perspective. Any reform, even a purely national one, will always create some application problems initially and, therefore, a slight uncertainty. However, in principle, this uncertainty is only temporary, and practically speaking, the pivotal issues are very quickly regulated by the implementation of the decree, or resolved by judges, and the new system becomes as secure as the old one. This is also true of the optional instruments. A new instrument necessarily creates new issues that may need to be resolved by a judge (at a national or possibly even European level), or regulated by a national legislator, if it is responsible in some way for the implementation of certain conditions for the application of the optional instrument. Therefore, the period of legal uncertainty is temporary. Nevertheless, it appears from these reports that it is advisable to limit as many of the problems of the implementation of the optional instrument as possible, in order to avoid impeding its development.

1.1.3. Complexity

Complexity is cited equally as often in the various reports, as an explanation for why the operators are rejecting or could reject the optional instrument. In the case of a choice between a simple national system and a complicated optional instrument, the operators will favour simplicity. This factor is not unrelated to the previous one, because this complexity is often the source of legal uncertainty.

As a result, the Regulation on the European Company is often criticised for its complexity.

The Belgian report notes in particular:

"Firstly, the Regulation lays down a hierarchy of standards. The Regulation is applied and can use the statute or national laws only if there are no other provisions. This implies that SEs must juggle different legislation. In the case of a merger or international transfer, the number of internal laws to be considered will force companies to call upon the advisors, which will significantly increase the cost of such operations."

199 The underlining is of the authors' doing.
Secondly, the rules implemented by the Regulation on the involvement of workers are complex. As a result, this obligation is an obstacle for companies who wish to form such a company\(^\text{202}\).

The European Commission made the same observation, as noted in its aforementioned report:

"The main negative aspects of forming an SE are: the formation costs, the length and complexity of the procedures, and the legal uncertainty associated with the fact that the operators and relevant public authorities are incapable of being objective and their lack of practical experience\(^\text{203}\). (…)

The lack of knowledge about the SE in the business community, both within the EU and outside it, is likely to be the main problem encountered when using this type of company. When a company announces that it is going to adopt the SE form, management often has to take the time to explain to the company’s trading parties (clients, suppliers, banks, etc.) and employees what an SE is. Several companies, legal advisers, and business associations believe that the rules on the involvement of workers have a negative impact, because they are too long and complex, especially in the Member States where the national legislation makes no provision for an involvement of workers system. These rules are sometimes judged disproportionately, particularly if the process of involvement concerns only a few employees. The ban on registering an SE before the completion of negotiations on the involvement of workers has also been referred to as a significant disincentive, particularly for listed companies as it is crucial that they are certain of the procedures and the time required for registration. However, employee organisations do not share this opinion\(^\text{204}\).

This situation is illustrated perfectly in the French report, which talks about a 'mille-feuilles de normes' (myriad of standards)\(^\text{205}\).

The Belgian report reiterates its observation about the EEIG, recalling that the groups will have to apply all of the following rules:

- Regulation 2137/85,
- Contract for the formation of a grouping,
- Auxiliary provisions of Regulation 2137/85 if the parties have not exercised their autonomy,
- Law of 12 July 1989,
- Code of Belgian Companies,
- General law.

It can be seen that complexity often arises less from the instrument itself than through its connection with other standards. In particular, the incomplete nature of the instrument and the reference to the national law is a source of great complexity and, therefore, a reason for the operators to reject the optional instrument.


\(^\text{203}\) The underlining is of the authors’ doing.


The European Commission acknowledges this in its aforementioned report on the European Company where it notes:

‘In the six years since the adoption of the SE Regulation experience has, nevertheless, shown that there were a number of problems with the application of this Statute in practice. The Statute of the SE makes no provision for an SE form that is identical across the European Union, instead there are 27 different types of SE. It includes numerous references to national legislation and the remaining uncertainties, as to the legal effects of this directly applicable legislation and its link to national legislation’.  

The reports annexed to the present study follow this same line of thought in reference to other optional instruments. Thus, the Spanish report attributed the fact that it was necessary to wait until March 2011 before an SCE could be established in Spain to the complexity of the connection of the SCE with national laws. 

Moreover, the study on the SCE has already listed seven pages and a total of 101 references made to national law in this optional instrument. 

This study concluded:

‘Apart from the general one in Article 8, par. 1 c), there are 101 specific references in a Regulation made up of 80 articles, which means more than one reference (1.25 references, to be precise) for each article on average. It goes without saying that this mechanism risks seriously hampering the effectiveness of the SCE Regulation and reducing the probability of its success. As will be pointed out later, references to national law are seen as a major problem by the stakeholders consulted for this research, which represents a cause of complexity of the SCE Regulation, which is considered, in turn, a major dissuasive factor for setting up an SCE’.

The Slovak report also criticises the legislation for being too complex and based on different sources of law.

The French report adds:

‘The result of this plurality is that the legal position is not simplified by the existence of a Community or European instrument but may instead, in some respects, be rendered more complex (interpretation of the notion of distinctiveness in trademark law, the areas of protection relating to a national patent claim and a European claim for the same object, and the designation of countries with a European claim as well as administrative or judicial dispute procedures)’.

1.1.4. Cost

A comparison of costs is equally important for the operator when choosing whether to use the optional instrument. So much so that the Luxembourg response considers ‘that the reasons why professionals decide to use these optional instruments relate to the advantages that they offer in terms of the reduction in costs and duration’.

208 Aforementioned study p. 55.
For example, a comparison of costs is particularly likely to take place in the case of optional instruments that work relatively well, such as the optional instruments on intellectual property. Nevertheless, to justify the fact that the Benelux trademark works just as well as the Community trademark, the Belgian report points out the fact that it is less costly.

On the contrary, the Bulgarian and French reports emphasise the fact that the intellectual property optional instruments are less costly (registration for protection in 27 Member States).

The French report mentions the following numbers in terms of the trademark:

- **Community trademark**

For the registration of a Community trademark, a single tax is payable, which has been reduced by 40% since 2009:

Basic tax: EUR 900 for electronic filing (e-filing) or EUR 1050 if the paper form is used. In each case, if the claim contains more than three classes of product and service, a supplement of EUR 150 is payable for each supplementary class.

- **National trademark**

Table No 13

<table>
<thead>
<tr>
<th>Paper filing</th>
<th>EUR 225</th>
<th>For products and/or services belonging to one, two, or three classes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Electronic filing</td>
<td>EUR 200</td>
<td></td>
</tr>
<tr>
<td>Supplementary classes</td>
<td>EUR 40</td>
<td>For every supplementary class of product and/or service</td>
</tr>
<tr>
<td>Payment</td>
<td>Payment of fees must be made on the day of filing.</td>
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</tr>
<tr>
<td></td>
<td>In the case of filing by fax, there is a supplementary fee of EUR 100</td>
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</tr>
</tbody>
</table>


In the same way, the European Commission’s report on the European Company emphasises the issue of costs, but this is to point out that the EC’s costs are sometimes too high:

> Well-known examples of the very high costs of the forming an SE include that of the Allianz SE and the BASF SE, where the cost of forming an SE amounted to EUR 95 million and EUR 5 million respectively. Apart from these cases, the average cost of forming the SEs interviewed during the external study was approximately EUR 784 000 (including the cost of tax, legal advice, translation, and registration costs). The general costs of forming an SE vary between a EUR hundred million and amounts between EUR two and four million.

The Italian report continues in this respect with regard to the EEIG:

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209 See the responses given by Jérôme COLLIN, industrial property consultant, to Question no 2.
'One reason could be found into administrative costs, given that there are more cost effective informal ways of achieving most desired commercial objectives, and that such alternatives can remain much more private.'

In the French report, the CCIP also emphasises the fact that the formation of an SE is 'costly and time consuming'.

Others, like the Belgian report, note that there is not even a specially designated tax system that could act as an incentive.

1.1.5. The speed and efficiency of the procedure

The operator will also take into account the speed of the procedure when it is comparing the two sections of the alternative. Thus, the Belgian report emphasises the fact that the Benelux trademark is resistant to the Community trademark, because, in addition to the lower cost, the procedure would be faster.

On the other hand, the Bulgarian report praises the efficiency of the procedure before the OHMI, which administered the system successfully. It praises 'the easier procedure – one single application, possibility to apply in all EU official languages, a single administrative body, possibility to ask protection for more than one design/mark with a single application, lower costs (one single fee)'.

Therefore, it seems that the involvement of a European body is likely to make the system more efficient.

With regard to the intellectual property optional instruments, the French report emphasises the simplification of the procedure:

'Simplified formalities and management thanks to:

- a single claim
- a single language used in the procedure
- a single administrative centre
- a single file to manage.

Claims can be submitted either directly to the Community Office or to central industrial property services.

The claim can also be submitted electronically. OHMI services ensure that:

- applicants receive a receipt in real time
- applicants receive on-line verification to ensure deposits are made without error
- the date of filing is guaranteed
- the opening of the registration procedure is sped up
- the claimant's contact details can be used for subsequent claims'.

Thus, the operator will first compare the two sections of the alternative in order to make a choice. However, other elements independent of a comparison of the two terms of the option can also help the operator to make a decision.
1.2. Reasons not based on a comparison of the two terms of the option (internal causes)

1.2.1. Whether to adapt the optional instrument to the needs of the operators

The issue of adapting the optional instrument to the situation in question is important.

In fact, it may happen that the chosen optional instrument, in its entirety, is ill-adapted to the needs of the operators of a Member State.

This is what the European Commission noted in its aforementioned report on the European Company: "Moreover, the uneven distribution of SEs in the European Union shows that the Statute is ill-adapted to the situation of companies in all the Member States".

This is confirmed by the Spanish report, which notes that Spanish companies are the small companies in Spain and cross-borders relations are rare: "In the case of the European society, it does not correspond to the small company most frequent in Spain, the sociedad limitada. European cooperative societies cannot still be constituted. Since most companies in Spain are small, their cross-border relationships are not frequent and therefore the use of OI is not necessary for their economic traffic".

The Bulgarian report follows the same line of thought: "The reasons for the lack of SEs in Bulgaria are among others the size of national companies (mostly SMEs and companies where the capital is individually owned), the high minimum capital requirement, the set-up costs, the time-consuming and complex procedures, the little knowledge and awareness in the legal and business community about the SE form. The reason for the lack of SCEs in Bulgaria are similar – the small size of Bulgarian co-operations, the high minimum capital required for the establishment of a SCE, the lack of relevant practical experience in business representatives, legal practitioners and competent public authorities".

This is a similar conclusion to that reached in the Greek report with regard to the SCE: "Again, the SCE cannot be considered as an 'equivalent' to local law cooperative societies, mainly because the SCE must include members from at least two different Member States; so it cannot serve the needs of local parties who do not intend to have cross frontier operations and transactions".

On the other hand, the adoption of the SE will be particularly useful for facilitating the control of cross-border groups in countries where these exist, and for reducing their operating costs, in particular in the banking and insurance sectors, as noted by the CCIP in the French report.

Sometimes, it is one particular provision of the optional instrument (and not the optional instrument as a whole) that is ill-adapted. This is what the Belgian report pointed out about the European Company:

"Finally, the Regulation makes provision for the obligation for European Companies to reconcile their registered office with their place of central administration. This can

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be criticised because this obligation prevents European Companies from freely transferring their registered office from one territory to another. This rule is ill-adapted to the current need for business mobility.'

Sometimes, the reports put the lack of use of the optional instruments down to the fact that they only affect cross-border relations and that there are not a large number of cross-border relations in existence.

The Bulgarian and Slovak reports, for example, use this to explain the low level of use of procedural optional instruments. There are not many cross-border relations and, therefore, there are few cross-border disputes. Thus, there is a low level of use of these procedural optional instruments.

However, one might ask if the optional instrument could, by favouring cross-border relations, have an influence on the number of these relations. This question is at the heart of the debate on the contractual law optional instrument. However, the situation is slightly different for procedural optional instruments because here it is about disputes.

The procedural optional instrument will not directly increase cross-border disputes.

At most, it could have an indirect influence on who will take part for the following reason: Reluctance to take part in cross-border trade is sometimes due to the fact that, in the case of a dispute, everything would be much more complicated. Therefore, by reassuring the operator that cross-border disputes would be easily resolved, thanks to the procedural optional instrument, it could indirectly facilitate the development of cross-border trade.

In other words, the instrument is self-sustaining because it encourages the development of cross-border trade, which could trigger disputes within its scope.

Such reasoning does not seem to derive from the responses to the questionnaires that were sent. No one noted that the number of cross-border disputes would increase after the introduction of these optional instruments, as a result of an increase in cross-border relations. However, there was not a direct question on this.

1.2.2. Correct or incorrect implementation of the optional instrument by national laws

When it is necessary to connect the optional instrument with national laws, the success of the aforementioned instrument is dependent on the way in which this connection is made.

For example, in terms of the SE, everything will ultimately depend on the national provisions. The French report notes that the ‘flexibility of the ‘French’ SE is a decisive factor, because it gives shareholders greater freedom in the organisation of their reports in a similar manner to the simplified joint stock company’. In other words, in this case the connection would be a positive thing for the optional instrument.

However, in other hypotheses, this does not hold true. The Belgian report placed a great deal of emphasis on the problems with the implementation of the Regulation on the European Enforcement Order in Belgium.

The Greek report (in its response to question 4) has also shown that an incorrect implementation of the optional instrument by national law can be a causal factor in its failure:
'In the absence of statistics, it is worth noting that, in Greece, unlike other European countries such as France, claims cannot be filed with the relevant court by any means of communication (fax, email, etc.). Greece does not accept claims filed electronically. The effective delivery of claims to the registry may be considered an obstacle for claims of less than EUR 2 200.'

It would seem that, in order to minimise the risk of failure of an optional instrument, European legislators would do well to minimise the referrals to national laws.

1.2.3. The lack of knowledge about the optional instrument

This is probably one of the most significant reasons behind the success or failure of an optional instrument.

Just as a fabulous product can go unnoticed by the consumer without advertisement, the optional instrument, even if it is suitable and beneficial, needs to be brought to the attention of the operators and their advisors in order to be effective. It can even be necessary to have educational presentations in order to achieve the efficiency that can be legitimately expected.

This is something that stood out in all the reports.

For example, the German Ministry of Justice notes that 'the low level of publicity is probably the main reason for the relatively little importance in practice'.

In relation to this, the German report from universities and legal practitioners shows that the well-known intellectual property optional instruments are frequently used, whereas the civil procedure optional instruments, which are less well-known, are applied less frequently.

The operators' lack of knowledge of the procedural optional instruments is also the conclusion reached in many reports (for example, the French, Hungarian, Slovak, and Swedish reports).

Obviously, this is not only the operators' lack of knowledge of the optional instruments, but also their advisors' lack of knowledge.

Thus, the Hungarian report notes, 'Hungarian lawyers are no (or not good) experts in OI'.

In terms of the European Enforcement Order, the Slovak report notes:

'The following disadvantages of the European Enforcement Order and/or reasons why professionals do not opt for this instrument may be identified: (...) lacking knowledge of professionals with respect to this instrument, its advantages and disadvantages'.

It comes to the same conclusion for the small claims procedure, but adds: 'this lack of knowledge is corroborated by reasoning of certain courts that apply the relevant Regulation also to proceedings that were not initiated on the basis of forms filed under this Regulation'.
The lack of knowledge of the optional instrument could, paradoxically, be a disability, even for an operator who is familiar with the aforementioned instrument. This is because it could face problems due to the fact that others are not aware of them.

Therefore, in the French report the CCIP notes that one of the causes of problems with the SE is that ‘this statute remains largely unknown, not only within administrative bodies, but also amongst the general public. Therefore, companies who make this choice must cope with, in particular, the raised costs of educating and communicating the effects and impacts of transforming into an SE to the general public’.

1.2.4. Neutrality of the optional instrument

It can be seen that the neutrality of the optional instrument, which is the law of either of the two parties, is, at no point, expressly discussed in the various reports. This is inherent for the optional matrimonial property system.

1.2.5. The European image of the optional instrument or the European label

At some points, this argument has been invoked to the benefit of the European Company. The French report emphasises the fact that the European label of the SE is an asset. However, this point does not seem to be made in the many other reports.
Table No 13 A - The different reasons behind the success and the problems brought together by the optional instrument

<table>
<thead>
<tr>
<th>OPTIONAL INSTRUMENT</th>
<th>Reasons for success</th>
<th>Reasons for problems</th>
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| EEO                 | simplified cross-border enforcement  
less costly       | legal uncertainty of the EEO due to problems with the application of the EEO  
In contrast, the national section of the option (national law and Regulation 44) is very safe, because interpretations have already been given by the ECJ  
few cross-border disputes  
incorrect implementation of some national laws and Regulations  
not well known  
legal practitioners have a lack of experience with these OIs |
| Small claims        | simplified cross-border enforcement for small issues  
less costly       | few cross-border disputes  
incorrect implementation of some national laws and Regulations  
not well known  
legal practitioners have a lack of experience with these OIs |
| Payment order       | simplified cross-border enforcement  
less costly  
speed       | legal uncertainty of the payment order due to the problems of interpretation of the Regulation  
few cross-border disputes  
not well known  
legal practitioners have a lack of experience with these OIs |
| Community trademark | larger territorial scope than the national trademark  
lower cost than the accumulation of national trademarks  
effective procedure before the OHMI  
simplification of the procedure | |
| Community designs   | larger territorial scope than the national design  
lower cost than the accumulation of national designs | |
<table>
<thead>
<tr>
<th>Policy Department C: Citizens’ Rights and Constitutional Affairs</th>
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<tbody>
<tr>
<td><strong>European patent</strong></td>
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<td><strong>European company</strong></td>
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<td><strong>EEIG</strong></td>
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<td><strong>SCE</strong></td>
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<td><strong>Optional matrimonial property system</strong></td>
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### 2. SUMMARY OF RESPONSES (COUNTRY BY COUNTRY) TO QUESTION NO 13

<table>
<thead>
<tr>
<th>Member State</th>
<th>Table No 13 B</th>
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<tbody>
<tr>
<td>Belgium</td>
<td>In your opinion, why do professionals (or couples in relation to the OI as referred to in Question II-Q10) adopt or reject these OIs?</td>
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<td>According to the Belgian legal practitioners who responded to this questionnaire, the instruments relating to the EEO, the European payment order and small claims are adopted because they are more effective and less costly.</td>
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<td>Nevertheless, they refer to three problems with the application of the EEO:</td>
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<td></td>
<td>- the issue of whether the absence of the defendant can be likened to the fact that he/she does not contest the claim, for the purposes of Article 3.1 b of the Regulation.</td>
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<td></td>
<td>- European legislators leave the task of identifying the appointing authorities, in terms of certification, to the Member States. In Belgium, the task of identification is provided for by the circular on 22 June 2005, which is hotly contested by legal commentators and case law in that it misinterprets the Regulation. In particular, it stipulates that the appropriate body for granting the European enforcement order certificate is the head court office of the jurisdiction that made the decision or that registered the court settlement. However, this authority seems to exceed the interpretative limits tolerated by the Regulation. On the one hand, the Regulation invariably uses the term 'court of origin', which the Regulation defines as being the court 'attached' to the decision on the substance of the case. On the other hand, if the Regulation forces States to notify the Commission of any decision concerning the authorities who are responsible for the certification of official deeds, nothing is mentioned with regard to the identification of 'courts of origin'. This seems to clearly indicate that States are not given any discretionary power. Case law almost unanimously considers that it is the responsibility of the judge to certify the decision on a European Enforcement Order and it is the responsibility of the officer of the court to issue the European enforcement order certificate.</td>
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<td>- Article 19 of Regulation 805/2004 makes provision for a review procedure. The issue of ascertaining whether Belgium satisfies the minimum conditions of this Article is very controversial. The stakes are high, because if Belgium does not satisfy the minimum conditions for a review in exceptional cases, the Regulation is, in compliance with recital 19, unenforceable.</td>
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<td>They also refer to the application problems for the European Payment Order: firstly, several uncertainties remain about the person of the</td>
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author of the claim; secondly, case law is divided over the issue of who shall serve/notify the Payment Order.

Therefore, intervention by the legislator is eagerly awaited. In fact, some may be wary of using the European Payment Order when the Courts and tribunals do not yet have a fixed position on the fundamental points of the procedure.

As regards the European Enforcement Order, Belgian legislation is generally similar to the rules laid down by the Regulation, but there are uncertainties surrounding the interpretation of certain elements of the text. Essentially, it is this legal uncertainty surrounding the interpretation of legal texts that drives the operators to favour the procedure established by Regulation 44/2001.

As regards the procedure of the European Payment Order, there has been little advertisement of this optional instrument, which explains why litigants do not always use it. In addition, this text has caused several controversies, which explains the legal uncertainty surrounding its correct application. In practice, this procedure is rarely used.

As regards the Regulation establishing a procedure for small claims Regulations, the lack of information here also affects the use of this instrument. A Belgian consumer rights association, Test-achat, recently claimed in a daily newspaper that this procedure was still too low-profile and that it should be brought to the attention of the public by publishing an explanatory brochure, for example.

As regards Community trademarks in Belgium, an individual wishing to register a trademark has the choice of using the Benelux Law on trademarks or the Regulation on the Community trademark. The advantage of the Community trademark is that it covers the territories of 27 Member States, whereas Benelux Law only covers three territories. Nevertheless, the Benelux procedure is less expensive and marginally quicker than the Community procedure. These advantages and disadvantages are such that, at present, the Benelux trademark is used far more than the Community trademark. Between 1996 and 2010 14,535 (or 2.35 %) of claims put forward in the EU. In 2011 139 claims had already been made, or 2.66 % of the total claims put forward in the EU.

With regard to Community designs, the situation is the same. Between 1996 and 2010 8,956 (or 2.17 %) of claims put forward in the EU. In 2011 123 claims had already been made, or 2.45 % of the total claims put forward in the EU.

As regards the European patent, it all depends on the level of protection sought by the patent holder. If there is only one use in Belgium, the Belgian patent is obviously sufficient. If the patent holder seeks broader protection, it would be better for him/her to use the European system which centralises the procedure, rather than to
file separate applications in each Member State. The adoption of Regulation relating to the unitary patent is eagerly awaited. A draft Regulation has already been adopted in December 2009. A (unitary) Community patent would drive innovation, growth and competition, all of which are necessary for the development of the internal market. At the very least, enhanced cooperation between ten Member States has been initiated.

As regards the European Company, the establishment of such a company type is complicated for various reasons. Thus, it is possible that the operators prefer to use other company types. Moreover, the Regulation could, at some limited levels, drive businesses to choose other company types.

Firstly, the Regulation lays down a hierarchy of standards. The Regulation is applied and can use the statute or national laws only if there are no other provisions. This implies that SEs must juggle different legislation. In the case of a merger or international transfer, the number of internal laws to be considered will force companies to call upon the advisors, which will significantly increase the cost of such operations. Secondly, the rules implemented by the Regulation on the involvement of workers are complex. As a result, this obligation is an obstacle for businesses who wish to form such a company. Thirdly, the Regulation makes no provision for a specially designated tax system for European Companies. Fourthly, the statutory margin of autonomy is very limited. Finally, the Regulation makes provision for the obligation of European Companies to reconcile their registered office with their place of central administration. This can be criticised as this obligation prevents European Companies from freely transferring their registered office from one territory to another. This rule is ill-adapted to the current need for business mobility.

As regards the European Cooperative Society, as with the SE, the numerous referrals to national law, as well as the absence of tax provisions, and the complex rules on the involvement of workers may detract from the proper functioning of the Regulation.

As regards the European Economic Interest Grouping, just like the Regulations on the European Company and the European Cooperative Society, the Regulation on the EEIG is incomplete in that it refers to national legislation for everything that it does not lay down itself. As a result, companies adopting this form should take the following rules into consideration:

- Regulation 2137/85,
- Contract for the formation of groups,
- Auxiliary provisions of Regulation 2137/85, if the parties have not exercised their autonomy,
- Law of 12 July 1989,
- Code of Belgian Societies,
- General law,
This implies that the businesses adopting such a company type will have to juggle with European legislation and the legislation of different Member States.

It is expected that the EEIG will be subject to the law of its registered offices. Other disadvantages of this type of association include, in particular, the fact that the activities performed must be similar to the existing activities of the members of this association. Moreover, the members are personally responsible for any debts. However, the advantage of the association is that it offers businesses a means of incorporated cooperation. Members retain a certain amount of legal and economic autonomy, which is another advantage.

Bulgaria

The main reasons behind the low level of use of these civil procedure OIs are as follows:

- the relatively low number of cross-border cases;
- the lack of information for the interested parties, in particular on the European small claims procedure;
- the lack of practical experience of advisors.

The reasons behind the lack of SEs in Bulgaria are, among others, the size of national businesses (particularly the SMEs and companies whose capital is held separately), the very high minimum capital requirement, the implementation of costs, the long and complex procedures, the lack of knowledge and awareness of the legal community and of business in terms of the SE.

The reasons behind why there are no SCEs in Bulgaria are the same: the small size of Bulgarian cooperations, the very high minimum capital requirement for the formation of an SCE, the lack of relevant practical experience among the representatives of the businesses, the legal practitioners, and the relevant public authorities.

As with EEIGs, this is an option that has existed for other Member States since 1985 and has paved the way for the introduction of the SE and the SCE. Consequently, it is understandable that since this OI has only existed in Bulgaria since 2007, it is not yet used in practice.

Industrial property OIs: The Community trademark and Community designs have become extremely popular and the number being registered surpassed even the most optimistic predictions made when the relevant Regulations were adopted by the Council of Ministers. In general, Bulgaria is not an exception to this trend. The main reasons behind why Bulgarian operators choose the Community trademark and patent are, among others, as follows:

- the business value of intellectual property rights, which offer protection throughout the European Union by means of a single legal system;
- the success with which the Office for Harmonisation in the Internal Market (OHIM) has administered the system;
- the much simpler system: a single application, the possibility to apply in all the official languages of the EU, a single administrative body, the possibility to request protection for more than one patent/trademark with a single application, reduced costs (a single fee).

The European patent is used by Bulgarian operators, because it offers the possibility of protection in more than one EU Member State with a single application to an administrative body (European Patent Office), with a single research and examination of applications process. This saves both time and money.

However, this procedure has several disadvantages compared with the Community trademark and the Community design, and given the success of these two since their introduction, there is a serious debate about the introduction of a Community patent and the creation of a new unitary and autonomous industrial property law.

<table>
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<tr>
<th>Czech Republic</th>
<th>The question was not included.</th>
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**Germany**

**Academic response**

As regards civil procedure instruments, these optional instruments are new and still not well known. In addition, their scope is relatively narrow which will undoubtedly prevent them from being frequently used in practice. Moreover, formal obstacles, such as translation, should not be underestimated.

As regards intellectual property instruments, these instruments are very well known among the operators, which explains their frequent use in practice. Furthermore, their scope is not limited in the same way as that in terms of civil procedure. Finally, since the protection of intellectual property is only effective at an international level, it is clear that the operators frequently use these OIs.

As regards company law instruments, these instruments are still of little relevance in practice owing, in particular, to a limited scope and a high level of complexity in the implementation of the rules on the one hand, and on the other hand to the recent development of European company law (legislation on the Directive and case law of the ECJ) which now allows (particularly in terms of cross-border mergers and the international transfer of registered office) all company types to conduct cross-border operations which had previously been reserved only for European instruments.

**The Ministry’s response**

As regards the EEO, the low level of advertising is probably the main
<table>
<thead>
<tr>
<th>Country</th>
<th>Reason for Relatively Insignificant Practice</th>
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<tbody>
<tr>
<td>Greece</td>
<td>The question was not included (because it is understood as being limited to matrimonial property systems).</td>
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<tr>
<td>Spain</td>
<td>The reasons have already been explained.</td>
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<td>In the case of the European Company, it does not correspond to the most common small business in Spain, the Sociedad Limitada.</td>
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<td>As regards European Cooperative Societies, they cannot yet be formed. As the majority of businesses in Spain are small, it is not common for them to have cross-border relations, and so the use of the OI is not necessary for economic trade in their case.</td>
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<td>As regards the agreement between France and Germany, the Spanish cannot choose this system because it is only available to citizens of France and Germany.</td>
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<tr>
<td>France</td>
<td>The responses have been given for each group of OIs:</td>
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<td></td>
<td>As regards the OIs on the law of economic interest groups:</td>
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<td></td>
<td>For the SE, broadly speaking and without the possibility for development here, there are some aspects of the responses which encourage professional to use this company type. The SE is an excellent mobility tool because it facilitates the transfer of registered office. It is also a restructuring tool because it facilitates cross-border merger operations in the European Union. In fact, even in view of the merger Directive, it is still a competitive tool for this operation. The text appropriate to mergers is not discernibly different from that for which the SE has already made provision (it is noted that this point is being discussed. In its response which follows, the CCIP believes instead that the merger Directive may be more attractive). Its European label is still an asset. However, overall, in reality, the flexibility of the 'French' SE is a decisive factor, because it gives shareholders greater freedom in the organisation of their reports in a similar manner to the simplified joint stock company.</td>
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<td>Its weaknesses, which could put off professionals, are known. These include the constraints linked to the fact that the registered office and the central administration must be located in the same Member State, the fact that there is no possibility to form an SE ex nihilo, the onerous procedure for the formation of an SE through merger, the uncertainty surrounding the concept of the subsidiary, the major formation constraints in the case of an SE holding company, and the constraints linked to transforming a public limited company into an SE. (in its response which follows, the CCIP adds that the involvement of workers is also a weakness).</td>
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<tr>
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<td>As regards the SCE, its advantages, which encourage professionals to</td>
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choose it, are known. These include a strong *intuitus personae*, the fact it is an effective means of pooling of assets on an equal basis, the open formation method, the flexibility of standards surrounding the formation of equity capital (possibility of variation), and significant statutory freedom.

Its main weaknesses, which may discourage professionals, are the complexity of its general Regulations (like the SE, it is a myriad of standards) and the complexity of the numerous referrals to national laws.

For the EEIG, its varied field of activity (cooperation in the banking, insurance and energy sectors among others), its knowledge of almost all the legislation of the Member States of the European Union, the fact that it is adapted to cooperative *joint ventures*, its Community dimension (less referrals to national law), and its substantial flexibility in terms of formation and operation, all encourage its adoption by professionals.

For the most part, its weaknesses stem from the uncertainty linked to the referrals to national laws, even with the few risks of *law shopping* that also exist for other associations, from its closed nature (related objects etc.), and from the unlimited joint and several liability of its members.

The Paris Chamber of Commerce and Industry (CCIP) also wanted to respond to this question:

Taking the example of the SE, the positive aspects that could encourage the heads of businesses to use them are as follows:

- Firstly, the European image (the European 'label') of the SE is a deciding factor. By adopting this legal instrument, the professionals are asserting their European identity and their willingness to be open to different markets. The consistent process of abandoning an exclusively internal structure for the SE is generally perceived as a strong message of openness and of European citizenship.

- Secondly, the adoption of the SE often has the aim of facilitating the control of cross-border groups and of reducing their operating costs. This is particularly true in specific sectors such as banking and insurance activities, for reasons related to the requirements of equity and prudential supervision (Bâle II and soon Bâle III).

- Finally, the third reason given by the heads of businesses is the possibility to transfer their businesses' registered office to any of the Member States without changing the company type. However, this last positive factor must be qualified: firstly, the adoption of the Directive 2005/56/CE of 26 October 2005 on cross-border mergers has reduced this interest. From now on, it is easier to conduct a cross-border merger between national company types than by means of an SE, especially considering the rules on the involvement of
workers. Secondly, this interest could also be limited if the project of the 14th Directive relating to the transfer of registered offices is revived. Thirdly, the decision by the French legislator to make it compulsory for a public limited company to have its headquarters and its registered office in the same place necessarily restricts the freedom of association.

However, there are also many reasons discouraging professionals from adopting the SE: On the one hand, the formation of an SE is costly and time-consuming (this is particularly due to the minimum amount of capital required and the complexity of the procedures). Thus, only structures capable of bearing these costs and using teams of top-level experts are able to access this. On the other hand, this statute remains largely unknown, not only to the administrative bodies, but also to the general public. Therefore, companies who make this choice must cope particularly with the raised costs of educating and communicating the effects and impacts of transforming into an SE to the general public. Finally, for many, the negotiation procedure with employees contributes to the complexity of this statute and to the raised formation costs.

As regards civil procedure OIs

The reason why professionals are not adopting the civil procedure optional instruments (European Enforcement Order, European Order for Payment Procedure, European Small Claims Procedure) is mainly the lack of knowledge about the procedures, which are all new. It is recalled that Regulation No. 1896/2006 of 12 December 2006 establishing a European Order for Payment Procedure has only been applicable since 12 December 2008 and Regulation No. 861/2007 of 11 July 2007 establishing a European Small Claims Procedure has only been, in turn, applicable since 1 January 2009.

With regard to Intellectual Property OIs

They allow for consistent protection throughout the European Union according to the simplified and standardised registration procedures: Reduced costs in terms of the protection given (one registration for protection in 27 States).

For example:

- Community trademark
  For the registration of a Community trademark, a single tax is owed, which has been reduced by 40% since 2009:
  Basic tax: 900 EUR for electronic filing (e-filing) or 1050 EUR if the paper form is used. In each case, if the application contains more than three classes of product and service, a supplement of 150 EUR is payable for each supplementary class.

- National trademark
Implementation of optional instruments within European civil law

Paper filing: EUR 225. For products and/or services belonging to one, two, or three classes.
Electronic filing: EUR 200.
Supplementary classes: EUR 40 for every supplementary class of product and/or service.
Payment of fees must be made on the day of filing. In the case of filing by fax, there is a supplementary fee of EUR 100.

Simplified formalities and management thanks to:
- a single application
- a single language used in the procedure
- a single administrative centre
- a single file to manage.

The applications can be submitted either directly to the Community Office or to the central industrial property services.

The application can also be submitted electronically. OHMI services ensure that:
- applicants receive a receipt in real time,
- applicants receive on-line verification to ensure filing is made without error,
- the date of filing is guaranteed,
- the beginning of the registration procedure is sped up,
- the claimant's contact details can be used for subsequent claims.

As regards family property law OIs

The very recent nature of the Franco-German agreement establishing a common matrimonial property system explains why it has not yet been adopted. Full information for the practitioners as to how the system operates will certainly be a deciding factor in terms of the adoption of this system. The fact that the model of participation in matrimonial assets is not favoured by the French notary profession, means that the training offered to practitioners (and, in particular, to notaries) will be essential in updating the specifics of the common matrimonial property system, offering certain advantages as much for Franco-German couples as for other couples.

According to Maître Michaux, everything that supports the status of people is good to use because disputes in this area are delicate and the legal result is not well controlled. The nature of the OI seems to me to be to avoid disputes. For its part, if an optional instrument exists for the status of people, it should make maximum use of this and it would seem essential to have a common system in Europe, because there is an increasing number of mixed marriages and that has consequences for the children and the scandals attached to them.

Italy

The question was not addressed (because it is understood as being
<table>
<thead>
<tr>
<th>Country</th>
<th>Response</th>
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<tbody>
<tr>
<td>Cyprus</td>
<td>No response has been provided for this question.</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>It can be considered that the reasons why professionals decide to use these optional instruments relate to the advantages that they offer in terms of reduced costs and duration. It is also possible to conclude that these instruments facilitate the development of the procedures. However, the lack of information and training on these optional instruments within the legal professions is reportedly behind the low level of use in terms of procedural optional instruments.</td>
</tr>
<tr>
<td>Hungary</td>
<td>In general, the majority opinion is that the lack of interest and information has led the OI to be less well-known in the areas of the law covered by the study. When the alternative systems introduced by the OI are better known, and, therefore, more widely used, it will be due to a professional interest, or based on client demand. As regards company law, professionals in Hungary are not using the OI for the following reasons: the lack of general knowledge on the OI (among the operators), the lack of external economic relations (where Hungary is on an equal footing), the process of establishment, the method, the cost and the time, the complexity of cooperation with foreign partners (for example, due to insufficient information technology, the lack of an adequate framework for digital signature), complications related to the implementation of the company types presented by the OI, the fact that Hungarian lawyers are not experts (or do not have the right expertise) in the OI, existing types of companies in national law, for example the association or the Hungarian cooperative (similar to the systems introduced by the OI), which are adapted to the cooperation in order to meet the requirements of the internal market. In general, the operators seemingly do not see the need for the OI.</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>The main reason why the OI is used is that it can offer an attractive alternative either to the national rules or to the rules of another country, which would be applicable according to the rules of private international law. This is regardless of whether the parties do not need to use the various national systems when conducting their activities in different countries or cross-border activities.</td>
</tr>
<tr>
<td>Austria</td>
<td>A different response was given with regard to each of the OIs mentioned.</td>
</tr>
<tr>
<td></td>
<td>The European payment order, for example, is very popular because, compared with the complementary national instrument; it reduces the procedural steps necessary to obtain a payment order that is enforceable in another Member State. Since the application for such an order does not require the exequatur procedure in the State in</td>
</tr>
</tbody>
</table>
which the enforcement is sought, the operators do not need to deal with the foreign procedures or to take the conditions for obtaining exequatur in the State in which the enforcement is sought into consideration.

Also, other OIs in the area of civil procedure make provision for automatic recognition and the enforceable nature of the rulings in another Member State. As a result, these instruments must also be more practical than the traditional national procedure. In particular, it can be expected that the EEO is widely used in cases where a European payment order procedure is not applicable (for example, in the case of non-contractual obligations).

As regards the OI on Community trademarks and designs, the existence of the Madrid system of trademark registration and the Hague system of designs registration should be taken into consideration. In these systems, the operators can apply for the protection of trademarks and designs in several countries thanks to a single application. The designated countries can be any of the EU Member States. The effect of this is that protection is granted throughout the EU. Nevertheless, the Community registration system could be more attractive as a result of the unique set of registration requirements as well as to the registration fees.

As regards the Community designs, it should be emphasised that only a minimum of formal requirements must be completed for their registration. This makes the registration process very efficient. On the other hand, under the Hague system, the operators must take into account different levels of application processing.

As regards the OIs in the area of company law, the SE, for example, is not popular in the slightest, particularly for operators who are concerned about the involvement of workers. Although the provisions on the involvement of workers are first negotiated between employees and management (to come) and the respective national laws are not applied by default, an SE can only be created if these negotiations succeed. Moreover, the Directive will impose the involvement of workers if only a minimum percentage of employees of the entities join together to form provisions for the involvement of workers. Consequently, the operators fear a 'purchase' of the strictest provisions for the involvement of workers at the time of the formation of an SE with the entities of different Member States.

Poland
The question was not included.

Portugal
The question was not included.

Slovakia
As regards the Community trademark and the Community design concerned, these instruments are adopted both for practical reasons (protection in 27 States based on one application) and for economic reasons (in particular, for the Community trademarks, which are
'cost-efficient'). For example, the fees for a national trademark application in Slovakia are EUR 165.50 while the charge for a Community trademark application is EUR 1050 (or EUR 900 for an electronic application).

As regards the registration of Community designs, the registration fees are higher, but these are offset by maintenance costs. For example, the fees for a national concept application in Slovakia are EUR 19.50 (designer) or EUR 39.50 (another candidate), while the fees for a Community design application are EUR 230 (registration fee) and EUR 120 (publication costs). However, the maintenance costs for national concepts are higher than those for Community designs.

The European patent is not widely used, principally because it is not a standard EU Regulation. Therefore, it does not lead to a uniform level of protection for pan-European patents.

Not many professionals are choosing supranational associations (EEIG, European Company, SCE), which is explained by the following reasons: the lack of information and experience with supranational associations, the diverging Regulations in different Member States, and complex Regulations based on several sources of law (the applicable Regulations, a Directive, national legislation, the national implementing legislation, and the statutes of the business).

Moreover, specific reasons apply to various supranational groupings:

For the EEIG: the unlimited liability of members, trade restrictions on the objective of the EEIG, the number of employees, etc.

For the European Company: raised capital, worker participation.

For the SCE: the negative historical experience with cooperatives in post-Communist countries, employee participation.

For the European Enforcement Order: the limited possibilities of the use of this instrument, the fear of procedural delays cause by new instruments due to the lack of knowledge about the deciding authorities on the relevant rules, professionals' lack of knowledge regarding this instrument and its advantages and disadvantages.

For the European Small Claims Procedure: the small number of cross-border disputes and consequently a small number of cases treated in this procedure; the majority of operators tend to avoid the jurisdiction of Slovak tribunals either by choosing the jurisdiction of foreign tribunals or by choosing arbitration; the fear of procedural delays caused by the new instruments due to the deciding authorities' lack of knowledge about the relevant rules; the estimated procedural costs may exceed the enforced application or they may be substantially disproportionate; if the foreign tribunals have jurisdiction, it is difficult for the professionals to ascertain an estimate.
of the procedural costs, including the cost of legal representation abroad; professionals' lack of knowledge of this instrument and its advantages and disadvantages, this lack of knowledge is confirmed by the reasoning of some tribunals also applying the relevant Regulations to procedures that have not been initiated on the basis of forms submitted under the present Regulation.

For the European payment order: the small number of cross-border disputes and consequently a small number of cases treated in this procedure (only 5 decisions published on the websites of the Ministry of Justice and the Supreme Court referred to the term 'European payment order'. Also, four of these concerned cross-border disputes with the Czech Republic and, in the case of the fifth, the countries involved cannot be identified due to undisclosed information); the fact that the majority of operators tend to avoid the jurisdiction of Slovak tribunals, in particular, by choosing arbitration; the fear of procedural delays caused by the new instruments due to the deciding authorities' lack of knowledge of the relevant rules; the fact that if foreign tribunals have jurisdiction, it is difficult for the professionals to ascertain an estimate of the procedural costs, including the cost of legal representation abroad; and, finally, professionals' lack of knowledge of this instrument and its advantages and disadvantages.

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<tr>
<th>Sweden</th>
<th>The Ministry’s response</th>
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<td></td>
<td>It is not clear why the operators use these three European company law instruments so little. Indeed, there could be some significant advantages for the operator if it chooses legal persons other than the well-known national entities.</td>
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<td></td>
<td>In general, it is recognised that the European patent system is valued by its users for the following reasons:</td>
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<td>- It contains unique and standardised procedures for obtaining a patent. This is of particular importance for candidates who need wide geographic protection.</td>
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<td></td>
<td>- The authorised languages of the EPO are restricted to English, French, and German, as selected by the candidate. This allows application to be produced more efficiently and in a less costly manner.</td>
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<tr>
<td></td>
<td>- Through standard practices and the sovereign deciding powers entrusted to the EOP, the system ensures a higher level of legal certainty.</td>
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<tr>
<td></td>
<td>On the other hand, the users tend to point out the following weaknesses of this system:</td>
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<td></td>
<td>- The system is, after all, too expensive since translations into the national languages is obligatory in the majority of countries for the validation of European patents.</td>
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|              | - The system is incomplete, because it does not contain common
The possibility of using the national instrument is valued by many users for the following reasons:

- The national route offers a wider 'entrance ticket' practice for the protection of patents. On paying a relatively low national application fee, the national structure quickly produces a search report, on which the claimant can base its evaluation and ascertain how to pursue the claim abroad.
- Candidates have the ability to communicate easily with the local examiners, in the national language.
- Users benefit from the opportunity to file patent claims in Sweden. Other candidates will appreciate the possibility of a first application file in English with a view to obtaining a search report (normally, only a translation of the claim in Swedish is filed within 16 months of the application date).

The national procedures can be seen to be less formal than those applied by the EOP. The use of qualified representatives is not obligatory in Sweden.

According to the executing authority, the general public is probably unaware of the different European Enforcement Orders. As regards the European Order, the Controlling Authority does not know why it is not used to a greater extent. Once again, lack of knowledge is probably a crucial factor. Another explanation could be that the Swedish payment order is equivalent to the European Payment Order and it is possible that the parties involved in cross-border situations prefer to use the Swedish order.

Response from the Stockholm Centre for Commercial Law (SCCL)

As regards the civil procedure, the optional instruments have improved the situation for consumers in terms of access to complaint procedures and access to tribunals and authorities in other countries. There are problems to do with the lack of information and knowledge among ordinary consumers on the civil procedures and access to justice, but these optional instruments can break down barriers and lower costs in order to achieve a greater level of information and knowledge in these areas. This is also true for small businesses, which do not have the financial strength to hire the relevant legal practitioners. The optional instruments can help to create minimum cross-border standards in these areas.

As regards intellectual property law, in several official documents, it was concluded that intellectual property (IP) is a specific area where the optional instruments are applied on a European basis. Therefore, it should be noted that Sweden has implemented the relevant Community legislation in this field in its legislation. Also, Sweden was part of the European Patent Convention (EPC) well before it joined the European Union.
Trademarks, designs, and patents can be registered at a national level. An optional trademark and designs can be registered for the whole of the common market. Patents can potentially be registered in the Member States designated in the Community patent claim. As a result, there is no possibility of obtaining registration of the patent for the whole of the common market. As designs and patents are priority rights, there is no possibility of having different right owners in different European Member States for the same design or the same invention. Grounds for rejecting the Community trademark could be the fact that the same trademark is registered at a national level in another Member State. Thus, the trademark system, apart from the system of designs and patents, gives different holders the right to have the same patent registered at a national level in different Member States.

Firstly, the optional instruments in the area of intellectual property have improved the situation for rights' owners, and they facilitate the possibility of obtaining effective intellectual property protection in several countries simultaneously.

Secondly, it is advantageous for rights' owners only to have to familiarise themselves with a single system of protection. In this respect, it should be noted that trademarks and designs are harmonised respectively by minimum harmonisation Directives, which results more or less in the reduction of problems in these areas of European legislation because, even if a registering authority or a national tribunal is free to decide an application or a violation of national legislation, the interpretation of the national legislation must be conducted in accordance with the harmonisation Directives, which reflect the conditions set out in the Regulations on trademarks and designs. The Swedish registration authorities and the tribunals have noted that this problem also exists in the area of patents.

Thirdly, the optional instruments can be used by international actors in the market, while the national rights' holders can cut down the implementation costs by using means of national protection. This minimises the costs of obtaining effective protection for international, as well as national, rights' holders.

In a broader sense, it is also in the consumer's favour if intellectual property protects assets that have a shared origin.

As regards company law:

For the European Company, the Swedish rules governing the SE have only been in force since August 2006 and to date there are only six registered SEs in Sweden. Given the limited number of SEs in Sweden, it is assumed that the overall improvement for the consumer must be limited, or even non-existent. As regards cross-border relations, the rules have improved these to a certain extent. However, the legal system governing the SE is quite complex and in
part difficult to understand. This is one reason that explains the limited use of the SE in Sweden. Other disadvantages are the prospect of lengthy and often costly negotiations on the involvement of workers when an SE is formed, and the very complex rules on cross-border mergers.

For the European Economic Interest Grouping (EEIG): they have very limited experience of the EEIG. There are only 29 EEIGs registered in Sweden. Given that the rules of the EEIG have now been in force for a number of years, it can be concluded that, up to now, the rules have only had a limited impact for consumers and also for companies involved in cross-border relations.

For the European Cooperative Society (SCE): at the moment, they do not have any experience of the SCE and, therefore, are not in a position to answer the questions.

| United Kingdom | The Ministry’s response: The response given to this question was negative. Academic response: Professionals do not use these optional instruments often due to the fact that they are already familiar with British law. The national laws are well known by the tribunals; therefore, it is easier to apply them and to know that the interpretation of the court will be. In addition, these optional instruments are very new. In fact, people still do not know how to use these procedures and, therefore, prefer to adopt the national system. |
PART 3 - HOW ARE OPTIONAL INSTRUMENTS APPLIED BY JUDGES, NOTARIES, LEGAL PRACTITIONERS AND OTHER KEY EUROPEAN UNION STAKEHOLDERS?

In order to answer this question, research is needed into the information received by legal professionals (heading 1), as well as how judges, legal practitioners and other key bodies apply optional instruments (headings two, three and four).

HEADING 1 - INFORMATION RECEIVED BY PROFESSIONALS

CHAPTER 14: ARE LEGAL PROFESSIONALS AWARE OF OPTIONAL INSTRUMENTS?

The question put to the rapporteurs comprised various points, including whether Member States had held symposiums on optional instruments, what training magistrates had been given on optional instruments, whether professionals were kept informed of these instruments by their professional bodies (professional organisations, supreme councils etc.), and finally if other methods were in place to promote awareness of the optional instruments in Europe.

We shall present the analysis of the answers one-by-one (1), followed by a more comprehensive summary showing the various answers country by country (2).

1. ANALYSIS OF THE ANSWERS

The various reports show that there are numerous sources of information (1.1). However, the existing information does not appear to be truly effective (1.2).

1.1. Numerous sources of information

1.1.1. Optional instruments appear in legal study programmes and some professional examinations

Numerous reports show that optional instruments are being taught on legal study programmes. Therefore in France for example, procedural optional instruments are taught under civil procedure or international private law, association law optional instruments under company law or European business law, and intellectual property optional instruments under intellectual property law or European business law. Some optional instruments are also included on programmes for certain examinations and professional training. Thus, the Spanish report stipulates that the European Enforcement Order is included in the judiciary examination programme.

Similarly in Hungary, Regulation 805/2004 is officially included in the lawyer examination programme.

The Polish report also highlights the fact that the courses leading to judicial professions include optional instruments in their study programmes.

212 V. See Bulgarian and Greek reports.
1.1.2. Large body of existing legal theory on optional instruments

Legal practitioners have a rather large body of legal theory to draw upon in order to familiarise themselves with the European optional instruments. Many reports have cited scientific work on the optional instruments which has been published in the specialist press, particularly that relating to the European Enforcement Order\textsuperscript{213}, small claims\textsuperscript{214}, the European payment order\textsuperscript{215}, the Community trademark\textsuperscript{216}, the European patent\textsuperscript{217}, the European Company\textsuperscript{218}, and the European Economic Interest Grouping\textsuperscript{219}.

\textsuperscript{213} See the following Spanish examples:

\textsuperscript{214} See the following Belgian examples:

\textsuperscript{215} See the following Spanish examples:

\textsuperscript{216} See the following Belgian examples:

\textsuperscript{217} See the following Belgian examples:

\textsuperscript{218} See the following Belgian examples:
1.1.3. Considerable numbers of conferences and symposiums on the optional instruments

All of the reports show that numerous symposi ums have been organised on the optional instruments.

Therefore in Belgium in 2009 and 2010, the Judicial Training Institute (Institut de Formation Judiciaire) organised training on 'Het Europees betalingsbevel en de geringe vorderingen' for Dutch-speaking magistrates and officers of the court, and in 2011 a new training course will be held, entitled 'Het Europees betalingsbevel/Procédures européennes d’injonction de payer', (European order for payment procedures), this time for both French and Dutch-speaking magistrates and officers of the court.

Confocus (professional conference organisers) are also organising a conference in 2011 focusing mainly on the European order for payment procedure, as well as another on the European small claims procedure (www.confocus.be).

Similar conferences are being held in Germany. The German report notes the following:

‘Information meetings, training courses and conferences on the new enforcement instruments are being organised by bar associations, company lawyers, specialist publishers and training centres
(http://www.rak-seminare.de/seminara_info.php?ID=572;
http://wallegaI.com/It/veranstaltungen/forderungsdurchsetzung-in-europa.html;
http://www.rwsverlag.de/nc/hauptnavigation/seminare/seminardetail.html?showSeminar=2092337;
http://www.emaqister.de/curso_ficheros/9/8/4/11489_11-09-5-DD.pdf;
http://www.inkassoakademie.de/seminare/seminaruebersicht/europaeisches-mahnverfahren;
http://www.ksv.at/KSV/1870/de/3services/6rechtstitps/200906/Zivilverfahren Teil_II/index.html’.

In France, the IRPI (Intellectual Property Research Institute) has organised symposiums on intellectual property optional instruments. The 106th Notaries' Congress (congrés des notaires) on couples and property, which was held in Bordeaux from 30 May to 2 June 2010, offered an introduction to the common optional matrimonial system. Other events have also studied this system. For example, the Nancy Faculty of Law organised a symposium addressing this topic on 18 March 2011 as part of its notary training (higher diploma for notaries). The Faculty of Law in Aix-en-Provence also organised a symposium on family property law on 15 April 2011 which looked at the optional system. There are an increasing number of such training days, both in an academic and a professional training setting.

Italy also hosts similar events on optional instruments\(^{221}\).

Finally, the Academy of European Law (ERA), based in Trier, Germany, also organises training in these areas\(^{222}\).

1.1.4. Specialist training on the OIs

Specialist training exists in certain countries. It is mainly aimed at magistrates, and sometimes lawyers. However it does not necessarily include all of the European optional instruments.

In Bulgaria for example, the National Institute of Justice prioritises the specialist training of magistrates in Community law. The Bulgarian report states the following:

‘During the year of 2010 there were seminars on the judicial cooperation in civil matters (19.04 – 21.04.2010, 16.06 – 18.06.2010)\(^{223}\) and a specific training related to the European order for payment procedure as compared to the analogical national procedure (04.10 – 06.10.2010)\(^{224}\).

There are some materials publicly available on NIJ’s website\(^{225}\) relating inter alia to the European order for payment, the European small claims and the European enforcement order for uncontested claims procedures which are unfortunately out of date (most of them issued in 2006)’.

Similarly, the aforementioned report cites specialist training delivered by the ‘Bulgarian Chamber of private enforcement agents’ so that their employees and agents are aware of the European enforcement procedures.

In Germany there is also special public training on optional instruments for magistrates,\(^{226}\) as well as training courses organised by private organisations\(^{227}\), and sometimes by law firms\(^{228}\).

Similar specialist training is also held in Italy:

‘The Supreme Council of Magistrates (Consiglio Superiore della Magistratura - CSM) organised training courses addressed to national judges on the European instruments of civil procédure’\(^{229}\).
It is also offered in Austria.

Similarly in Poland, the training of judges is organised by the Ministry of Justice, the National School of Administration and the Public Prosecution Service. The Polish report highlights the following:

‘In 2010 the National School of Judiciary and Public Prosecution launched the training for 140 judges with regard to the Regulations No.1896/2006 and No. 861/2007. In 2009 trainings for 700 judges and judge’s trainees were carried out on the subject of judicial cooperation within the European Union.’

In Slovakia, the training of judges also relies on the school for the judiciary, which in 2011 planned training on European private international law.

However, such specialist training is not available everywhere. The Greek report highlights the fact that there is no specific training for magistrates on the optional instruments. The same is true of Luxembourg.

Where training is available, it is often very patchy. The Hungarian report notes that such training is available to lawyers, but that only Regulation 805/2004 is officially included in training prior to the bar examination. Following the bar examination, no further compulsory training is organised by the professional organisations.

1.1.5. Other types of information are available on the optional instruments

- Information is available on the websites of bodies such as the national industrial property offices

The Bulgarian report notes the following:

‘There is extensive information on the website of the Bulgarian Patent Office (BPO) on the European patent, the Community design and the Community trademark, stressing on the fact that European procedures are an alternative to national ones and to the international ones (international registration of patents, trademarks and industrial designs through the World Intellectual Property Organization - WIPO). Information is available mostly in Bulgarian, but also in English’.

- 22/10/2009, seminar n. 4939 del 2009, 'European day on civil justice. European law and the process: effects and limits of judicial cooperation in EU'. Available at: http://appinter.csm.it/incontri/ele_corsi_inc.php?as=MjAwOQ%3D%3D
- 25/01/2007, incontro n. 2671 del 2007, 'Titolo esecutivo europeo'. Available at: http://appinter.csm.it/incontri/ele_relat_inc.php?as=MzQxNA%3D%3D but, more in general, there is a growing attention to these issues and a growing percentage of Italian judges are going to attend UAMI courses as it is possible to see at http://oami.europa.eu/ows/rw/pages/QPLUS/networks/EJS_docs.it.do with reference to the OHIM Judges’ Seminars topics.

It adds that there is a virtual help desk on the BPO website, which enables users to ask questions and obtain answers.

In Bulgaria in 2009, 2,248 consultations were given at the Central Patent Library (CPL), 1,228 of which were to external clients.

Similarly, the German Patent and Trademark Office\textsuperscript{230}, and the Austrian Patent Office\textsuperscript{231} publish a large amount of information on optional instruments in this area.

The Swedish report states that the Swedish Enforcement Authority is in the process of reviewing its website, and that the new version will include information on the European Enforcement Order.

- **Information on the optional instruments can originate from publications by professional organisations, CCIs or chambers of notaries**

The German report cites publications by professional organisations\textsuperscript{232} and CCIs on the optional instruments\textsuperscript{233}, as well as those by notaries’ associations\textsuperscript{234}.

The Austrian report also emphasises the information provided by the Austrian Chamber of Commerce on its website\textsuperscript{235}.

The Cypriot report even mentions an email information system:

> ‘Legal practitioners ... are also informed by a system provided to all the registered members of Cyprus Bar Association through the internet which notifies by emails any legislative instruments which are in a way adopted in our national legislation’.

- **Information may be provided by judges**

The Hungarian report cites a group of judges who can be consulted on European issues:

> ‘There is currently a group of judges who can be consulted on European matters arising during the course of proceedings. The group is called 'Specialist Judges & Advisers on European Law’, and comprises 60 national judges. They are often consulted on European law-related matters, and can organise training for judges who request it. Several of those questioned who used to be or are currently part of this group attest to the fact that the system has been working well and is important to Hungary’.

The table below contains information gathered from questionnaire answers. The table is necessarily concise given that the answers do not always specify which optional instrument the information relates to. It demonstrates however that the information currently tends to focus on the civil procedure and intellectual property law optional instruments.

\textsuperscript{230} http://www.dpma.de/patent/patentschutz/europaescheundinternationalepatente/index.html#a1.
\textsuperscript{231} Österreichisches Patentamt; http://www.patentamt.at.
\textsuperscript{234} http://www.notare.bayern.de/front.php?newsID=93&artID=205.
\textsuperscript{235} http://www.patal.wko.at
In spite of the above, it is evident that the information is not truly effective.

1.2. **The lack of truly effective widespread information**

Although some countries are optimistic\(^{236}\), it appears that the information is not always effective.

It should be noted for example that on the subject of small claims procedure, the Belgian report indicates that: ‘out of the eight courts questioned, only three were aware of the content of the Regulation. (http://www.lalibre.be/actu/belgique/article/605139/reglement-des-petits-litiges-peu-d-infos-en-belgique.html)’.

The French report also emphasises the fact that legal professionals are not aware enough of optional instruments, with the exception of intellectual property optional instruments.

The Luxembourg report notes that there are gaps in Luxembourg legal professionals’ knowledge of the optional instruments.

The Slovak report also focuses on this area:

‘In order to identify the degree of knowledge and use of optional instruments among legal practitioners, relevant parts of the questionnaire were sent to Slovak professional organisations (Slovak Bar Association, Slovak Association of Bailiffs, Slovak Association of Notaries). Consequently, the Slovak Association of Bailiffs asked its members the following questions:

1. Do you deal with European Enforcement Orders (enforcement titles certified in compliance with Regulation No. 805/2004) in your practice?’

\(^{236}\) See the Czech report: ‘Our impression is that the knowledge is wide-spread...’.

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**Table 14**

<table>
<thead>
<tr>
<th>OI</th>
<th>University and examinations</th>
<th>Legal theory</th>
<th>Conferences and training</th>
<th>Website information, help desk, public consultation</th>
<th>Professional organisations, CCIs, Notaries’ associations</th>
<th>Information provided by the judge</th>
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<td>General</td>
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<td>EEO</td>
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<td>Small claims</td>
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<td>European payment order</td>
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<td>Community trademark</td>
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<td>European patent</td>
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<td>Optional matrimonial system</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>x</td>
</tr>
</tbody>
</table>
2. Do you deal with enforcement titles issued in European Small Claims Procedures (Regulation No. 861/2004) in your practice?

3. Do you deal with enforcement titles in form of a European order for payment (Regulation No. 1896/2006) in your practice?

4. Do you have sufficient information about the European instruments listed above?

77 respondents (members of the Slovak Association of Bailiffs) took part in the survey, which provided these results:

Table 14 A

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>No answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Question 1</td>
<td>17</td>
<td>60</td>
<td>0</td>
</tr>
<tr>
<td>Question 2</td>
<td>3</td>
<td>71</td>
<td>3</td>
</tr>
<tr>
<td>Question 3</td>
<td>9</td>
<td>64</td>
<td>4</td>
</tr>
<tr>
<td>Question 4</td>
<td>33</td>
<td>43</td>
<td>1</td>
</tr>
</tbody>
</table>

The survey shows that of the 77 people questioned, 33 deem themselves to be well-informed while 43 are ill-informed.

Information on optional instruments therefore differs greatly throughout the EU, despite the fact that it is one of the pre-requisites of the success of an optional instrument.
### 2. SUMMARY OF ANSWERS (COUNTRY BY COUNTRY) TO QUESTION 14

<table>
<thead>
<tr>
<th>Member State</th>
<th>Table 14 B</th>
</tr>
</thead>
<tbody>
<tr>
<td>Are legal professionals aware of the OIs? Have symposiums been held in your country on one or several of the OIs?</td>
<td></td>
</tr>
<tr>
<td>Do magistrates receive training on the OIs?</td>
<td></td>
</tr>
<tr>
<td>Has information on the OIs been provided to legal professionals by their professional bodies (professional organisations, supreme councils etc.)?</td>
<td></td>
</tr>
<tr>
<td>Are other methods used to promote awareness of the OIs in your country?</td>
<td></td>
</tr>
<tr>
<td>Belgium</td>
<td>Several conferences and symposiums have been held on the European Enforcement Order for bailiffs, lawyers and legal practitioners. In 2009 and 2010, the Judicial Training Institute organised training for Dutch-speaking magistrates and officers of the court, and in 2011 a new training course will be held on European order for payment procedures, this time for both French and Dutch-speaking magistrates and officers of the court.</td>
</tr>
<tr>
<td>Confocus (professional conference organisers) are also organising a conference in 2011 focusing mainly on the European order for payment procedure (<a href="http://www.confocus.be">www.confocus.be</a>). Several authors have written on this subject.</td>
<td></td>
</tr>
<tr>
<td>As regards the small claims procedure, out of the eight courts questioned, only three were aware of the content of the Regulation. Confocus (professional conference organisers) are organising a conference in 2011 focusing mainly on the small claims procedure (<a href="http://www.confocus.be">www.confocus.be</a>). Some authors have written about the Regulation, but there is less documentation than for the first two Regulations.</td>
<td></td>
</tr>
<tr>
<td>As regards the Community trademark, in Belgium there are no magistrates specialising in trademark-related matters. Several authors have written on these texts. Several authors have also written about the European patent, the European Company, the European Economic Interest Grouping and the European Cooperative Society.</td>
<td></td>
</tr>
<tr>
<td>Bulgaria</td>
<td>Most of the instruments mentioned above are included in the study programmes of universities offering law qualifications. The European payment order, the European small claims procedure and the European Enforcement Order for uncontested claims are covered by civil procedure courses, SEs, SCEs and EEIGs by commercial law courses, and the EU optional instruments linked to industrial property are taught in private international law classes.</td>
</tr>
<tr>
<td>Professionals have been made aware of the civil procedure OIs by way</td>
<td></td>
</tr>
</tbody>
</table>
of numerous training courses and regular conferences on the new Code of Civil Procedure. Industrial property OIs are also well-known by professionals due to numerous training courses and conferences based on the protection of industrial and intellectual property. Information on all of the OIs, subject to this study, is available via several charged legal information systems used by professionals.

The National Institute of Justice (NIJ) is a public establishment which provides learning opportunities to judicial staff (judges, prosecutors and administrative personnel from various courts). One of the NIJ’s priorities is the specialist training of magistrates in EU law. EU law seminars, and more specifically judicial cooperation in civil matters form part of the continuing training of practising magistrates, and on a lesser scale the initial training of new magistrates. In 2010 seminars were held on judicial cooperation in civil matters, as well as specific training comparing the European order for payment procedure to the equivalent national procedure.

Information regarding in particular the European payment order, the European small claims procedure and the European Enforcement Order for uncontested claims is available to the public on the NIJ website. Unfortunately this information is no longer up to date as most of it was published in 2006.

The Bulgarian Chamber of Private Enforcement Agents (BCPEA) also organises training courses and seminars on civil procedure OIs in order to improve the skills of the private enforcement agents and their employees.

There is a large body of information on the European patent, the Community design and the Community trademark on the Bulgarian Patent Office (BPO) website, which emphasises the fact that the European procedures are an alternative to the national and international procedures (i.e. the international registration of patents, trademarks, designs and industrial designs with the World Intellectual Property Organization/WIPO). The information is available mainly in Bulgarian but also in English.

The BPO’s official publications include, amongst others, the Official Gazette and the annual report. The Gazette is the main source of information on all industrial property rights (IPRs), register entries and changes to the legal status of the IPRs. Both the English and Bulgarian versions of the Official Gazette and annual report are available on the Patent Office’s website.

Compulsory training sessions for industrial property representatives (who are authorised to represent applicants to the BPO) include training on existing European industrial property OIs.

In 2009, documentation was provided and consultations given to 2248 clients of the Central Patent Library (CPL), 1228 of which were to external clients. There is a virtual help desk on the BPO website, which
enables users to ask questions and obtain answers on the Community trademark and the Community design. Every year, the BPO helps to organise information campaigns, open days etc. in order to promote its activities, as well as resources to protect the IPRs and to obtain information.

| **Czech Republic** | Bulgarian legal practitioners feel that there is a widespread awareness of the OIs, particularly as regards the procedural instruments, the European patent, the Community trademark and the European Company (SE).

The Legal Academy (educational body for judges and employees working in the justice sector) organises special courses on the procedural instruments.

The Industrial Property Office has published some useful educational material regarding the intellectual property instruments.

Moreover, there seems to be a wide range of literature available on these instruments. |

| **Germany** | **Academic response**

Information meetings, training courses and conferences on the new enforcement instruments are organised by bar associations, company lawyers, specialist publishers and training centres.

Special training is also available to magistrates and their colleagues together with publications by professional organisations, CCIs, notaries' associations and others. There are direct references to European intellectual property instruments on the German Patent and Trademark Office's website.

This draws the attention of every user planning to apply for a patent or to register their trademark or design using the European options, and informs such users of the relevant process. Additionally, some specialist publishers offer training courses and seminars on the OIs.

The fact that the OIs are so frequently used in Germany shows that the work and effort invested in information and explanation have been remarkably successful. Indeed, concern about the reduced importance of national instruments is sometimes expressed (see the annual report of the German Patent and Trademark Office/DPMA 2008, p. 51)

Professional organisations and lawyers' associations also provide information on the OIs. Training courses and seminars are also offered by training centres and law firms. Moreover, university lecturers regularly include the legal system for European company statuses in their company law courses. |
The Ministry's response

There is no data available as regards the EEO. Promoting awareness of the EEO is generally made possible by way of reports in legal journals and in association and organisation magazines.

For the European order for payment procedure: The Federal Ministry has put a series of measures in place to raise awareness of the European payment order. These include symposiums and magistrate training.

As regards family law: The matrimonial property system has been presented based on German and international case law. As it stands nine articles have been published in scientific journals.

As regards small claims: Articles 1097 to 1104 of the Zivilprozessordnung or ZPO (German Code of Civil Procedure) contain provisions relating to the characteristics of the small claims procedure in comparison with the normal procedure. The federal and state legal administrations (Landesjustizverwaltungen) are responsible for the training of judges and judicial staff.

As regards company law: The European Company and the EEIG are applied by judges, notaries and practitioners without any fundamental issues. These instruments are perceived to be having a positive effect.

For the SCE: There is a hierarchy of standards in this area, with five different levels according to Article 8 of the SCE Regulation. The levels are as follows:

1) The SCE Regulation.
2) Where expressly permitted by the Regulation, the provisions of the SCE’s Articles of Association (Art. 8, paragraph 1, let. B).
3) As far as permitted by the SCE Regulation, the introduction of special legislation for the SCE Regulation in German law (Art. 8, paragraph 1 c, case i).
4) As far as the Regulation refers to national legislation on co-operatives, the German Co-operative Societies Act - (Art. 8, paragraph 1 c, case ii).
5) The provisions of the SCE’s Articles of Association, as for a cooperative formed in accordance with the German Co-operative Societies Act (Art. 8, paragraph 1 let. C, case iii).

Greece

Practitioners are starting to become aware of the OIs. There is no specific training for magistrates on OIs. However, the Athens Faculty of Law teaches OIs on its Masters in Civil Procedural Law and in Commercial Law.

As regards the Euro-mortgage, although it is not very well known, it is referred to in a diploma project in the Thessaloniki Faculty of Law Masters in Civil Law, Civil Procedural Law and Employment Law from 2006 (tutor Prof. A. Koutsouradis). Also, in January 2007, during a symposium organised by the Association of Hellenic Industries, Assistant
Prof. C. Gortsos, referred to the Euro-mortgage as a means of protecting the consumer while introducing the new land system structure.

Spain

<table>
<thead>
<tr>
<th>The universities have organised conferences on optional instruments.</th>
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<tbody>
<tr>
<td>Candidates taking the examination to become a judge must study the European Enforcement Order, with the exception of Regulations 1896/2006 and 861/2007. The European Enforcement Order is however not on the examination programme to become an officer of the court, perhaps because the examination content has not been altered since 2006. Candidates sitting the examination to become a civil servant with the courts must also spend some time studying the European Enforcement Order. However there are no such requirements for land notaries and officers of the court.</td>
</tr>
<tr>
<td>Information on the optional instruments is provided and specific courses organised by the relevant professional bodies. Some publications on the optional instruments are available (a non-exhaustive list is available in the annexes).</td>
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</table>

France

<table>
<thead>
<tr>
<th>As regards the association law OIs:</th>
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<tbody>
<tr>
<td>Legal professionals are not aware enough of these OIs. Symposiums on these topics are rarely held. Mr Lecourt has held professional training for magistrates in Community law through the French National School for the Judiciary. They are not truly interested in these topics, although they may feel obliged to learn about them. There does not seem to be any specific information provided by the organisations or supreme councils.</td>
</tr>
<tr>
<td>The only real promotion method consists of the professional training delivered by academics to professionals in the context of their continuing training commitments.</td>
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<tr>
<td>As regards the civil procedure OIs</td>
</tr>
<tr>
<td>Legal professionals have little awareness of the civil procedure optional instruments (European Enforcement Order, European order for payment procedure, European small claims procedure). Of course, they have been the subject of publications and studies in specialist legal journals, but they are still largely unknown. Few professional training courses have been provided, given that professionals have rarely requested such training due to the relatively limited volume of cross-border litigation.</td>
</tr>
<tr>
<td>According to Maître Michaux: There are many well-planned training courses, and information circulates very well. Furthermore, the JurisClasseur encyclopaedias, permanent dictionaries, other Lamy resources and newsletters are read and used on a daily basis. They are also up to date.</td>
</tr>
<tr>
<td>As regards the intellectual property OIs</td>
</tr>
<tr>
<td>Legal professionals have a good awareness of the optional instruments</td>
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largely due to the important role of the Intellectual Property Research Institute (IRPI) in organising symposiums and professional training.

Continuing training is also provided by professional bodies (National Society for Industrial Property Advice, French Association of Industrial Property Specialists for Industry etc.). Professionals also have access to various columns published in specialist journals such as *Propriété Industrielle* (Industrial Property) and *Propriétés Intellectuelles* (Intellectual Property). Please also note that the OHIM has implemented 'measurement instruments enabling the quality of the services provided by the Office to be assessed directly with their users'. The OHIM therefore organises numerous meetings with its users via various channels. Industrial property counsels practise these optional instruments on a daily basis, as they are acting as representatives for their clients vis-à-vis the offices responsible for issuing such rights.

As regards family property law OIs

Relating specifically to the common optional matrimonial system, in addition to publications in professional journals on this topic, several symposiums and training courses are available to practitioners. One of these is the 106th Notaries' Congress on couples and property, which was held in Bordeaux from 30 May to 2 June 2010 and offered an introduction to the system. Other forthcoming events will also study the system. For example, the Nancy Faculty of Law is organising a symposium addressing this topic on 18 March 2011 as part of its notary training (higher diploma for notaries). The Faculty of Law in Aix en Provence is also organising a symposium on family property law on 15 April 2011 looking at the optional system. There are an increasing number of such training days, both in an academic and a professional training setting.

**Italy**

<table>
<thead>
<tr>
<th>I. Civil procedure</th>
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<tbody>
<tr>
<td>Legal professionals are now willing to do training since it has been updated. Several conferences and symposiums have been organised all over Italy at various levels, i.e. those promoted by universities and open to professionals, and those promoted by public or private organisations and aimed specifically at legal practitioners as 'continuing training' for legal professionals.</td>
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<tr>
<th>II. Intellectual property law</th>
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<tbody>
<tr>
<td>There are large law firms in the main Italian towns and cities which specialise in intellectual property, for which a good knowledge of the subject is a pre-requisite for employees. The lawyers in question often have access to a high level of training in these areas. Even professionals who only deal with this field on an occasional basis will be aware of it, due to frequent courses organised by the national Bar Association and the Chamber of Commerce.</td>
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In Italy, there are 12 specialist legal divisions that deal with industrial
property issues. These divisions were implemented by the Decree of 27 June 2003, No 168 in a limited number of courts. They specifically apply to the courts of first instance and the courts of appeal in Bari, Bologna, Catania, Florence, Genova, Milan, Naples, Palermo, Rome, Turin, Trieste and Venice. According to Article 134, the division’s jurisdiction extends to disputes relating to industrial property, competition law, antitrust law and copyright. The purpose is therefore to have specific expert knowledge in certain fields in order to enable the parties to apply to a court which is fully qualified in the subject in question.

The Supreme Magistrates' Council (CSM) has organised training courses aimed at national judges on these issues: No 5322, 28/03/2011 in Rome, and overall there is an increasing interest in such issues, and an increasing proportion of Italian judges are attending the courses.

III. Company law

Education and training on these OIs is provided by universities, as well as public and private organisations which organise conferences and symposiums in the area of European company law. The Supreme Magistrates' Council also promotes and/or organises training placements aimed at legal professionals (lawyers and judges).

### Cyprus

Legal practitioners are made aware of these OIs by visiting various websites which publish such information, including EurLex, the EU law blog. They are also kept informed by way of an online system provided to all members of the Cyprus Bar Association, which provides email updates of all of the legislative instruments which are in some way adopted in national legislation.

The Cypriot Bar has organised a number of conferences on European law and how it is applied.

The Cypriot Bar is not involved in judge training; it only offers training for its registered members.

### Luxembourg

In the Grand Duchy of Luxembourg, there are generally gaps in legal professionals' knowledge of certain optional instruments.

A few seminars have however been organised, mainly relating to European judicial cooperation in civil matters, civil procedure law instruments (name of the seminar), the European Company, the European Cooperative Society etc. (The dates of these training sessions can be provided).

Legal professionals have not received any specific training on optional instruments from their professional organisations.

However the Chamber of Trade, the government through its website 'guichet.lu' and certain other organisations such as the Chamber of Trade have published brochures on these optional instruments, which is a means of promotion aimed at the economic operators.
<table>
<thead>
<tr>
<th>Hungary</th>
<th>After consulting private practitioners and judges, the following general conclusions can be drawn:</th>
</tr>
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<tbody>
<tr>
<td></td>
<td><strong>Lawyer training</strong></td>
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<tr>
<td></td>
<td>Prior to the bar examination there is a compulsory training course for trainees, during which issues related to European law can be addressed. However, Regulation 805/2004 is the only instrument which is officially included in the civil procedure subjects that must be studied before applying to the Bar. (A list of subjects is available on the Ministry of Justice website, to which all candidates have access.)</td>
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<tr>
<td></td>
<td>Following the Bar examination, no compulsory training programmes are organised by the professional organisations (such as the Bar Association).</td>
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<tr>
<td></td>
<td>There are also some specialist post-university training courses which are organised by several major universities, for example in Szeged or Budapest, which very often deal with a subject area that focuses on the application of European law. These include a specialist European law training course in Szeged (taught in Hungarian), a Masters in European law in Szeged (taught in French) and a training course in European business law in Budapest (taught in English).</td>
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<tr>
<td></td>
<td>Within these post-university training courses, the OIs may be covered in one of the subjects taught, thus enabling professionals to familiarise themselves with the content of the OIs and to apply this knowledge in the context of their work.</td>
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<tr>
<td></td>
<td>Some one-off events (usually conferences and symposiums) are organised by the Bar Council on certain topics related to recent European legislation. One of those questioned described an example of a conference held in 2006 on practical issues relating to the EEO Regulation (European Enforcement Order) adopted in 2004.</td>
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<tr>
<td></td>
<td><strong>Judge training</strong></td>
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<tr>
<td></td>
<td>Prior to the European Union accession in 2004, official and compulsory training was provided to judges so that they could familiarise themselves with the basics of European law, given that the most magistrates had not studied European law in their university courses. These sessions lasted for a week, and involved judges studying how European institutions were run, and how to file claims or applications to the European organisations or to the ECJ.</td>
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<tr>
<td></td>
<td>Following Hungary's accession, these training sessions continued for at least a year. The last of these compulsory training sessions was held in 2005.</td>
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<tr>
<td></td>
<td>As well as these compulsory courses, optional courses were also provided to judges.</td>
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</tbody>
</table>
'There is currently a group of judges who can be consulted on European matters arising during the course of proceedings. The group is called 'Specialist Judges & Advisers on European Law', and comprises 60 national judges. They are often consulted on European law-related matters, and can organise training for judges who request it. Several of those questioned who used to be or are currently part of this group attest to the fact that the system has been working well and is important to Hungary.

As regards the Hungarian National Chamber of Civil Law Notaries (HNCCCLN): Notaries attended a training course prior to the responsibilities of ordering payment orders and adopting notarial acts being transferred to them (which happened on 1 June 2010). They are now able to handle the European order for payment procedure and the European Enforcement Order. The annual notaries’ symposium also looked at these topics in 2010 through educational lectures. Notaries have received information on European civil procedures, and the National Chamber of Notaries' website also contains information on these areas.

As regards the distribution of information on the OIs: By way of example, the Ministry of Administration and Justice's website includes a harmonised database in Hungarian, where anyone can find the required information on the European legal instruments and the related national harmonised law. Other applications such as a legal database software tool also enable practitioners to find information on OIs.

Netherlands
The OIs were certainly discussed during post-doctoral courses aimed at practitioners. Special courses on several of the OIs have also been organised by universities, commercial institutions and the judicial training institute. This means that judges were also kept informed of OIs (particularly procedural law OIs). Furthermore, certain government (and other) websites contain information on some of the OIs.

Austria
As regards legal practitioners

In Austria, courses and seminars for professionals on the OIs in question are mainly organised by the following institutions: The Academy of Lawyers (Anwaltsakademie, hereafter referred to as AWAK) whose sole shareholder is the Association of Lawyers, for professional training and education (the members of this association are, amongst others, all of the regional associations of the Austrian Bar), the Academy of Notaries (Österreichische Notariatsakademie, hereafter referred to as NAK) an association whose members include all of the regional Chambers of Civil Law Notaries, and the Academy of Law and Taxes (Akademie für Recht und Steuern, hereafter referred to as ARS).

These establishments offer seminars and other events, mainly on the OIs related to intellectual property and civil procedure.

As regards intellectual property law, over the past few years, AWAK and ARS have organised courses at least once a year on trademarks and
design law and on European company law. There appears to have been a particular emphasis on the Community trademark and the Community design. In addition, every year the Austrian Intellectual Property and Copyright Society organises, in partnership with a legal publisher, a seminar of experts on trademarks, designs and patents which includes the European instruments. The Austrian Patent Office (Österreichisches Patentamt) offers seminars on trademark law, mainly dealing with Regulation 40/94 on the Community trademark.

As regards civil procedure law, AWAK and ARS have organised seminars on European civil procedure at least once a year. There appears to have been a particular emphasis on the European order for payment procedure and the European small claims procedure. According to the information provided by the Austrian Chamber of Civil Law Notaries, notaries are regularly informed about legislative changes through various channels such as conferences and seminars. Furthermore, the Austrian Chamber of Civil Law Notaries is a member of the European Notarial Network, which is in the process of developing a training programme in order to improve the implementation of knowledge and practice in European law. For example, a seminar on the European Enforcement Order was held during one of the Network’s meetings in Rome last year.

As regards company law, there appears to be virtually no training on optional instruments in this area. AWAK and ARS run seminars on company law which, according to the information available on these organisations’ websites, do not cover the OIs in question. According to the Austrian Chamber of Civil Law Notaries’ website, a seminar is available on company law which mainly covers the European Economic Interest Grouping.

As regards judges

According to the information supplied by Dr Brigitte Tschütscher, the Austrian Ministry of Justice (Abteilung für Aus-und Fortbildung), Head of Department for basic training and advanced professional training, civil law and civil procedure training and seminars for judges are provided on a regular basis. These training courses and seminars related mainly to the OIs in question.

On their website, the Austrian Economic Chambers (www.portal.wko.at) provide a leaflet with disparate information on some of the topics relating to the OIs in question, such as the SE or the Community trademark. Awareness of the OIs in question has also been supported by academic debates, seminars, documents and publications. Furthermore, the Austrian Bar Association and the Austrian Chamber of Notaries regularly publish position papers on proposals and draft European legislation, including the above OIs. This also contributes to the promotion of the OIs in question amongst professionals, as the position papers are published on the websites of the abovementioned institutions.
Poland

As regards civil procedure OIs, each professional association organises periodic legal training on European law. Additionally, explanations of these issues are provided to a certain extent as part of the initial training of judges, lawyers and notaries.

Judge training is organised by the Ministry of Justice and the National School for the Judiciary and Criminal Proceedings. In 2010, the National School for the Judiciary and the Public Prosecution Service started training 140 judges on Regulation Nos. 1896/2006 and 861/2007. In 2009, training on judicial cooperation within the European Union was provided to 700 judges and trainee judges.

There is no uniform and centralised promotion and explanation system. There has undoubtedly been a general increased awareness of OIs. The first place in which they are described in national legislation is the Code of Civil Procedure. The second is during legal training in this field, which is on-going.

As regards intellectual property OIs, numerous seminars, conferences and courses both at a national and regional level have been organised for lawyers and judges by the Ministry of Justice and by private companies. Some of them have received financial support from the EU.

As regards association law OIs, practitioners are aware of the OIs relating to the SE, the EEIG and the SCE because conferences and symposiums have been held on these OIs in Poland.

The preparation required to enter a legal profession (e.g. judges, notaries and legal advisers) includes these OIs. The official bodies have not held any information campaigns.

Portugal

No answer has been provided for this question.

Slovakia

In order to identify the extent of legal practitioners' awareness and use of the optional instruments, the relevant sections of the questionnaire were sent to the Slovak professional organisations (the Slovak Bar association, the Slovak Association of Bailiffs and the Slovak Association of Notaries).

As a result, the Slovak Association of Bailiffs asked its members four questions about their awareness of the OIs, particularly the procedural OIs. 77 answers from members of the Slovak Association of Bailiffs were therefore gathered. A table summarising the answers to these four questions is available in the annexes.

However, the Slovak Association of Bailiffs has provided no information in these questions to show whether education and training are available.

Professional training and judge training are only provided by the Slovak Republic School for the Judiciary (the 'Legal Academy'), which is a member of the International Organization for Judicial Training (IOJT). The Legal Academy's Training and Study Plans which have been...
approved for 2011 show that the Academy is also planning training in European private international law.

In Slovakia, conferences and symposiums on the relevant optional instruments are usually organised under the auspices of university institutions (university law faculties, Slovak Science Academy etc.) in partnership with practitioners. These educational events are open to the general public. The interest of judges, notaries and other practitioners for such events can be qualified as average.

The Slovak Bar regularly organises two professional conferences per year. These conferences cover the current issues in the field of civil, commercial and criminal law, including the optional instruments referred to above.

Sweden The Ministry’s response

There is detailed information on the three types of company law European instruments on the Swedish Companies Registration Office’s website. The instruments are also covered in the courses on European company law organised by the Office and by other organisers.

Legal practitioners have a good knowledge of intellectual property OIs (trademarks, designs and patents). Patent law (including EPO case law), is regularly covered during conferences. The EPO provides training for patent agents and other professionals. There is a European network for patent judges and a similar organisation for patent lawyers. Information on the protection of patents by European patents is provided by, amongst others, the European Patent Office and the Swedish Patent Office. The other topics relating to intellectual property are also regularly discussed by the relevant parties during various national and international conferences. The Office for Harmonization in the Internal Market (OHIM) provides legal training on the Regulations relating to trademarks and Community designs.

The Swedish Enforcement Authority has not organised conferences or symposiums on civil procedure OIs. There is information on the European payment order and links to application forms on the Enforcement Authority’s website (www.kronofogden.se).

The Enforcement Authority is currently updating its website. The new site will be up and running at the end of 2011, and will provide more detailed information to highlight the three Enforcement Orders as well as the best time to apply them. On the Swedish Implementation Authority's website there is a publicly-accessible application manual relating to 'enforcement'. One section of this manual covers the EEO and the European payment order. A new edition of the manual will be published in the Spring of 2011, and will be available online and in stores. The new edition will contain information on the three European Enforcement Orders.

In Sweden, the Judicial Training Academy has provided training for all professional judges since January 2010. Training is available in a wide
range of subjects. Until now, the optional instruments referred to in the survey were not covered in the training sessions. In order to improve judge training in this area, the Judicial Training Academy is planning to launch new training sessions in the Autumn of 2011. Instruments relating to the Community trademark and the Community designs as well as European patents will be included in the new intellectual property law course. The European small claims procedure together with other civil procedure instruments will be covered in a training session on private and procedural international law.

The Swedish National Courts Administration has informed the general courts of the European Judicial Network for civil and commercial matters.

United Kingdom

The Ministry’s response

Yes, professionals are aware of the OIs. However there is no information on any conferences that may have been organised on this topic.

Furthermore, there is no judge training and no information campaigns on the OIs. Other methods are however used to promote awareness of the OIs, but no details were provided on this point.

Academic response

Legal practitioners are aware of the OIs.

The British Institute of International and Comparative Law (BIICL) organises seminars at which academics, judges and other specialist practitioners together with governmental and intergovernmental representatives present and debate recent developments on the topic for the purposes of legal practice as well as for research in the area of private international law.

A seminar entitled 'The European optional instrument in contract law - What to expect?' was held on 7 February 2011. Other topics include: 'The future of international patent disputes in Europe' and 'The matrimonial property system and conflicting laws: towards a European system?'.

The Trading Standards Institute also provides a guide to the small claims procedure. This brochure was co-produced by the European Commission and provides information on making a claim using the European small claims procedure.

Furthermore, the OIs are strongly promoted on the court websites. For example, the Northern Ireland Courts and Tribunals Service provides an explanation of the European small claims procedure.

The Certified Patents Institute organises events such as the consultation held on 20 April 2011 on the new European Patent Office rules. The Institute provides information both to professionals and to students who...
have recently completed a Masters. Another conference on patent case law is planned, and will focus on a mid-year review of the most important decisions made over the past 12-18 months by the Intellectual Property Office and the British courts.

The UK European Consumer Centre is responsible for providing information to professionals on OI civil procedure. The Centre also provides general information on consumer law, and on their rights when buying services within the EU, as well as details of organisations that can provide practical assistance in the event of a dispute. The Consumer Centre is a condition of Article 21 of the EU Services Directive. It is provided by the Trading Standards Institute and funded by the Department for Business, Innovation and Skills.

There are many organisations which offer training courses to legal practitioners and judges. The Law Society of England and Wales is the representative body for over 130 000 solicitors in England and Wales. The Society negotiates on behalf of the profession and represents it vis-à-vis legislators, governments and EU institutions.

The Bar Council has also provided services to members of the Bar. The Bar website also lists training courses run by other providers.

Enterprise Europe Network London performs searches and provides an information service for all issues relating to legislation, policies and European funding. It also provides information on doing business with other European countries, and offers training for companies.

The Global School of Business (GSB) and Central Law Training also offer legal training, courses and conferences.

However there is no training for judges on the optional instruments, and no OI information campaigns are planned for professionals by way of their official organisations.
HEADING 2 - JUDGES AND OPTIONAL INSTRUMENTS

Several questions were asked:

Is there any litigation relating to the optional instruments (chapter 15)?

Have there been many preliminary rulings on interpretation before the ECJ relating to the optional instruments by EU judges (chapter 16)?

Have there been national legal interpretations which might have distorted the optional instrument and/or which have later been questioned by the ECJ (Chapter 17)?

Do EU judges have a means of knowing about interpretations made by judges from other Member States regarding the same issue (Chapter 18)?

Which methods of interpretation do national judges generally use to interpret the optional instruments (Chapter 19)?
CHAPTER 15: IS THERE ANY LITIGATION RELATING TO THE OIS?

We shall present the analysis of the answers one-by-one (1), followed by a more comprehensive summary showing the various answers country by country (2).

1. ANALYSIS OF THE ANSWERS

There are no official statistics on optional instrument litigation.

Research was carried out by Marion Nadaud (a Doctor of Law and Trainee Administrator at the ECJ, Documentation and Research Department) in the following way using the ECJ database:

‘The research for these answers was solely carried out using the internal databases of the Court of Justice of the European Union (more specifically the DEC NAT database in MINIDOC II). These databases record the decisions of national courts of Members States which apply EU law’.

In fact, all national decisions which resulted in a preliminary ruling and decisions made by national judges (only in Supreme Courts since 2002) of a particular and immediate interest to the Court are consistently recorded. Other decisions may appear in the databases, but not consistently.

The research produced the following results:

- 4 national decisions recorded for the European Enforcement Order;
- 1 decision for the European order for payment procedure;
- No decisions for the European small claims procedure;
- 88 decisions for the Community trademark;
- 20 decisions for the designs;
- As regards the EU patent, the database data is not precise enough to know whether the European Patent Convention referred to in the national decision recorded is indeed the 1973 Munich Convention. The data has not enabled reliable results to be established as is the case for the other optional instruments;
- 2 decisions for the European Company;
- 9 decisions for the European Economic Interest Grouping;
- 4 decisions for the European Cooperative Society;
- No decisions were recorded for the Agreement of 4 February 2010 between France and Germany creating a common optional matrimonial system (this is normal given that it is not yet in force).

Two tables have been created from this research. The first lists all of the decisions by national judges that were recorded. Despite its length, it is reproduced in the annex to this study.

The second shows the number of decisions by country. We have reproduced them below:
### Table 15: Presented by Member State

<table>
<thead>
<tr>
<th>Member State</th>
<th>EEO</th>
<th>European order for payment procedure</th>
<th>Small claims</th>
<th>Community trademark</th>
<th>Community designs</th>
<th>EP</th>
<th>SE</th>
<th>EEIG</th>
<th>SCE</th>
<th>T O T A L</th>
</tr>
</thead>
<tbody>
<tr>
<td>Germany</td>
<td>2</td>
<td>14</td>
<td>3</td>
<td>6</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td>15</td>
</tr>
<tr>
<td>Austria</td>
<td>1</td>
<td>8</td>
<td>3</td>
<td>1</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td>13</td>
</tr>
<tr>
<td>Belgium</td>
<td></td>
<td>6</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
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<td>7</td>
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<tr>
<td>Bulgaria</td>
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<tr>
<td>Denmark</td>
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<tr>
<td>Spain</td>
<td>1</td>
<td>6</td>
<td>7</td>
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<td>16</td>
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<tr>
<td>Estonia</td>
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<tr>
<td>Finland</td>
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<tr>
<td>France</td>
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<td>7</td>
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<tr>
<td>Greece</td>
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<tr>
<td>Hungary</td>
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<tr>
<td>Ireland</td>
<td>2</td>
<td></td>
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<td>3</td>
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<tr>
<td>Italy</td>
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<td>7</td>
<td>1</td>
<td>1</td>
<td>4</td>
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<tr>
<td>Latvia</td>
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<td>Lithuania</td>
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<td>Luxembourg</td>
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<td>Malta</td>
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<tr>
<td>Poland</td>
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<tr>
<td>Portugal</td>
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<tr>
<td>Czech Republic</td>
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<tr>
<td>Romania</td>
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<tr>
<td>United Kingdom</td>
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<td>31</td>
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<tr>
<td>Slovakia</td>
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<tr>
<td>Slovenia</td>
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<tr>
<td>Sweden</td>
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</tbody>
</table>

This shows that optional instrument litigation is clearly very uncommon - we will return to this in the following question on preliminary rulings.

Insofar as only certain national decisions are recorded in this study (and since 2002 mainly the supreme court decisions and preliminary ruling decisions), there may be differences in comparison with the national reports which also cite the decisions of trial judges, even after 2002, whether or not they are of significant interest.

The reports show the same results as the research by Ms Nadaud cited above.

As regards the procedural optional instruments, note that only the European Enforcement Order creates a small amount of litigation, in Belgium\(^{237}\), Germany\(^{238}\), a small amount in Spain\(^ {239}\), in Italy, in the Netherlands\(^{240}\), and in Austria\(^ {241}\).

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Litigation is however extremely rare in France\textsuperscript{242}.

Litigation is less common for the European payment order, but it does exist in Belgium\textsuperscript{243}, and in Germany\textsuperscript{244}. In Spain, this optional instrument has been used several times in litigation proceedings as a supererogatory argument or equivalent reasoning\textsuperscript{245}.

There is however virtually no litigation involving the European small claims procedure\textsuperscript{246}.

The same is noted for association law optional instruments. At the very most there is some litigation relating to the EEIG, particularly in Belgium\textsuperscript{247}.

However, a very different scenario is noted for intellectual property optional instruments.

There are a number of disputes relating to the Community trademark. The Belgian report cites several such disputes\textsuperscript{248}. The Bulgarian report emphasises the fact that the disputes relate to two main points:

\begin{quote}
‘1. Disputes related to the rejected registration application for national mark or design due to prior registration of Community trademark/Community design.
\end{quote}

\textsuperscript{28} As regards the scope and the official conditions (See: Bundesgerichtshof (German Federal Court of Justice) from March 25th 2010, I ZB 116/08 (Neue Juristische Wochenschrift – NJW 2010, pg. 1883 or BGHZ 185, pg. 124-133); OLG München, NJW-RR 2007, p. 1582 s.; OLG Stuttgart NJW-RR 2009, p. 934; NJW-RR 2010, p. 134.


\textsuperscript{240} Six cases.

\textsuperscript{241} Oberste Gerichtshof, OGH, 3 Ob 253/06m.


\textsuperscript{244} See however from Germany: Court of Instance of Geldern from 9.2.2011 (BeckRS 03927).


2. Disputes related to the protection of registered Community trademark/Community design, i.e. cases where the owners of the mark/design look for enforcement of the mark/design protection by the court.

The German report counts nearly 500 national decisions on the Community trademark, but emphasises the fact that since 2003, most of the decisions in this area have been made at Community level\textsuperscript{249}.

The French report also confirms that litigation is common for intellectual property optional instruments. It indicates that 36.44\% of cases brought before the EGC relate to intellectual property. However, this official EU statistic does not enable one to determine what proportion of this litigation can be attributed to intellectual property optional instruments, and to European Law derived from intellectual property.

The same conclusions can be made for Community designs\textsuperscript{250}. For example, the German report indicates the following:

‘The German courts responsible for European designs also have jurisdiction over this OI. (Article 80, paragraph 1 GGV, Eichmann/von Falckenstein Geschmacksmustergesetz). Consequently, national decisions are more common that those issued by European courts (a search on the beckOnline website gives twice as many results for the national courts in comparison with the European courts). Nevertheless there are fewer decisions that for the European trademark.’

Finally, there is a significant amount of litigation relating to the European patent, for example in Belgium\textsuperscript{251}, or in Sweden, where the Ministry of Justice records 20 to 40 cases per year of European patent litigation, which according to this Ministry represents over half of European patent litigation.

These figures demonstrate that the amount of litigation is proportional to the success of the instrument, given that the optional instruments must be used in order to potentially give rise to litigation, given that one must have an interest to act in order to take legal action.

It should therefore not be concluded that this litigation reveals faults in the optional instruments.

\textsuperscript{249} Van Raden, Community Trademark Courts – German Experience, IIC 2003, p. 270 sqq.
## 2. SUMMARY OF ANSWERS (COUNTRY BY COUNTRY) TO QUESTION 15

<table>
<thead>
<tr>
<th>Member State</th>
<th>Table 15 A</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td><strong>Is there any litigation relating to the OIs?</strong></td>
</tr>
<tr>
<td></td>
<td>As regards the European Enforcement Order, a number of decisions have been issued by the Belgian Courts, but no judgments were issued by the Court of Cassation.</td>
</tr>
<tr>
<td></td>
<td>A number of decisions were also issued relating to the European payment order, European patents and the European Economic Interest Grouping.</td>
</tr>
<tr>
<td></td>
<td>There is not a great deal of case law for Community designs, but some judgments were issued.</td>
</tr>
<tr>
<td></td>
<td>There were however none on the Regulation implementing the Small claims procedure, or on the European Company.</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>Given that the SE, SCE and EEIG do not exist in Bulgaria, there were no disputes related to these OIs.</td>
</tr>
<tr>
<td></td>
<td>No information is available on litigation related to the European small claims procedure. In 2010, even the Sofia regional court, the most major regional court in the country, did not receive any requests to initiate this procedure. Furthermore, no information has been found regarding disputes for the other civil procedure OIs.</td>
</tr>
<tr>
<td></td>
<td>And as the Franco-German agreement is not an applicable OI in Bulgaria, no disputes were found on this subject.</td>
</tr>
<tr>
<td></td>
<td>Unlike the other OIs, subject to this study, the OIs linked to industrial property are very often used by Bulgarian users, and disputes relating to these OIs occur from time to time. The courts do not record accurate statistics on such disputes, but an analysis of the available judicial decisions enables several types of disputes to be distinguished:</td>
</tr>
<tr>
<td></td>
<td>1. Disputes related to a rejected registration application for a national trademark or design due to prior registration of a Community trademark/Community design.</td>
</tr>
<tr>
<td></td>
<td>2. Disputes related to the protection of a registered Community trademark/Community design, i.e. cases where the owners of the trademark/design seek enforcement of the trademark/design protection by the court.</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>No answer has been provided for this question.</td>
</tr>
<tr>
<td>Germany</td>
<td><strong>Academic response</strong></td>
</tr>
<tr>
<td></td>
<td>As regards the European Enforcement Order, despite the European</td>
</tr>
</tbody>
</table>
Regulation on Enforcement Orders being introduced to German law only a short time ago, there is already a relatively high level of litigation, particularly in relation to the scope and the official conditions.

As regards the payment order, as it stands the courts of appeal have not yet had the opportunity to establish consistent case law. One of the only decisions to be regularly cited is that of the Nürnberg Court of Appeal issued on 18 January 2012. In addition to this, the Wedding Court of Instance handles approximately 150-200 claims per month, which are however often 'incomplete' or 'incorrect'.

As regards small claims, until now hardly any litigation proceedings have been brought before the courts. One of the only such decisions was issued by the Geldern Court of Instance on 9 February 2011.

As regards the European trademark, there were few legal decisions prior to 2003, which can be attributed to the lack of a European trademark court. Yet at the same time, such decisions do exist. Generally speaking, there are no major problems when applying German case law to the European trademark. Since the jurisdiction of the General Court and the ECJ was extended to cover the European trademark, most of the decisions made in this area are issued at Community level. The beckOnline website returns more than 1500 results for the keywords 'European trademark' for the period from 2006 to 2011 whereas the national courts have only issued 500 decisions.

There are however many cases of litigation which have been brought before the German courts relating to the interpretation of the national trademark law provisions which have incorporated the European Directive.

The German courts also have jurisdiction over the Community design (Article 80, paragraph 1 GGV). Consequently, national decisions are more common that those issued by the European courts (a search on the beckOnline website gives twice as many results for the national courts in comparison with the European courts). Nevertheless there are fewer decisions that for the European trademark.’

As regards the European patent, there are several decisions issued by the patents administrations, but few cases of litigation brought before the courts.

As regards the European Cooperative Society and EEIGs, there are few European Companies in Germany (in comparison to the total number of joint-stock companies), and few registered EEIGs. There are therefore not many legal decisions in this area.

The Ministry’s response

For the European order for payment procedure: The answer is no.

As regards the EEO, please note the decision of the Bundesgerichtshof
(German Federal Court of Justice) issued on 25 March 2010.

As regards small claims: There has been no public debate on this point. The German Ministry of Justice is not aware of any legal decisions relating to small claims.

<table>
<thead>
<tr>
<th>Country</th>
<th>Civil Procedure Settlements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Greece</td>
<td>There are no civil procedure settlements.</td>
</tr>
</tbody>
</table>

Spain

- Regulation 805/2004 was applied to some decisions.
- Regulation 1896/2008 was used as a supererogatory argument in several decisions.
- No Spanish decisions relating to Regulation 861/2007 were found.

France

I. Association law

Litigation is extremely rare. One EEIG decision has been noted, and there were no decisions for the other association types. However it is clearly too early as the transposition texts are still relatively recent.

II. Civil procedure: No

III. Intellectual property law

There is a great deal of litigation relating to the optional instruments. Intellectual property therefore represents 36.44 % of the cases brought before the European General Court. Over the past few years there has also been an unprecedented number of actions heard by the General Court and appeals heard by the ECJ.

The work of Community judges is particularly crucial in relation to the Community trademark. Whenever action is taken against the decisions of the OHIM, the General Court interprets ambiguous concepts from Regulation 40/94 supervised by the ECJ. Community judges are also involved in standardising trademark law within the European Union.

IV. Family property law

Not yet relevant.

Italy

I. Civil procedure

Case law is only available for the European Enforcement Order for uncontested claims.

II. Intellectual property law

No case law is available.

III. Company law
<table>
<thead>
<tr>
<th>Country</th>
<th>Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cyprus</td>
<td>No information.</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>According to the information provided by the public prosecutor’s office central documentation department, as far as the office is aware there are no disputes relating to optional instruments.</td>
</tr>
<tr>
<td>Hungary</td>
<td>Those questioned based in the local courts of Szeged concluded at this (lower) level of the justice system, disputes relating to the OIs and their content are very rare, and that they were unable to cite any case in which an OI was the subject of a dispute. At the higher levels of the justice system, particularly in the capital, disputes relating to the questions on the OIs listed in the questionnaire became increasingly likely.</td>
</tr>
<tr>
<td>Netherlands</td>
<td>There are definitely disputes related to the OIs, even though they are not often solely based on the substantive rules of the OI itself. The electronic database of Dutch case law therefore reveals that the European Enforcement Order played a role in around 20 cases, while the Small claims procedure was used in six cases. The same is true for some of the other OIs.</td>
</tr>
<tr>
<td>Austria</td>
<td>There was one dispute relating to the EEO and to a ruling by the Austrian Supreme Court. There was particular controversy surrounding a potential delivery obligation for the debtor of the certification of a judgment as a European Enforcement Order. The Supreme Court denied such a demand, contrary to what had been suggested by certain Austrian specialists. Furthermore, another controversial issue also arose pertaining to the same instrument. It consisted of knowing if a European Enforcement Order could only be contested using an objection claim, or also by way of an objection claim. The latter option prevailed in this case.</td>
</tr>
<tr>
<td>Poland</td>
<td>As far as all of the people preparing the report were aware, there are no disputes relating to the OIs.</td>
</tr>
<tr>
<td>Portugal</td>
<td>No information.</td>
</tr>
<tr>
<td>Slovakia</td>
<td>No information.</td>
</tr>
<tr>
<td>Sweden</td>
<td>The Ministry’s response</td>
</tr>
<tr>
<td></td>
<td>The Stockholm District Court is the court of first instance with sole jurisdiction over nearly all disputes related to civil patents. According to the information supplied by the Court, there are approximately 20-40 cases concerning patent law every year in Sweden. More than half of these cases relate to European patents. Few patent cases are heard by</td>
</tr>
</tbody>
</table>
the higher courts. Legal cases based on trademark and design Regulations are also common, but there are very few disputes relating to the other OIs according to the National Courts Administration.

<table>
<thead>
<tr>
<th>United Kingdom</th>
<th>The Ministry’s response No information.</th>
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</thead>
<tbody>
<tr>
<td></td>
<td><strong>Academic response</strong></td>
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<tr>
<td></td>
<td>There are few decisions on the optional instruments in the United Kingdom, given that most of them are rarely used. However, Scotland has issued several decisions relating to the Community trademark. The two most important decisions were Bravado Merchandising Services Ltd v. Mainstream Publishing (Edinburgh Ltd (called the 'Wet Wet Wet case') from 1996 and Allied Domecq Spirits and Wine Limited v. Murray McDavid Limited from 1997. The first provided some useful advice on how section 11 of the Law of 1994 should be used. These judgments highlight the differences in procedure and jurisdiction which exist in the methods that the High Court and the Scottish courts apply, and the solutions that they use.</td>
</tr>
</tbody>
</table>
CHAPTER 16: HAVE THERE BEEN MANY PRELIMINARY RULINGS ON INTERPRETATION BEFORE THE ECJ BY EU JUDGES?

We shall present the statistical data in order (1.), followed by a more comprehensive summary showing the various answers country by country (2.).

1. PRESENTATION OF THE STATISTICAL DATA

The research carried out by Marion Nadaud under the conditions set out in the previous paragraph (question 15), demonstrates that there are few preliminary rulings on interpretation for the optional instruments. She lists the following rulings:

- 1 preliminary ruling for the European Enforcement Order;
- 1 preliminary ruling for the European order for payment procedure;
- No decisions for the European small claims procedure;
- 17 preliminary rulings in disputes relating to a Community trademark, of which 14 are fully related to Regulation No 40/94;
- 3 preliminary rulings for Community designs;
- No rulings for the European patent;
- No preliminary rulings for the European Company;
- 3 preliminary rulings for the European Economic Interest Grouping;
- 1 preliminary ruling for the European Cooperative Society;
- No decisions recorded for the Agreement of 4 February 2010 between France and Germany creating the common optional matrimonial system.

<table>
<thead>
<tr>
<th>National decisions recorded</th>
<th>Preliminary ruling and case number</th>
<th>Preliminary question (PQ) before the Court of Justice regarding the OI</th>
</tr>
</thead>
<tbody>
<tr>
<td>European Enforcement Order</td>
<td></td>
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</tr>
<tr>
<td>1 - Landgericht Regensburg, Beschluss vom 17/05/2010 1 O 1205/09 (2) C. Buschmann / C. de Visser (Germany)</td>
<td>YES C-292/10 Application phase</td>
<td>PQ: Does Art. 26, paragraph 2 of Regulation 44/2001 hinder the issuing of a default judgment pursuant to Art. 331 of the German Zivilprozessordnung, and therefore the issuing of an EEO for an uncontested claim as defined by Regulation 805/2004? Ruling pending.</td>
</tr>
<tr>
<td>European order for payment procedure</td>
<td></td>
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</tr>
<tr>
<td>1 - Audiencia Provincial de Barcelona, auto del 29/11/2010 Banco Español de Crédito, SA / Joaquín Calderón Camino (Spain)</td>
<td>YES C-618/10</td>
<td>Not yet detailed on Curia site.</td>
</tr>
<tr>
<td>European small claims procedure</td>
<td>Community trademark</td>
<td></td>
</tr>
<tr>
<td>---------------------------------</td>
<td>----------------------</td>
<td></td>
</tr>
<tr>
<td>None</td>
<td>PQ relating to Article 7, paragraph 3 of Regulation 40/94: 'Can the distinctive character of a trademark as referred to in Article 3, paragraph 3 of the [Directive] and in Article 7, paragraph 3 of the [Regulation] be acquired following or as a consequence of the use of such a trademark as part of another trademark or in combination with the other trademark?'</td>
<td>ECJ 17 September 2005.</td>
</tr>
<tr>
<td>1- Court of Appeal (England), Civil Division, judgment of 25/07/2003 Manufacturer Nestlé SA/Mars UK Ltd (United Kingdom)</td>
<td>YES</td>
<td>C-353/03</td>
</tr>
<tr>
<td>2- Gerechtshofte's-Gravenhage, arrest van 28/08/2003Gerechtshofte's-Gravenhage, arrest van 28/08/2003Class International BV / Colgate-Palmolive Company e.a (Netherlands)</td>
<td>YES</td>
<td>C-405/03</td>
</tr>
<tr>
<td>3- Högsta domstolen, beslut av 09/08/2005 Nokia Corp. / Joacim Wärdell (Sweden)</td>
<td>YES</td>
<td>C-316/05</td>
</tr>
<tr>
<td>4- Oberster Gerichtshof, Beschluß von 12/06/17 Ob 10/07f PAGO International / Tirolmilch registrierte Genossenschaft mbH (Austria)</td>
<td>YES</td>
<td>C-301/07</td>
</tr>
<tr>
<td>5- Oberster Gerichtshof, Beschluß vom 02/10/17 Ob 20/07a Lindt &amp; Sprüngli EG / Franz Hauswirth GmbH (Austria)</td>
<td>YES</td>
<td>C-529/07</td>
</tr>
<tr>
<td>Case</td>
<td>Court</td>
<td>Reference</td>
</tr>
<tr>
<td>------</td>
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<td>-----------</td>
</tr>
<tr>
<td>6-</td>
<td>Hof van cassatie (België), 1e kamer, arrest van 07/02/2008UDV North America Inc / Brandtraders (Belgium)</td>
<td>YES C-62/08</td>
</tr>
<tr>
<td>7-</td>
<td>Court of Cassation (France), Commercial, financial and economic division, judgment of 20/05/2008Google France et Google Inc. /Louis Vuitton Malletier (France)</td>
<td>YES C-236/08</td>
</tr>
<tr>
<td>8-</td>
<td>Finanzgericht München, Beschluss vom 19/06/14 K 3393/07 (Germany)</td>
<td>YES C-302/08</td>
</tr>
<tr>
<td>9-</td>
<td>Oberlandesgericht Nürnberg, Beschluss vom 31/3/20103 U 1497/08 Coty Prestige Lancaster Group GmbH / Simex Trading AG (Germany)</td>
<td>YES C-127/09</td>
</tr>
<tr>
<td>10-</td>
<td>Court of Cassation (France), Commercial, financial and economic division, judgment of 23/06/2009DHL Express France/Chronopost SA (France)</td>
<td>YES C-235/08</td>
</tr>
<tr>
<td>11-</td>
<td>High Court of Justice (England), Chancery Division, order of 16/07/2009Interflora, Application</td>
<td>YES C-323/09 P</td>
</tr>
<tr>
<td>Case Details</td>
<td>Decision</td>
<td>PQ</td>
</tr>
<tr>
<td>--------------</td>
<td>----------</td>
<td>----</td>
</tr>
<tr>
<td>Inc. and Interflora British Unit/Marks and Spencer Plc and Flowers Direct Online Limited (United Kingdom)</td>
<td>phase</td>
<td>context of e-commerce.</td>
</tr>
<tr>
<td>Oberster Gerichtshof, Beschluss vom 22/09/17 Ob 17/09p Lindt &amp; Sprüngli EG / Franz Hauswirth GmbH (Austria)</td>
<td>YES</td>
<td>C- 529/07</td>
</tr>
<tr>
<td>Finanzgericht München, Beschluss vom 28/09/14 K 2040/09 Zino Davidoff S.A. / Bundesfinanzdirektion Südost (Germany)</td>
<td>YES</td>
<td>C-302/08</td>
</tr>
<tr>
<td>Court of Appeal (England), Civil Division, order of 09/11/2009 Nokia Corporation / Commissioners for Her Majesty's Revenue and Customs and International Trademark Association (United Kingdom)</td>
<td>YES, C-495/09</td>
<td></td>
</tr>
<tr>
<td>Case Study</td>
<td>Jurisdiction</td>
<td>Date</td>
</tr>
<tr>
<td>------------</td>
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<td>------</td>
</tr>
<tr>
<td>16- Tribunal Supremo, Sala de la Contencioso-Administrativo, Tercera Sección, auto del 09/04/2010 Génesis Seguros Generales Sociedad Anónima de Seguros y Reaseguros (GENESIS) / Boys Toys SA (Spain)</td>
<td>YES C-190/10 Application phase</td>
<td>PQ: ‘Can Article 27 of Council Regulation (EC) No 40/94 of 20 December 1993 concerning the Community trademark be interpreted in such a way that consideration be given not only to the date, but also the hour and minute of submission of a trademark registration application to the OHIM, provided that such data exists, in order to determine the time priority in relation to a national trademark registered on the same date, where the national Regulation governing the registration of the latter trademark considers the submission time to be relevant?’</td>
</tr>
<tr>
<td>17- Oberlandesgericht Nürnberg, Beschluss vom 22/3/2010 U 1497/08 Coty Prestige Lancaster Group GmbH / Simex Trading AG (Germany)</td>
<td>YES C-127/09</td>
<td>The PQ relates to the interpretation of the concept of putting on the market as defined by Article 13, paragraph 1 of Regulation (EC) No 40/94.</td>
</tr>
<tr>
<td>Community designs</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1- Juzgado de lo Mercantil nº 1 de Alicante y nº 1 de Marca Comunitaria, auto del 18/01/2008 Fundación Española para la Innovación de la Artesanía (FEIA) / Cul de Sac Espacio Creativo SL et Acierta Product &amp; Position SA (Spain)</td>
<td>YES C-32/08</td>
<td>The PQ relates to the interpretation of the terms ‘employee’ and ‘employer’ used by Article 14, paragraph 3 of Regulation No. 6/2002.</td>
</tr>
<tr>
<td>2- Juzgado de lo Mercantil nº 1 de Alicante y nº 1 de Marca Comunitaria, sentencia del 01/09/2009 Fundación Española para la Innovación de la Artesanía (FEIA)/Cul de Sac Espacio Creativo SL et Acierta Product &amp; Position SA (Spain)</td>
<td>YES C-32/08</td>
<td>As previous question.</td>
</tr>
<tr>
<td>3- Juzgado de lo Mercantil de Alicante, auto del 15/09/2009Celaya Empananza y Galdos</td>
<td>YES C-488/10 Application phase</td>
<td>The PQ relates to the scope to ban third parties from using the aforementioned design as set out by Article 19 of Regulation No. 6/2002 on Community designs.</td>
</tr>
<tr>
<td>Case Description</td>
<td>Judgment</td>
<td>Date</td>
</tr>
<tr>
<td>------------------</td>
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<td>------</td>
</tr>
<tr>
<td>Internacional SA / Proyectos Integrales de Balizamientos SL (Spain)</td>
<td>none</td>
<td></td>
</tr>
<tr>
<td>European patent</td>
<td>none</td>
<td></td>
</tr>
<tr>
<td>European Company</td>
<td>none</td>
<td></td>
</tr>
<tr>
<td>European Economic Interest Grouping</td>
<td>1.-Oberlandesgericht Frankfurt/Main, Vorlagebeschuß vom 09/12/20 W 308/95 Firma European Information Technology Observatory (Germany)</td>
<td>YES</td>
</tr>
<tr>
<td>2- Corte Suprema di Cassazione, ordinanza del 29/11/2007Adige Carini scrl (in liquidazione)/Ministero dell'Economia e delle Finanze et Agenzia delle Entrate (Italy)</td>
<td>YES</td>
<td>C-78/08</td>
</tr>
<tr>
<td>3- Corte Suprema di Cassazione, ordinanza del 29/11/2007Amministrazione delle finanze dello Stato e Agenzia delle Entrate / Paint Graphos scarl (Italy)</td>
<td>YES</td>
<td>79/08</td>
</tr>
<tr>
<td>European Cooperative Society</td>
<td>1- Corte Suprema di Cassazione, ordinanza del 20/12/2007 Amministrazione delle finanze dello</td>
<td>YES</td>
</tr>
</tbody>
</table>
The following numbers of preliminary rulings have been issued for each country:

- Belgium: 1
- Germany: 6
- Spain: 5
- France: 2
- Italy: 3
- Netherlands: 1
- Austria: 3
- United Kingdom: 4

Total: 26

It is again noted that the abovementioned rulings are greater in number for the most successful optional instruments, the application of which will therefore give rise to several interpretation issues.

Please note that these figures provided using systematic research are slightly less favourable than those provided by the national rapporteurs, which are listed in the table below.

### 2. SUMMARY OF ANSWERS (COUNTRY BY COUNTRY) TO QUESTION 16

<table>
<thead>
<tr>
<th>Member State</th>
<th>Table 16 A</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>For Regulation 805/2004, Regulation 1896/2006 and Regulation 861/2007 there have been none.</td>
</tr>
</tbody>
</table>

Regulation 40/94 was the subject of a question for preliminary ruling raised by the Belgian Court of Cassation, to which the Court of Justice responded in its judgment C-145/05. The question was as follows:

1) In order to determine the scope of the protection of a trademark acquired according to its distinctive elements in the proper way, as set out by Article 5, paragraph 1 of [Directive 89/104], should the judge consider the perception of the public in question when the use of the trademark or the similar sign accused of infringing the trademark began?

2) If not, can the judge consider the perception of the public in
question at any time during the period following time that the alleged use began? Specifically can the judge consider the perception of the public in question at the time at which they are issuing a judgment?

3) If the judge deems there is an infringement of the trademark in accordance with the criterion set out in (1), are they justified, as a rule, in ordering the suspension of the use of the sign which constitutes the infringement?

4) Is the judge also justified in doing so if the applicant's trademark has wholly or partially lost its distinctive elements since the time at which the use constituting the infringement began, but only in the event that such a loss is wholly or partially due to the fault or negligence of the trademark holder?’

The Court ruled that public in question’s perception of the trademark cited at the time at which the use of the sign infringing the trademark began should be taken into consideration.

There have been none for Regulation 6/2002, Regulation 2157/2001, the European patent or Regulation 2137/85.

Bulgaria

None. During interviews with representatives from the justice system, it was highlighted that the OIs have not been subject to all of the requests relating to questions for preliminary rulings.

Czech Republic

As it stands, the Czech courts have not launched any preliminary proceedings relating to the instruments in question.

Germany

Academic response

As regards the Enforcement Order, there was one application for a question for preliminary ruling by the Regensburg Regional Court on 11 June 2010. The courts also often refer to the wider range of ECJ case law with regard to Regulation 44/2001 on jurisdiction and the recognition and enforcement of decisions in civil and commercial matters for areas covered by this Regulation. Germany has no preliminary rulings for the other European procedures.

As regards the intellectual property instruments

The German courts made many preliminary rulings in the area of European trademark law, for example: The decision of BGH (14.2.2008), the ruling by OLG Nürnberg (31.3.2009), together with the ECJ's ruling (2.7.2009 – on the preliminary ruling by the München Financial Court).

There have also been many preliminary rulings before the courts as regards the interpretation of the German trademark law based on the European Directives.
Preliminary rulings in the area of Community designs are however rare, as is the case for patents (only rulings were by the BPatG on 29.4.2009 and 29.1.1998).

As regards European Companies and the EEIG, preliminary rulings by the German courts are rare, and even virtually non-existent, given the low number of such cases and the few legal decisions in this area. Concerning the EEIG, there is the ECJ ECJ judgment of 18 December 1997 ECJ ECJ (on referral from OLG Frankfurt am Main).

**The Ministry's response**

For the European order for payment procedure: No.

Data is available as regards the application of the EEO or its interpretation.

For small claims: The German Ministry of Justice is not aware of any such applications.

Greece
There are currently none for the civil procedure optional instruments.

Spain

In its decision of 24 February 2010 the third chamber of the Supreme Court requested a preliminary ruling on the interpretation of Art. 27 of Regulation 40/94, i.e. when the application was made where various implementations were made on the same day.

France
The only preliminary rulings related to the intellectual property law OIs. Preliminary rulings on interpretation may be brought before the ECJ. Also see examples of the Google France ECJ judgment of 23 March 2010 and the Lego ECJ judgment of 14 September 2010.

The ECJ mainly intervened in the area of trademarks. In this respect, the interpretation of Council Directive 89/104/EEC of 21 December 1988 which streamlines Member States' trademark law is particularly noteworthy, demonstrating the importance of the Court of Justice's creator role in this area. Moreover, it should be noted that several concepts shared by Regulation 40/94 and Directive 89/104 have been interpreted in the same way, which attests to the unity of the community structure in this area.

Italy
I. Civil procedure

No preliminary rulings have been made for the civil procedure instruments. They were only taken into consideration in the Advocate-General Trstenjak's submissions issued on 24 April 2008, in the case of Caffaro Srl v Azienda Unità Sanitaria Locale RM/C.
<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>II. Intellectual property law</strong></td>
<td>No preliminary rulings have been made for this area.</td>
</tr>
<tr>
<td><strong>III. Company law</strong></td>
<td>No referrals for a preliminary ruling have been made for these optional instruments.</td>
</tr>
<tr>
<td><strong>Cyprus</strong></td>
<td>No preliminary ruling applications were sent for these questions.</td>
</tr>
<tr>
<td><strong>Luxembourg</strong></td>
<td>The research results and the answers provided by the public prosecutor's office documentation department during interviews on this question appear to demonstrate that at present, no preliminary rulings on interpretation have been brought before the ECJ in relation to the optional instruments.</td>
</tr>
<tr>
<td><strong>Hungary</strong></td>
<td>Preliminary rulings before the ECJ are very rare in Hungary. As regards the interpretation of the OIs included in the questionnaire, there were no cases of such a ruling have been brought before the ECJ. The judges mentioned a case in which a preliminary ruling was initiated based on Regulation 44/2001 for issues relating to court jurisdiction. As regards another case, one of the judges also indicated that there were issues to be resolved in relation to the European Certificate of Succession, but that a preliminary ruling was yet to be made. Statistics are available on the ECJ website showing the number of preliminary rulings initiated by Hungary (a total of 27 preliminary rulings based on the various levels of the justice system).</td>
</tr>
<tr>
<td><strong>Netherlands</strong></td>
<td>This is not the case in the Netherlands.</td>
</tr>
<tr>
<td><strong>Austria</strong></td>
<td>The Austrian courts do not send many applications for preliminary rulings. There are two known applications concerning the Community trademark (Pago/Tirolmilch and Goldhase II).</td>
</tr>
<tr>
<td><strong>Poland</strong></td>
<td>At the present time, no applications or information relating to this question have been published. It is too early to be able to answer this question.</td>
</tr>
<tr>
<td><strong>Portugal</strong></td>
<td>No information.</td>
</tr>
<tr>
<td><strong>Slovakia</strong></td>
<td>No preliminary ruling applications were sent to the ECJ by the Slovak courts regarding the interpretation of the optional instruments.</td>
</tr>
<tr>
<td>Country</td>
<td>The Ministry’s response</td>
</tr>
<tr>
<td>---------------</td>
<td>----------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Sweden</td>
<td>The ECJ does have jurisdiction over the European patents as such.</td>
</tr>
<tr>
<td></td>
<td>According to the National Courts Administration, applications for preliminary rulings</td>
</tr>
<tr>
<td></td>
<td>on the interpretation of the OIs are rare.</td>
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<tr>
<td></td>
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</tbody>
</table>
CHAPTER 17: HAVE THERE BEEN NATIONAL LEGAL INTERPRETATIONS WHICH MIGHT HAVE DISTORTED THE OPTIONAL INSTRUMENT AND/OR WHICH HAVE LATER BEEN QUESTIONED BY THE ECJ?

We shall present the analysis of the answers one-by-one (1), followed by a more comprehensive summary showing the various answers country by country (2).

1. ANALYSIS OF THE ANSWERS

The various reports show that there have been very few legal interpretations that do not comply with the texts on which the optional instruments are based.

In some cases, certain administrative texts may give rise to a contestable interpretation of a text on which an optional instrument is based, but in such cases judges will ensure that the proper interpretation prevails. The Belgian report demonstrates that a distorted interpretation of the Regulation on the European Enforcement Order appeared in a circular dated 22 June 2005. While the Regulation appears to deem that the competent authority to issue the European Enforcement Order certificate is the 'original court', that it defines as being the court 'attached' to the decision on the substance of the case, the Belgian circular dated 22 June 2005 stipulates that it is 'the head court officer of the court who made the decision or who registered the court settlement' who is responsible for issuing the EEO certificate, which does not appear to comply with the Regulation. The Belgian report states however that the case law almost unanimously considers that it is the responsibility of the judge to certify the decision as a European Enforcement Order and the responsibility of the officer of the court to issue the European Enforcement Order certificate. It therefore appears that judges did not follow the circular's incorrect interpretation.

In other cases there are controversial legal issues which may indicate that a preliminary ruling is required and that an application for such a ruling is overdue.

In Belgium there also appears to be a problem with the interpretation of Article 19, 1 b of the Regulation on the European Enforcement Order. The text states:

'Article 19
Minimum standards for a review in exceptional cases:

1. Further to Articles 13 to 18, a judgement can only be certified as a European Enforcement Order if the debtor is entitled, under the law of the Member State of origin, to apply for a review of the judgement where:

   a) i) the document instituting the proceedings or an equivalent document or, where applicable, the summons to a court hearing, was served by one of the methods provided for in Article 14, and
   ii) service was not effected in sufficient time to enable him to arrange for his defence, without any fault on his part
   b) The debtor was prevented from objecting to the claim by reason of force majeure or due to exceptional circumstances, without any fault on his part, provided in either case he acts promptly.
2. This Article is without prejudice to the possibility for Member States to grant access to a review of the judgement under more generous conditions than those mentioned in paragraph 1'.

In Belgium there are two opposing trends in case law and legal theory. The first deems that the debtor, in this case, always has the right to appeal or contest a decision. Writers reiterate that there is legal theory and case law which deems that such a right to appeal remains open, even when the deadlines have passed, if the delay was the result of a force majeure event. On the contrary, certain decisions in case law deem that 'exceptional circumstances beyond the debtor's control' as set out in Article 19, 1b), cannot be confused with cases of force majeure. Given that these two interpretations are conflicting, one of them will necessarily oppose the way in which the optional instrument is interpreted. However, this may simply indicate that a preliminary ruling should be sought from the Court of Justice on this issue.

The German report also cites cases of conflicting interpretations, which were resolved as soon as the ECJ was called upon to provide an interpretation of the text. For example, in one of the cases cited, the Amtsgericht Frankfurt am Main refused to register the start-up company 'European Information Technology Observatory, Europäische Wirtschaftliche Interessenvereinigung' (EITO), whose registered office is located in Frankfurt, under section A of the trade register on the grounds that under German law, a Europäische Wirtschaftliche Interessenvereinigung or European Economic Interest Grouping (EEIG) can only have a purely personal company name or a personal company name combined with additional references. Therefore it could not be registered because its company name is composed solely of elements which describe the purpose of the company. Following an appeal, the Oberlandesgericht decided that this appeal was without basis, given that in a decision of 18 May 1993 it had already ruled that the company name of an EEIG could not appear on the trade register if it was composed solely of elements which described the purpose of the company, because the Law applying to company names for general partnerships under German law ('offene Handelsgesellschaften'), which applies to EEIGs, stipulates the use of purely personal company names, or personal company names combined with additional references. In this decision, the Oberlandesgericht specifically rejected the approach set out in Article 5 a) of the Regulation, which imposes a company name which purely and simply describes the purpose of the company. According to the Oberlandesgericht, this provision indicates simply that the words 'European Economic Interest Grouping' or the acronym 'EEIG' do not necessarily have to precede or follow the company name, and that consequently, the matter of the company name (with the exception of an addition reference to the legal status) is governed solely by national law.

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252 P. P. GIELEN, 'Le problème de l’applicabilité du Règlement (CE) n°805/2004 en Belgique', J.L.M.B., 2010, p.1629 and J.-F. VAN DROGHENBROECK and S. BRIJS, Un titre exécutoire européen, Les dossier du Journal des Tribunaux, Larcier, Brussels, 2006, p. 177; C. VANHEUKELEN, 'Le titre exécutoire européen - Approche d’un praticien du droit', Le droit judiciaire en mutation - En hommage à Alphonse Kohl, Liège Anthémis, 2007; referring to justice of the peace, 1st cant., Brussels, 14 March 2007, J.L.M.B., 2007, p. 1199. Also see judgment of the justice of the peace of the canton of Heist-op-den-Berg, 2 March 2006, Revue@dipr.be , 2006, no 1, p.58 which is considered to be the founding judgment of the trend whereby the judge highlights the fact that the Court of Cassation will accept an extension of the deadline for the preparation of an appeal in a case of force majeure, where the force majeure is the result of an event which is beyond the control of the interested party, and where such party was unable to predict or prevent such an event. The court stipulates that the concept of a case of force majeure is more restricted than simply an exceptional circumstance.


However the Oberlandesgericht applied to the Court of Justice for a preliminary ruling on interpretation. The court rightfully stated that:

‘Article 5 a), of Council Regulation (EEC) No 2137/85 of 25 July 1985, concerning the setting up of a European Economic Interest Grouping (EEIG), should be interpreted in the sense that the company name of a European Economic Interest Grouping must contain the words ‘European Economic Interest Grouping’ or the acronym ‘EEIG’, while other elements which must be included in the company name can be imposed by the national law provisions applicable in the Member State in which said Grouping’s registered office is located’.

Of course, in this case the Court of Justice did not follow the Oberlandesgericht’s interpretation, but this is after all a normal outcome for the institutions. The important point here is that the German judge did indeed refer an application for a preliminary ruling on interpretation to the Court of Justice.

Ultimately, with the exception of the Greek report which states that ‘In many cases Greek courts and the Greek Trademark Committee openly deny to apply the ECJ and General Court jurisprudence on trademarks’, without providing any clarification, the various reports conclude that there is no national case law interpretation which might distort the optional instruments.

### 2. COUNTRY-BY-COUNTRY SUMMARY OF RESPONSES TO QUESTION 17

<table>
<thead>
<tr>
<th>Member State</th>
<th>Table 17</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>As regards the European Enforcement Order, the Regulation left the Member States to decide which authority is competent to issue the certificates. As yet there has been no legislation on this point in Belgium, and it was therefore a circular dated 22 June 2005 which stipulated that it is ‘the head court officer of the court who made the decision or who registered the court settlement’ who is responsible for issuing the EEO certificate. This interpretation of the Regulation is incorrect (see above) and the majority of case law does not comply with the circular. Some case law however does apply this circular by specifically allowing the officer of the court to issue the certificate. Moreover, by checking that the decision on the substance of the case meets the conditions set out by Article 6 of the Regulation, the officer of the court is making a legal ruling in a disputed matter. However, such an officer only has executive powers. Furthermore, officers of certain courts frequently issue the certificates, even though the matter has not been referred to a judge and no legal ruling has been made by a judge. And yet the decision may not be</td>
</tr>
</tbody>
</table>

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255 See answer to question 6 on trademarks.
enforceable, the claim may be contested or the decision may not be covered by the scope of the Regulation. The ECJ has not yet issued any judgments in this area.

As regards the Community trademark Regulation, the Liège Court of Appeal issued a ruling on 3 March 2008 on an infringement of a trademark. And yet pursuant to Article 92 of the Regulation, this is the sole jurisdiction of the Community trademark courts. In Belgium, the Community trademark courts are the Brussels commercial courts. Appeals against judgments can only be made to the Brussels Court of Appeal (Articles 574, 11 and 633d of the Judicial Code).

There appears to be no such interpretations pertaining to the European payment order, the small claims procedure, Community designs, the European patent, the European Company and the European Economic Interest Grouping.

<table>
<thead>
<tr>
<th>Country</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bulgaria</td>
<td>No, there are no legal interpretations which could change an OI, and there are no cases in which the OIs have been interpreted in a way which has been rejected by the ECJ.</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>The legal practitioners who responded to this questionnaire are not aware of such cases.</td>
</tr>
<tr>
<td>Germany</td>
<td>Academic response</td>
</tr>
<tr>
<td></td>
<td>One writer (Hess, EurZivilprozessrecht paragraph 10 36) criticises the fact that the integration of the European Enforcement Order into German law was not properly carried out as regards the protection of people from a European Enforcement Order issued by a foreign country.</td>
</tr>
<tr>
<td></td>
<td>In the area of European trademark law, there is a conflict of interpretation between the LG and the OLG München on one side and the ECJ on the other ('bayerisches Bier'): See ECJ judgment of 22.12.2010 and the report in beck aktuell, becklink 1008768.</td>
</tr>
<tr>
<td></td>
<td>In the area of EEIGs, a conflict arose between company name law in the German interpretation and the European concept of a EEIG (see ECJ judgment of 18.12.1997 – referral for a preliminary ruling by OLG Frankfurt).</td>
</tr>
<tr>
<td></td>
<td>The Ministry’s response</td>
</tr>
<tr>
<td></td>
<td>None for the European order for payment procedure or the EEO. The Ministry is not aware of any cases relating to small claims.</td>
</tr>
<tr>
<td>Greece</td>
<td>No information.</td>
</tr>
<tr>
<td>Spain</td>
<td>No information.</td>
</tr>
<tr>
<td>Country</td>
<td>Summary</td>
</tr>
<tr>
<td>---------</td>
<td>---------</td>
</tr>
<tr>
<td>France</td>
<td>The only answers that can really be provided relate to the intellectual property law OIs. A Magistrate at the Paris Regional Court reveals that 'in order to uphold the unified nature of the Community trademark and to prevent too many disparities between decisions, the EU legislator has asked Member States to nominate as limited a number of courts of first and second instance as possible to hear litigation proceedings questioning these industrial property rights'. See for instance Article 95 of Regulation EC 207/2009 of 26 February 2009. As regards trademarks, indeed national judges do not have jurisdiction over registration applications and revocation orders; the OHIM that is responsible for such matters. National judges do however have jurisdiction over counterfeiting cases. As regards designs, the national courts have a limited jurisdiction as defined negatively by Article 81 of Regulation 6/2002 of 12 December 2001. It should however be noted that differences in case law have arisen between the national courts which do not distort the optional instruments, e.g.: A more stringent assessment of the criterion of distinctiveness of a trademark is applied by OHIM that by the other organisations such as the National Intellectual Property Institute (INPI). In the area of patents there are also differences in the assessment of the criteria such as inventive ingenuity, which until now has been assessed more liberally by the European Patent Office than by certain decisions issued by the French courts. The interpretation of national judges does not appear to have differed from the interpretation of the ECJ.</td>
</tr>
<tr>
<td>Italy</td>
<td>I. Civil procedure According to the few available decisions, national judges tend to interpret the Regulations strictly in the light of their own objectives. When they refer to ECJ case law, where it exists, Italian judges often interpret the Regulations originating from EU legislation (consumer law for example) along the same lines as the European court. Case law commentators highlight the 'trust' of Italian judges in their European colleagues and their work, meaning that they do not request any checks of the instrument once it has been issued. II. Intellectual property law There are no cases of national legal interpretation in Italy which differ from those of the ECJ. III. Company law: No data available.</td>
</tr>
<tr>
<td>Country</td>
<td>Response</td>
</tr>
<tr>
<td>---------</td>
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</tr>
<tr>
<td>Cyprus</td>
<td>There have been no such interpretations or cases.</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>According to the information sent by the public prosecutor's office, there has been no national legal interpretation which might have distorted the optional instruments, nor any interpretation which may have later been questioned by the ECJ.</td>
</tr>
<tr>
<td>Hungary</td>
<td>As far as those questioned are aware, there is no national interpretation which might distort the content of the OIs. Furthermore, based on the information available to them, there is no interpretation which has been questioned by the ECJ. However, a case linked to a German referral for preliminary ruling has raised an important point of discussion relating to whether the ECJ's interpretation of this German issue restricted the courts of other Member States and thus the Hungarian courts. Clearly European law has to be restrictive in order to be effective, but discussions are ongoing amongst legal practitioners on this point.</td>
</tr>
<tr>
<td>Netherlands</td>
<td>No, most of the OIs are too recent to have been interpreted in this way.</td>
</tr>
<tr>
<td>Austria</td>
<td>According to the available data, there does not seem to have been any cases in which the OIs have been interpreted in a way which has later been rejected by the ECJ.</td>
</tr>
<tr>
<td>Poland</td>
<td>Probably not but it is too early to be able to answer this question. In the areas set out in paragraph C I, at present only four judgments have been published on the EEO, one relating to the European order for payment procedure and none relating to the European small claims procedure. It is difficult to provide credible data in the absence of decisions, publications in legal journals and examinations by judges and lawyers. As it stands there have been no national legal interpretations relating to the SE, EEIG or the SCE.</td>
</tr>
<tr>
<td>Portugal</td>
<td>No information.</td>
</tr>
<tr>
<td>Slovakia</td>
<td>There appears to have been no such interpretations.</td>
</tr>
<tr>
<td>Sweden</td>
<td>The Ministry's response: There is no known legal interpretation which might change the OIs. And there were no cases in which the OIs have been interpreted in a way which (insofar as the ECJ has jurisdiction) has later been rejected by the ECJ.</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>The Ministry's response: No information. Academic response: None.</td>
</tr>
</tbody>
</table>
CHAPTER 18: DO JUDGES IN ONE MEMBER STATE HAVE A MEANS OF KNOWING ABOUT INTERPRETATIONS MADE BY JUDGES FROM OTHER MEMBER STATES REGARDING THE SAME ISSUE?

To elaborate on this question, rapporteurs were asked to state whether lawyers are able to find out about and invoke these differing interpretations in their own conclusions.

This section analyses the responses one-by-one (1.), before presenting a table with a more detailed overview of the different answers by country (2.).

1. ANALYSIS OF THE RESPONSES

The greatest empiricism possible is achieved when national judicial decisions in Europe can be accessed from one Member State to another. There are certainly international journals and websites of national supreme courts, which are sometimes translated into several languages. But there is no database bringing together decisions of the different Member States, and a fortiori bringing together decisions regarding optional instruments.

However, the reports are more optimistic about two areas: the area of intellectual property, where the German report notes that international journals in this area report intellectual property decisions in national courts; and the area of procedural law, where the Academy of European Law (ERA), which brings together magistrates from all EU Member States, organises conferences, such as those in Trier, where magistrates from different Member States can exchange information on, for example, the order for payment procedure.

Despite this, different rapporteurs suggest using existing instruments to develop institutionalised exchanges of information regarding the above decisions:

1. either through the *European Judicial Network*, created by Council Decision 2001/470/EC of 28 May 2001,
2. or through the Europa portal, or the JURE database (useful for the Brussels I Regulation or the Lugano Convention),
3. or through the Network of the Presidents of the Supreme Judicial Courts of the European Union, which could also assist with exchanges of this type.
## 2. COUNTRY-BY-COUNTRY SUMMARY OF RESPONSES TO QUESTION 18

<table>
<thead>
<tr>
<th>Member State</th>
<th>Table 18</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>The authors of some publications report on the manner in which other Member States apply optional instruments. However, there is no specific means of finding out about these interpretations.</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>Judges do not use any specific tool to familiarise themselves with interpretations of OIs by judges in other Member States. They may be able to use sources of judicial decisions which are in the public domain if these decisions are available in the language of the judge who has made the decision. Lawyers are also able to use these sources, but at this stage the practice is too restricted and it is not possible to evaluate their ability to manage or find out about such interpretations. However, at this stage, this practice and interpretations by judges from other Member States, are generally not considered to be appropriate arguments in their conclusions.</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>Unfortunately, there are no official channels for the exchange of either jurisprudence or general experience. Exchange is indirect only (via conferences, the European Judicial Network, literature, etc.). The JURE database serves similar purposes, but for other instruments (Brussels I Regulation, Lugano Convention). It could be useful to widen the operating range at least to the procedural optional instruments mentioned in this questionnaire.</td>
</tr>
<tr>
<td>Germany</td>
<td><strong>Academic response</strong></td>
</tr>
<tr>
<td></td>
<td>To give an example, the German Supreme Court regularly states that OIs must be interpreted in the spirit of Community and comparative law.</td>
</tr>
<tr>
<td></td>
<td>In the area of intellectual property, German legal practitioners effectively have a means of finding out about and taking into account decisions made in foreign courts, mainly through international intellectual property law journals, which regularly publish these decisions (such as GRUR International or IIC).</td>
</tr>
<tr>
<td></td>
<td><strong>The Ministry’s response</strong></td>
</tr>
<tr>
<td></td>
<td>For the European order for payment procedure: yes – the conferences in Trier, organised by the ERA, bring together magistrates from all EU Member States, and even from outside the EU (such as Switzerland).</td>
</tr>
</tbody>
</table>
|                    | For the EEO, as there will be a need for individual cases to discuss
problems of interpretation when applying the European legal instruments, the European Judicial Network could create a forum for this purpose. In addition, legal practitioners can consult legal journals to read about interpretations of certain issues concerning European legal instruments and the decisions made in this context.

Small claims: No data available.

<table>
<thead>
<tr>
<th>Country</th>
<th>Information</th>
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<tbody>
<tr>
<td>Greece</td>
<td>Judges and lawyers can learn of interpretations made by judges from other Member States on the same issue by consulting legal databases available on the Internet, and also through Greek legal journals which occasionally publish decisions by courts of other Member States when they are of particular interest. Interpretagons by judges in other Member States can also be consulted by means of articles published in these specialist journals by authors who have particular expertise in the subject in question. These authors present the interpretations by comparing them with interpretations by Greek judges on the same issue.</td>
</tr>
<tr>
<td>Spain</td>
<td>There is no particular procedure.</td>
</tr>
<tr>
<td>France</td>
<td>I. Association law: yes, lawyers are able to find out about these other interpretations, but with great difficulty when consulting specialist databases, and even more – as is more often the case – with regard to personal contacts. II. Civil procedure: French Judges, like lawyers, are not very familiar with interpretations made by judges from other Member States. It is very rare for decisions to be published in private international law journals. III. Intellectual property law: the judges asked did not respond to this question. The audit carried out on the legal profession demonstrates their awareness of these interpretations; nevertheless, national legal arguments are entrusted with local providers (lawyers).</td>
</tr>
<tr>
<td>Italy</td>
<td>Italian judges do not claim to be aware of interpretations applied in other Member States, but they may certainly take them into consideration. The adoption of a 'comparative approach' is also left to judges' and lawyers' personal discretion. On this point, prominent Italian researchers have condemned the 'negligence' of lawyers and judges with regard to comparative law. It has been maintained that Article 12 of the preleggi, which establishes the criteria for applying analogue technology during interpretation, could justify judges' arguments against applying foreign interpretations. The Court of Cassation and the Constitutional Court have referred to foreign jurisprudence, albeit only on a handful of occasions. No</td>
</tr>
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</table>
Implementation of optional instruments within European civil law

<table>
<thead>
<tr>
<th>Country</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cyprus</td>
<td>The Supreme Court is a member of several European organisations through which judgments on European issues are known by all Member States, mainly through their websites. If lawyers do their research properly, they will be aware of these interpretations and will try to refer to them in their pleadings.</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>Luxembourgeois judges have the means of finding out about interpretations by judges from other Member States regarding the same issue, by way of foreign legal sites and databases. It should be noted that in general, Luxembourgeois judges do not hesitate to follow interpretations (depending on the subject) by judges from other Member States, especially France, Belgium and Germany.</td>
</tr>
<tr>
<td>Hungary</td>
<td>Awareness of judges with regard to interpretations made in courts of other Member States: there is a Network of Presidents of the Supreme Judicial Courts of the European Union, but the people questioned believe that this is more of a matter of protocol than a professional network. A similar network could meet the objective of an exchange of practical national judicial information, but such a network does not yet exist. Insofar as there is no true overall database of legal practices of Member States of the European Union, it is quite rare for judges in one Member State to undertake research on this subject, or that they are able to access information on legal practices of other Member States. In Hungary, on the basis of the provisions of the Law on Electronic Access to Information (Law XC of 2005), a database containing anonymous legal decisions should be implemented. This database should be implemented to conform with the law. Hungarian legal practices are more or less accessible in Hungarian, and it is possible to research them to a certain extent, but again only in Hungarian. The website of the Supreme Court also contains information in Hungarian about decisions. Decisions of the Constitutional Court are available online in English. The websites of European courts (ECJ, ECtHR) are of course accessible in Hungary, but due to the lack of a database, one can certainly conclude that judges in our country have no means of finding out about the practical national legal practices of other Member States. If a judge wishes to find a decision of the ECJ without using online methods, he must consult the Report of Legal Decisions (Bírósági Határozatok Közlönye), where the most important decisions of the ECJ are published in Hungary. Awareness of judges with regard to interpretations made in courts of other Member States: In general, lawyers do not take judicial interpretations of other Member States into account when assessing</td>
</tr>
</tbody>
</table>
In all cases, they mainly take into account judicial interpretations by other national courts (not to mention certain foreign courts) in their reports (such as the BVerfG – the German Federal Constitutional Court – or European courts – ECJ, ECtHR).

<table>
<thead>
<tr>
<th>Country</th>
<th>Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>The \ Netherlands</td>
<td>Judges may take advantage of the possibilities offered by the European Judicial Network (EJN) to keep informed about interpretations in different countries. Databases from other countries are also sometimes available to them. Most importantly, however, the Dutch legal system has implemented a large project to inform judges about European law (&quot;Eurinfra&quot;). Within the scope of this project, all judges have access to databases which also allow them to consult foreign jurisprudence with regard to European law.</td>
</tr>
<tr>
<td>Austria</td>
<td>Following Council Decision 2001/470/CE of 28 May 2001, a European Judicial Network in civil and commercial matters was set up to facilitate judicial cooperation between Member States in both civil and commercial matters. This put into place an information system for the members of the Network. In July 2010, the e-justice portal was created by the European Commission to give citizens and authorities access to the laws of Member States. Information on laws, national, European and international jurisprudence, and the legal system of each Member State, is directly accessible on this site. Furthermore, it provides links to national databases of Member States, as well as to European databases. Thanks to the website of the Network of the Presidents of the Supreme Judicial Courts of the European Union, national databases containing jurisprudence of the supreme courts of Member States can also be accessed.</td>
</tr>
<tr>
<td>Poland</td>
<td>Interpretations made in other Member States can be found on the LEX system. In the rare event of legal decisions being published in the area of OIs and civil procedure, and in the absence of publications by judges and lawyers in legal journals, it is impossible to provide this information. For intellectual property OIs, there are easily accessible publications in Polish about these interpretations. Yes, lawyers consult them during their pleadings.</td>
</tr>
<tr>
<td>Portugal</td>
<td>No information available.</td>
</tr>
<tr>
<td>Slovakia</td>
<td>Judges and other legal practitioners can follow foreign judicial decisions on the websites of courts of other EU Member States. For example, the Legal Academy also publishes links to databases and search engines for judicial decisions, including databases of the German, Austrian, English, Welsh, Scottish and Irish Supreme Courts, the Supreme Court of the Czech Republic and the Supreme Administrative Court of the Czech</td>
</tr>
</tbody>
</table>
Republic.

The extent of the information available to Slovakian courts is obviously limited to the linguistic competence of judges and other court officials who assist them. Judges and other legal practitioners appear to be more interested in foreign decisions regarding company law (especially Czech, German and Austrian decisions), due to highly important economic relations with these countries.

Sweden

The Ministry’s response: No information available.

United Kingdom

The Ministry’s response: No information available.

Academic response

In the United Kingdom, judges are trained when they are appointed, and this training continues throughout the course of their careers.

The Judicial College is directly responsible for training full-time and part-time judges in courts in England and Wales, and for training judges and court officials within the scope of the Tribunals, Courts and Enforcement Act 2007. The Judicial College is also responsible for supervising the training of magistrates. It also trains judges overseas, which allows it to be up-to-date with interpretations made by judges on the same issues.

In the United Kingdom, the Judicial College is a member of the United Kingdom and Republic of Ireland Judicial Studies Council. Its members make available all relevant training programmes, and issue publications.

At a European Union level, the Judicial College is an active participant in the European Judicial Training Network (EJTN). The aim of the EJTN is to encourage a common European legal and judicial culture, to develop freedom, security and justice and to promote mutual awareness of judgements. The EJTN coordinates European law programmes across Europe.

A large number of events are organised each year across Europe by training schools in the network, and many of them are open to other members (programme catalogue).

The Judicial Collage also takes part in events organised by the International Organization for Judicial Training (IOJT), a global judicial body dedicated to the promotion of the rule of law in other countries, and to help other countries open training schools. The Judicial College receives numerous requests for assistance from abroad, sometimes through the British Council, the Foreign and Commonwealth Office or the international section of the Ministry of Justice, and sometimes directly from foreign courts.

However, there is not necessarily training in place for every optional instrument. Judges receive essential training on the small claims procedure and the Economic Interest Grouping. They also receive training
on procedural law, but not on substantive law.

In effect, judges can keep up-to-date with other judgments thanks to the Internet, as long as the decisions are available in English. As a result, they do not have a great awareness of interpretations made by judges in other countries. And this problem is the same for lawyers, who are therefore unable to rely on these interpretations in their pleadings.
CHAPTER 19: WHICH METHODS OF INTERPRETATION DO NATIONAL JUDGES GENERALLY USE TO INTERPRET OPTIONAL INSTRUMENTS?

To elaborate on this question, rapporteurs were asked to state whether the methods of interpretation differ between trial judges, appeal judges and Supreme Court judges.

This section analyses the responses one-by-one (1.), before presenting a table with a more detailed overview of the different answers by country (2.).

1. ANALYSIS OF THE RESPONSES

The various reports show:

- that the methods of interpreting optional instruments do not generally differ from the methods of interpreting European Union legislation.

The Hungarian report emphasises that 'grammatical interpretation is most up-to-date; also – in certain cases – comparative, logical or structural interpretation; furthermore, interpretation in the spirit of European law or the principle of effectiveness may also be applied in judicial interpretation.'

- that there is no real difference between interpretation by trial judges and interpretation by Supreme Court judges; if anything, the latter are more inclined to apply abstract methods of interpretation;

- if an interpretation by the Court of Justice of the European Union exists, it will be respected;

- that optional instruments are interpreted in the spirit of European law.

The German report states that: 'OIs are generally interpreted in the spirit of European law, and not as instruments of national law (please refer to the area of enforceable instruments: Adolphsen MüKo ZPO 2008, previously section 1079 No. 10 s. See also: BGH NJW 2010 1884, which interprets it in an anonymous manner and not as an interpretation according to the German notion of one).'

The Italian report, for its part, gives examples, including the following:

'See, for example, the 'A-style' case: This mark has been evaluated by the Section of Bari, who decided that it is not contrary to morality, according to art. 14 C.p.i., even if its graphical representation hides a second image of two stylized human figures represented in a sexual relationship (Tribunale di Bari, 25 June 2007, Riv. dir. Ind., 2008, p. 470). The decision expressly refers to the principles of Community law. Article 7, paragraph 1f) Regulation No. 40/94 on the Community trademark precludes registration - such as the Italian law - of the 'marks which are 256 See Hungarian report.

257 However, the Hungarian report states: 'The Supreme Court previously adopted Directives provided that it was authorised to examine whether or not referral of a reference for a preliminary ruling to the ECJ was necessary according to the case at hand. When the ECJ was consulted on the legality of such a practice by the Hungarian Supreme Court, it concluded that such a judicial interpretation was illegal, which led to the eventual revision of Hungarian regulations.'
contrary to public order and morality’. In any case, according to the ruling of the OHIM judges should avoid a too-broad interpretation of the rule in order to prevent the risk of an excessive restriction to the enterprises’ freedom of expression (see UAMI, 6 July 2006, R. 2005-G, concerning the Screw You mark).

However, there are two exceptions:

- Firstly, national guidelines for the application of optional instruments (where necessary) may be interpreted partially in the spirit of the national law.

- Secondly, the German Ministry of Justice states that the optional matrimonial system, which forms a part of national legislation, is to be interpreted according to national law. Admittedly, this matrimonial system does not result from a piece of Community legislation, but from an agreement between Member States.

2. **COUNTRY-BY-COUNTRY SUMMARY OF RESPONSES TO QUESTION 19**

<table>
<thead>
<tr>
<th>Member State</th>
<th>Table 19</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td><strong>Which methods of interpretation do national judges generally use to interpret optional instruments?</strong>&lt;br&gt;Do these methods differ between trial judges, appeal judges and Supreme Court judges?</td>
<td>The methods are similar, regardless of whether one is before a trial judge, an appeal judge or a judge at the Court of Cassation. Courts generally refer directly to Regulations on optional instruments, and as the case may be, to national legislation which incorporates the Regulations. If there has already been an interpretation by the Court of Justice of the European Union, the judges give it precedence.</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>National judges use the same methods of interpretation for OIs as they do for interpreting national legislation. These methods do not differ between trial judges, appeal judges and Supreme Court judges. In view of national legislation and practice, it is not expected that differences will emerge in the future. In the event that judges' interpretations differ and reveal significant discrepancies, the Supreme Court has the authority to provide an interpretation which will establish consistent practice in the country's courts.</td>
<td></td>
</tr>
<tr>
<td>Czech Republic</td>
<td>Interpretation does not seem to differ much from what is common in national law. Grammatical (textual), systematic, teleological and other methods are used. There are of course some unique characteristics. For example, with EU law instruments, it is also necessary to compare this legislation with versions in other languages to ensure that they are all equal; the role of teleological interpretation is more important, etc.</td>
<td></td>
</tr>
</tbody>
</table>
**Germany**

**Academic response**

OIs are generally interpreted in the spirit of European law, and not as instruments of national law. The case law for this is BGH NJW 2010 1884, which interprets it autonomously, and not in accordance with the German idea of such practice. The Supreme Court of Justice uses the same case law to refer to numerous examples of unique characteristics according to European law.

In the area of intellectual property, the boundaries between national and European interpretation are blurred.

In the area of trademark law, the two legal systems are almost identical, as shown by the ruling in BGH GRUR 2009, 949 Tz 11. Furthermore, the Act on the Community Patent and for the amendment of provisions of Patent Law (Gemeinschaftspatentgesetz) expressly requires the amendment of national and European law (as shown by the ruling in BGH NJW 1989, 1863).

**The Ministry’s response**

As far as decisions by German courts with regard to the EEO are concerned, they must be oriented towards the principle of interpretation established by the rulings of the European Court of Justice.

For family law: matrimonial property systems generally form part of national legislation, and must generally be interpreted according to national provisions.

For small claims: judges may use the ordinary methods of interpretation when interpreting rules relating to the small claims procedure. Given that the Federal Ministry of Justice is not aware of any decisions made regarding small claims, no other precise information can be provided.

**Greece**

There is currently no legal department at either appeal level or Supreme Court level with regard to OIs. However, there is a legal department which deals with issues arising from Regulation 44/2001.

**Spain**

The methods of interpretation are the same as those used to interpret national law; clearly, jurisprudence from the Court of Justice is given particular attention. There is no discrepancy amongst judges.

**France**

I. Civil procedure

French judges use the classic methods of interpretation to interpret legislation on optional instruments, without having recourse to specific methods of interpretation. These methods do not differ between trial and appeal judges and judges of the French Court of Cassation.
II. Intellectual property law

When applying the conventional method of interpretation, the national judge is obliged to interpret the national law in the spirit of the Directive, in addition to interpreting jurisprudence relating to Community trademarks, since their notions are common to both the Directive and the Regulation. The freedom of national courts is limited to the following: only interpretations of Community courts have authenticity with regard to this matter, since national courts outside of this domain only have limited competence. Certain decisions may be reversed by a superior court without being challenged.

### Italy

I. Civil procedure

These instruments are included in Regulations which are directly applicable in the Italian legal system. They must be interpreted autonomously and in the spirit of European legislation. More specifically, the Regulations must be compatible with Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. For example, this Regulation provides the definition of 'civil and commercial matters', which is not explicitly stated in Regulation 805/2004.

At the same time, the OIs concerned are not self-sufficient since they contain explicit references to national legislation, so that they can be supplemented and integrated.

II. Intellectual property law

In this area, several Italian decisions of the 'sezioni specializzate' (specialised sections) have applied European Regulations and Directives, taking the jurisprudence of the European Court into account. Even when applying national legislation on trademarks, the judges take into account advice from the Community for most of the legislation; this has facilitated important harmonisation in this domain.

See, for example, the 'A-style' case: this trademark was evaluated by the Court of Bari, which decided that it was not contrary to public morality in accordance with Article 14 of the C.p.i., even though its graphic imagery hid a second image of two stylised human figures represented as having sexual intercourse (Court of Bari, 25 June 2007). The decision expressly refers to Community legal principles in Article 7(1)(f) of Regulation No. 40/94 on the Community trademark, which – like Italian law – prohibits the registration of 'trademarks which are contrary to public policy or to accepted principles of morality.' Regardless of the OHIM's decision, judges must avoid interpreting too widely from the rules in order to avoid risking excessive restrictions on the freedom of expression of businesses.

III. Company law

Company law instruments are subject to ordinary jurisdiction: as a
result, reference may be made to observations previously presented for civil procedure OIs.

<table>
<thead>
<tr>
<th>Country</th>
<th>Implementation of optional instruments within European civil law</th>
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<tbody>
<tr>
<td>Cyprus</td>
<td>Judges interpret optional instruments in such a way as to avoid conflict with European law, the constitution and national legislation. There are two levels of legal system in Cyprus; however, the same methods of interpretation are used at both levels.</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>The prosecution documentation department specifies that national judges must use the same method of interpretation for analogue optional instruments as they do for national law. This method is identical across all types of courts.</td>
</tr>
<tr>
<td>Hungary</td>
<td>Regarding methods of interpretation in general: grammatical interpretation is most up-to-date; also – in certain cases – comparative, logical or structural interpretation; furthermore, interpretation in the spirit of European law or the principle of effectiveness may also be applied in judicial interpretation. The most complex methods of interpretation are regularly used by higher judicial bodies, where the issues raised are more complex; on the other hand, interpretation must extend to more complex situations with the aim of resolving disputes or rectifying any error made by lower judicial bodies. At the same time, if time constraints have compromised the response, it is possible to conclude that the use of more complex methods of interpretation has increased amongst young professionals who are more competent in European law. It is emphasised that the Constitutional Court often uses a comparative or historical approach with regard to interpretation. When there are differences of opinion between courts regarding the method of interpretation: there should not normally be differing interpretations amongst different courts. There may be a general tendency for higher courts to use a more complex method of interpretation. However, we must continue this explanation with the particular situation regarding the Supreme Court. The Supreme Court previously adopted Directives, provided that it was authorised to examine whether or not referral of a reference for a preliminary ruling to the ECJ was necessary according to the case at hand. When the ECJ was consulted on the legality of such a practice by the Hungarian Supreme Court, it concluded that such a judicial interpretation was illegal, which led to the eventual revision of Hungarian Regulations. This decision ('soft law') may have been detrimental to parties involved in ongoing litigation. In addition, the question remains as to how decisions by the Supreme Court affect the standardisation of the law. Where legal practice regarding interpretation of specific rules differs between the varying areas of competence, the Supreme Court has the power to determine</td>
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</table>
which interpretation is to be used universally when interpreting legal provisions. The Supreme Court may possibly face a situation where it must decide on the interpretation of a piece of European legislation which is interpreted differently in Hungary depending on the areas of competence. Should such a case arise, the Supreme Court does not have the authority to ask the ECJ for a preliminary ruling. This would place the Supreme Court in an impossible situation, leading to obligatory interpretation of the law for the Supreme Court as well as for lower courts.

<table>
<thead>
<tr>
<th>Country</th>
<th>Description</th>
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<tbody>
<tr>
<td>The Netherlands</td>
<td>It is too early to make a general assessment. Dutch courts are sensitive to the fact that these OIs are European in nature, and must therefore be interpreted in the spirit of European law. In this respect, there is no difference between lower courts and the Supreme Court.</td>
</tr>
<tr>
<td>Austria</td>
<td>Judges generally use classic canon law methods to interpret laws. These methods involve textual, contextual, historical and teleological interpretation. In a European context, different linguistic versions must be taken into account, and particular emphasis must be placed on the idea of effectiveness. The methods do not differ between judges at different levels.</td>
</tr>
<tr>
<td>Poland</td>
<td>If necessary, judges may cite documents and their respective provisions, as well as court verdicts. OIs are interpreted in the same way as national law. Literal interpretation was initially used, followed more recently by functional interpretation. Functional interpretation is more in line with OIs, particularly with regard to the objectives of the Regulations stated in the preambles. Considering how rarely judicial decisions in this area are published, as well as the absence of publications by judges and lawyers in legal journals, it is impossible to provide detailed information.</td>
</tr>
<tr>
<td>Portugal</td>
<td>No information available.</td>
</tr>
<tr>
<td>Slovakia</td>
<td>No information available.</td>
</tr>
<tr>
<td>Sweden</td>
<td>The Ministry’s response</td>
</tr>
<tr>
<td></td>
<td>We are not aware of any judicial interpretation which differs when dealing with OIs.</td>
</tr>
<tr>
<td></td>
<td>And there has never been a case where an OI has been interpreted – to the extent that the ECJ is competent – only to then be rejected by the ECJ.</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>The Ministry’s response</td>
</tr>
<tr>
<td>----------------</td>
<td>------------------------</td>
</tr>
<tr>
<td></td>
<td>No information available.</td>
</tr>
</tbody>
</table>

**Academic response**

Methods of interpretation do not differ between courts. Courts use standard methods to interpret OIs, namely teleological interpretation (purposive approach).

National courts use the teleological method of interpretation when a issue of interpretation arises in European law. As Lord Denning observed in the case of *H P Bulmer Ltd v J Bollinger SA*: ‘... what are the English courts to do when they are faced with a problem of interpretation? They must follow the European pattern. No longer must they examine the words in meticulous detail. No longer must they argue about the precise grammatical sense. They must look to the purpose or intent.’

Furthermore, in the case of *Institute of Chartered Accountants in England and Wales v Customs and Excise Commissioners*, Beldam LJ declared that: 'In construing an Act of Parliament passed with the intention of giving effect to a Directive of Community law, United Kingdom courts are bound to interpret and apply the legislation so that the provisions of the Act conform with the requirements of Community law unless the words of the Act make such an approach impossible. Thus it is the duty of the court to give a purposive construction to the words used in the Act and not to be bound by any strict or literal interpretation.'

It appears that all courts use teleological interpretation when an issue of interpretation arises in European law.
HEADING 3 – LEGAL PRACTITIONERS AND OPTIONAL INSTRUMENTS

In Heading III, we ask about the awareness and use of optional instruments by notaries (Chapter 20), lawyers (Chapter 21) and commercial legal practitioners (Chapter 22).

CHAPTER 20: NOTARIES AND OPTIONAL INSTRUMENTS

The questionnaire asked rapporteurs if notaries were aware of optional instruments, if they have ever had to apply them, and if so, how they have done so.

This section analyses the responses one-by-one (1), before presenting a table with a more detailed overview of the different answers by country (2).

1. ANALYSIS OF THE RESPONSES

It must first be noted that some European countries do not have notaries in their legal systems, as exists in numerous continental countries. This is the case in the United Kingdom and Cyprus.

1.1. Which optional instruments may be applied by notaries?

In addition to the common matrimonial property system when it is in place, two optional instruments are already mainly concerned.

Firstly, there is the European Enforcement Order for which notaries are often granted the power to notarise the documents that they receive.

For example, in France, Article 509-3(3) of the Code of Civil Procedure provides that ‘notwithstanding Article 509-1,-the petitions for purposes of certification of the authenticated notarial acts, in view of their implementation abroad pursuant to Regulation (EC) No 805/2004 of the European Parliament creating a European Enforcement Order for uncontested claims, must be presented to the notary or the legal entity owning the notary's office which keeps the original of the document received.’

The same applies in Germany, and in Luxembourg. In effect, the Luxembourgeois report states that: ‘within the scope of Regulation (EC) 805/2004: The authorities targeted by Article 25 of Regulation (EC) 805/2004 are the notaries appointed by Grand-Ducal Decree to exercise the role of notary in the Grand Duchy of Luxembourg. In accordance with Article 25(1), notaries who have drawn up the authenticated act relating to an enforceable claim have the power to issue the European Enforcement Order certificate by using the type of form shown in Annex III of Regulation (EC) 805/2004.’

Notaries are then also affected by association law optional instruments.

For example, notaries are indeed often involved in the authentification of partnership agreements. For example, they may inspect the legality of the SE when it is merged.

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260 For Germany, see:
1.2. Do notaries really know about optional instruments?

Opinions are divided as regards notaries' real knowledge of optional instruments. The different reports generally only present subjective elements.

Some reports claim that notaries are not very familiar with optional instruments (Bulgaria, Greece, Spain), while others are more optimistic (Czech Republic, Germany, France, Italy262, Luxembourg, Hungary, Netherlands (for association law OIs), Austria, Poland).

However, some reports note that although notaries are well informed about association law optional instruments, they nevertheless have few opportunities to apply them, taking into account the low number of optional instruments in their country (see Polish report).

Only the Belgian and French reports rely on objective preliminary studies rather than on a subjective opinion.

These preliminary studies exclusively concern the European Enforcement Order.

The Belgian report refers to a preliminary study by A. Guyot, entitled 'Le titre exécutoire européen dans la pratique notoria' ('The European Enforcement Order in notarial practices'), which was undertaken during a notarial conference in 2009263. It recounts:

-In April 2009, a preliminary study was undertaken throughout the 1 200 notaries' offices in Belgium. Only 172 replied. The following observations were made:

- More than half of notaries had heard of the EEO but didn't know exactly what it involved.
- While 19 French-speaking notaries knew what the EEO was, and/or had granted European Enforcement Order certificates at the time of the preliminary study, only 1 Dutch-speaking notary had done so. This raises the issue of the discrepancy in information between the north and south of the country (…).

The author of the preliminary study concludes by saying that it is the lack of information amongst notaries which is the cause of the low take-up rate of the EEO.'

For its part, the French report contains an annex with a preliminary study carried out by the French notary profession, which shows the number of European Enforcement Order used by notaries, as well as the development of this number, since the preliminary study was undertaken in both 2007 and 2010 with all notary chambers in France.

In 2007, 38 European Enforcement Orders had been used by notaries who replied to the survey, while in 2010, the number had reached 98 (33 of which had been used by the Interdepartmental Chamber of Paris, Seine Saint-Denis and Val de Marne, and 30 by the Interdepartmental Chamber of the Haute-Pyrénées, Landes and Pyrénées-Atlantiques).


261 In France, this duty is shared by officers of the court: see Catherine Cathiard and Arnaud Lecourt, La pratique du droit européen des sociétés, Analyse comparative des structures et des fusions transfrontalières, Coll. Pratique des affaires, Joly Editions, Lextenso Editions, 2010.

262 However, the Italian response is cautious. In effect, it states: ‘Theoretically speaking notaries have to know about the OI in the area of company law (i.e. SE, EEIG and SCE)’.

263 Rapports Congrès Notarial 2009, Larcier, pp. 286 et s.
It should be noted that the preliminary study also asked whether notaries who had used the European Enforcement Order had encountered any difficulties while doing so. The preliminary study shows that the vast majority of notaries who had used the Order did not encounter any difficulties.

2. COUNTRY-BY-COUNTRY SUMMARY OF RESPONSES TO QUESTION 20

<table>
<thead>
<tr>
<th>Member State</th>
<th>Do notaries know about these OIs?</th>
<th>Do they have to apply these optional instruments? If yes, how do they go about it?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>With regard to the European Enforcement Order, in April 2009, a preliminary study was undertaken throughout the 1200 notaries' offices in Belgium. Only 172 replied. The following observations were made: more than half of notaries had heard of the EEO but didn't know exactly what it involved. While 19 French-speaking notaries knew what the EEO was, and/or had granted European Enforcement Order certificates at the time of the study, only 1 Dutch-speaking notary had done so. This raises the issue of the discrepancy in information between the north and south of the country. Cases in which certificates were issued regarded uncontested claims for maintenance obligations. Council Regulation 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations has recently resulted in the abolition of the exequatur procedure for maintenance obligations. One can then ask if the EEO still has any practical use in Belgium. The author of the preliminary study concludes by saying that it is the lack of information amongst notaries which is the cause of the low take-up rate of the EEO. Notaries are not required to participate in matters regarding the Community trademark, the Community design system and the European patent. No data is available for the European Company, the European Cooperative Society and the European Economic Interest Grouping.</td>
<td></td>
</tr>
<tr>
<td>Bulgaria</td>
<td>Notaries are not very well informed about existing instruments. However, in practice, they do not need to have specific knowledge of the subject and do not apply these OIs.</td>
<td></td>
</tr>
<tr>
<td>Czech Republic</td>
<td>Notaries are mostly aware of the EEO. The reason for this is that they have the right to draw up authenticated acts which may be certified as EEOs (by the competent courts).</td>
<td></td>
</tr>
</tbody>
</table>
### Germany

**Academic response**

With regard to civil procedure instruments, notaries are required to take part in the 'confirmation' of executory public acts (vollstreckbare öffentliche Urkunden) by means of a European Enforcement Order. Notaries are therefore heavily involved in the application of this OI.

Notaries are not required to participate in orders for payment or small claims.

In the area of European Companies, EEIGs and European Cooperative Societies, notaries must sometimes participate in the authentication of partnership agreements (SEs and SCEs) and they are legally obliged to request that they are entered onto the register. Notaries are therefore needed to implement OIs.

**The Ministry’s response**

For the EEO: No information available.

For family law: the matrimonial property system has been discussed at jurisprudence events, both in Germany and internationally. To date, 9 articles have been published in scientific journals.

For small claims: there are no statistics, and no surveys have been carried out concerning the acceptance of the method in practice.

### Greece

If optional instruments form part of a European Regulation, then notaries are obliged to be aware of them and to apply them. In reality, these OIs are not very well known.

### Spain

Only one of the notaries consulted (based in Barcelona) has used the European Grouping.

Notaries have shown great interest in the European Certificate of Succession, because they fear that their competence in the area of succession will be restricted as a result. One must bear in mind that Article 37.2 of the proposal stipulates that ‘the Certificate must be issued by the competent court in the Member State whose courts are competent pursuant to Articles 4, 5 and 6.’ Even if the provision refers to a ‘competent court’, Spanish notaries unanimously believe that the wording necessitates a wide interpretation, including other authorities which, according to national law, also undertake judicial activities under delegation, especially notaries who do so in relation to the law of succession. The best solution for notaries would be to create a network of notaries whose goal was to coordinate the granting of European Certificates, as this would be a simple and fast system capable of relieving courts of additional tasks.

### France

Notaries have a good knowledge of the OIs concerned because important powers are conferred to them in this field. When the procedure of implementing and merging the contents of an SE takes place, it is the
job of the officer of the court or the notary to inspect the legality and outcome of the SE when it is merged (if the SE being merged is registered in France). This results in the issuing of a 'certificate of legality' regarding the implementation of the merger, as well as the establishment of the new company formed by the merger.

The dividing line between these two authorities (officer of the court and notary) is rather blurred. However, it appears that the role of either officer of the court or notary is most important during the second stage of the inspection. This is the reason why French legislators originally exclusively entrusted notaries with this task. However, it quickly became apparent that this separation of roles was not justified, and that it was preferable to allow the inspection procedure to be entrusted to one person: the officer of the court. This became French law following the Law of 12 May 2009 amending Article L. 299-3 of the Commercial Code. From now on, companies will therefore have the choice of entrusting the second inspection stage to either an officer of the court or a notary.

The choice between notary and officer of the court will depend on circumstances. While the responsible officer of the court will be required to be the officer of the court in the jurisdiction where the merged SE is registered, the notary may come from any jurisdiction. The elements considered in the final decision will take the role into account. In any event, if a notary is required to carry out the inspection because it involves, for example, immovable property, it will be possible to request for the notary’s role to be extended. But above all, the choice will rest upon the ease with which the inspection is able to take place. Since they have equal skills, it is useful that the officer of the court who has already carried out such inspections within the scope of the contents of the SE, may be given priority over a notary, in order to facilitate the task of explaining the procedure to directors of merged companies.

Within their field of expertise, the notary or officer of the court will confirm that merged companies have a certificate that is issued by the competent authority of the Member State of each society in the merger (the officer of the court for French companies) during the first inspection stage, and that each certificate conclusively states that the required acts and formalities have been carried out. These certificates must be passed to the notary or officer of the court within six months of being issued, accompanied by the documents specified in Article R 229-13 of the Commercial Code.

Following Article R 229-13 of the Commercial Code, Decree No 2009-1559 of 14 December 2009 adds two new articles – D229-13-1 and D229-13-2 – to the terms. These articles specify that – in addition to the aforementioned certificate dating from the last 6 months – after a merged EC has been registered, each company involved in the procedure must pass a file to the notary or officer of the court in charge of the legality inspection in the jurisdiction in which the merged society is registered. The file must contain at the very least the following documents: the SE’s statutes; the common draft terms of merger; a copy of all documents relating to mandatory reports; copies of minutes
from all meetings; and documents confirming that each of the companies being merged have approved mutual draft terms of merger and have established the terms relating to the involvement of employees in accordance with Articles L 2351-1 to L 2354-4 of the Labour Code.

The legality inspection is then carried out within 15 days of receipt of all of the documents specified in Article D 229-13-1 of the Labour Code.

Article L 229-1(I) of the Commercial Code highlights three specific areas where the notary or officer of the court must take particular care. Firstly, the notary or officer of the court must verify that the merging companies have approved mutual draft terms of merger. This may not be obvious if one of the mergers is in German, Romanian, etc., depending on the nationality of the companies involved in the operation. The common draft terms of merger should therefore be approved in the same language, and any translation (certified if necessary) should be passed to the associates and authorities in the country of the company concerned whose language is not used in the common draft terms of merger.

Secondly, the notary or officer of the court will have to check that 'the terms relating to the involvement of employees have been established pursuant to the provisions of Articles L 439-25 to L 439-45 of the Labour Code.' Once again, this check will prove to be particularly strict because the notary will have to ensure that employees – regardless of whether they are informed, consulted, involved in the administration or management bodies, or have any other role – are, or will be (as the case may be) implicated in the SE.

Thirdly, the notary or officer of the court will check that the contents of the SE being merged correspond fully 'with the conditions laid down by the French legal provisions.' The notary or officer of the court will therefore check that the conditions of the contents of the SE being merged conform with French provisions regarding the merging of companies, provided for in Articles L 236-1 to L 236-22 of the Commercial Code.

Like with SEs, for SCEs registered in France, the inspection of the completion of the merger and its contents is entrusted to a notary or an officer of the court. The notary is entrusted with inspecting the legality of the merger.

The EEIG does not have this type of inspection.

With regard to the Franco-German optional matrimonial system, the various training programmes make notaries aware of this instrument, and bring them very up-to-date with it.

With regard to the EEO, the role of notaries is important (see the preliminary study published in the annex of the report undertaken by the French notary profession in 2007 and 2010).
<table>
<thead>
<tr>
<th>Country</th>
<th>Notes</th>
</tr>
</thead>
</table>
| Italy       | I. Civil procedure  
Notaries are not required to use this type of instrument in their roles.  
II. Intellectual property law  
Notaries are not required to use this type of instrument in their roles.  
III. Company law  
Theoretically speaking, notaries are aware of OIs in the area of company law (SEs, EEIGs and SCEs). This is because a public act is required in order to create an SE, SCE or EEIG, and in Italy, notaries are the only people who have professional authorisation to draft a public act. Furthermore, according to Article 27 of the 'Notarial Law' (Law no. 89/1913), the notary is obliged to draft a public act when asked to do so. Notaries therefore cannot refuse to use OIs if they are asked to do so by operators. |
| Cyprus      | Notaries do not exist in Cyprus. Lawyers are able to undertake all legal work. |
| Luxembourg  | Notaries are aware of optional instruments and know how to apply them.  
Within the scope of Regulation 805/2004: The authorities targeted by Article 25 of the Regulation are the notaries appointed by Grand-Ducal Decree to exercise the role of notary in the Grand Duchy of Luxembourg. In accordance with Article 25(1), notaries who have drawn up the authenticated act relating to an enforceable claim have the power to issue the European Enforcement Order certificate by using the type of form shown in Annex III of Regulation 805/2004.  
With regard to the provisions of optional instruments in company law, notaries are above all responsible for drafting company statutes and certain acts relating to the social life of these companies. |
| Hungary     | According to the Hungarian National Chamber of Civil Law Notaries (HNCCLN): notaries are regularly informed about OIs and optional systems. For more details, please refer to the responses given to earlier questions.  
In Hungary, notaries have been using the European order for payment procedure and the European Enforcement Order since 1 June 2010 after amendments to procedural law. |
| The Netherlands | Notaries are aware of optional instruments, especially in the area of company law. In the Netherlands, notaries play an important role in advising business clients on all types of issues regarding companies and tax, and they are expected to inform clients about the possibilities of creating an SE, EEIG or SCE. Some notaries also mention these instruments on their websites. |
As a general remark on information about OIs, the parties themselves are able to become aware of their existence: on the website of the Dutch Ministry of Justice, citizens can simply download forms for the small claims and European order for payment procedures.

### Austria

According to the information provided by the Austrian Chamber of Civil Law Notaries, notaries are regularly informed about legislative changes through various channels (seminars, conferences, reports and news magazines). As a result, notaries know about OIs in the areas which concern them. The Council of the Notariats of the European Union (CNEU) are currently conducting an enquiry of its members regarding the application of the EEO.

### Poland

There is no data for this subject. There is obviously some knowledge of the existence of these OIs, but it would be difficult to obtain more specific information.

Notaries are aware of OIs, but even if they are familiar with the concepts of the SE, EEIG or SCE, they have few opportunities to apply them.

Given that there are very few instruments of this type in Poland, it is difficult to say how they are applied.

### Portugal

No information available.

### Slovakia

The Chamber of Notaries of the Slovak Republic has not provided any relevant information for this question.

### Sweden

**The Ministry’s response**

The response will be the same for Questions 20, 21 and 22.

Commercial legal practitioners, lawyers and patent advisors are very familiar with European patents. According to the Swedish Companies Registration Office, lawyers and commercial legal practitioners are aware of the three types of European instruments regarding company law.

However, the information received which demonstrates lawyers' knowledge of civil procedure OIs, is vague.

### United Kingdom

**The Ministry’s response:** No information available.

**Academic response**

The notarial profession does not exist in the United Kingdom.
CHAPTER 21: LAWYERS AND OPTIONAL INSTRUMENTS

The questionnaire asked rapporteurs if lawyers are aware of optional instruments, if they use them, and if so, how they do so.

This section analyses the responses one-by-one (1), before presenting a table with a more detailed overview of the different answers by country (2).

1. ANALYSIS OF THE RESPONSES

The data regarding lawyers' awareness and use of optional instruments is very empirical.

The different reports reveal that lawyers are aware of them, but only within their areas of expertise:

Lawyers who deal with cross-border disputes are aware of optional instruments, especially procedural ones (see the Belgium, Bulgarian, Czech, German, Spanish and Luxembourgish reports).

The German report humorously reveals that the only German legal decision relating to the European payment order concerns the recovery of lawyer's fees!

The French report is much more reserved, and states above all that the lawyers who were asked the question admit themselves to having little or no knowledge of these procedural optional instruments. The Hungarian report also gives this impression, and states that lawyers are insufficiently trained in European law.

The Cypriot report indicates that lawyers are informed by email of all new pieces of legislation. However, the importance of written information carries the risk of making actual information uncertain.

Lawyers specialising in intellectual property law have a very good awareness of the optional instruments in this field (see the reports from France and the Swedish Ministry of Justice).

The large legal firms which specialise in company and European law have a good knowledge of association law optional instruments (see the French, Luxembourgish and Dutch reports).

The Slovakian rapporteur conducted an enquiry amongst lawyers, which returned the following results:

'In order to answer this question, a survey among lawyers including following questions was conducted:

Question 1: Do operators opt for the European Company?
Question 2: Do operators opt for the European Economic Interest Grouping?
Question 3: Do operators opt for the European Cooperative Society?
Question 4: Do operators opt for the European Enforcement Order?'
Question 5: Do operators opt for the European Small Claims Procedure?
Question 6: Do operators opt for the European order for payment?

Table 21:

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes (%)</th>
<th>No (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Question 1</td>
<td>60</td>
<td>40</td>
</tr>
<tr>
<td>Question 2</td>
<td>0</td>
<td>100</td>
</tr>
<tr>
<td>Question 3</td>
<td>0</td>
<td>100</td>
</tr>
<tr>
<td>Question 4</td>
<td>80</td>
<td>20</td>
</tr>
<tr>
<td>Question 5</td>
<td>0</td>
<td>100</td>
</tr>
<tr>
<td>Question 6</td>
<td>60</td>
<td>40</td>
</tr>
</tbody>
</table>

The report reveals that a response rate of 0 % shows a lack of awareness by lawyers of the optional instrument. On the other hand, the optional instrument is used in association law on the recommendation of lawyers, who therefore know this optional instrument well.

Overall, these reports reveal that lawyers' knowledge of optional instruments and their advantages could be improved.
## 2. COUNTRY-BY-COUNTRY SUMMARY OF RESPONSES TO QUESTION 21

<table>
<thead>
<tr>
<th>Member State</th>
<th>Table 21A</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Belgium</strong></td>
<td>Do lawyers know about these OIs? Do they use them? If yes, how do they go about it?</td>
</tr>
<tr>
<td></td>
<td>The abundance of doctrinal and jurisprudential sources in this area shows that lawyers are aware of these OIs. This being the case, lawyers who know about these methods are those who deal with cross-border cases.</td>
</tr>
<tr>
<td><strong>Bulgaria</strong></td>
<td>Do lawyers know about OIs. However, each lawyer's level of knowledge depends on their specific area of practice. Some of these lawyers use OIs, or intend to use them, if they are beneficial to their clients' interests. It is worth noting that OIs are better known and more widely used by lawyers who provide services to international clients, or to clients involved in international commercial activities. At this stage, lawyers use OIs most often in the area of industrial property. They recommend them to their clients as an alternative to the domestic registration of a trademark or a design.</td>
</tr>
<tr>
<td><strong>Czech Republic</strong></td>
<td>Lawyers are most familiar with procedural OIs. They are able to advise their clients to use them in cross-border disputes. Certain specialist intellectual property companies help their clients to obtain optional intellectual property orders and also to defend these orders in various disputes.</td>
</tr>
<tr>
<td><strong>Germany</strong></td>
<td><strong>Academic response</strong></td>
</tr>
<tr>
<td></td>
<td>Lawyers are informed by the Bar Association and specialist journals. Civil procedure instruments play a particularly important role for lawyers (order for payment and small claims procedures). These procedures are carried out even if the assistance of a lawyer is not necessary. Furthermore, the only legal decision relating to the order for payment procedure concerns lawyer's fees (see the decision of OLG Nürnberg of 18/1/2009).</td>
</tr>
<tr>
<td></td>
<td><strong>The Ministry’s response</strong></td>
</tr>
<tr>
<td></td>
<td>Lawyers are using the EEO increasingly often.</td>
</tr>
<tr>
<td></td>
<td>For family law and small claims, please see the response to Question 14.</td>
</tr>
<tr>
<td><strong>Greece</strong></td>
<td>OIs are beginning to become known.</td>
</tr>
</tbody>
</table>
| **Spain**         | The lawyers consulted have occasionally used the European order for
Implementation of optional instruments within European civil law

France

OIs are known and used by some lawyers. The forms are in specialist publications or on the Internet. Furthermore, professional responsibility nowadays is so important that lawyers pay great attention to OIs.

However, other lawyers have little knowledge of optional instruments. Therefore the use of these instruments is uncommon. An interesting example of the use of these instruments should be noted. This concerns the enforcement procedure: the European Enforcement Order, which replaces the traditional exequatur procedure.

Other lawyers admit that they do not know certain rules, such as those concerning the European order for payment procedure and the European Enforcement Order, but they recognise that this is because they do not practise this aspect of law at national level. It is in the area of intellectual property law that Community orders have worked best, especially the Community trademark and - more recently - the Community design. Their cost is attractive to businesses, and the bridge that they cross to the international trademarket for the Community trademark has contributed to its success. The drawback is the length of time that the registration procedure takes, and the risk that the trademark may not be available in one single EU Member State, which would prevent registration as a Community trademark thanks to it already being taken in just one Member State; it would then be a unitary right instead.

Moreover, with regard to intellectual property, they do not think that there is such thing as an optional system since there are different types of property rights. Instead, they are non-optional in the sense that the registration of a Community trademark does not exempt the commencement of registration – at the very least – of a national trademark in a country (as a safeguard), in order to have Convention priority if the registration of the Community trademark is rejected due to another country already possessing such a trademark.

As regards the European Company, its application is too recent in France to be able to assess lawyers’ experiences.

Certain lawyers have been able to advise medium-sized businesses on the international perspective, in order to create a European Company, but none have yet been created. In fact, they are astonished that no businesses have yet created International Companies. This is without doubt due to the logistics of auditing, as well as fear of the unknown.

Other lawyers who do not practise in specialist company and Community law firms (i.e. those who practise in areas which have very little in common with these areas of law) do not use these OIs.

Lawyers have a poor knowledge of civil procedure optional instruments. Most often, they know that these instruments exist, but
barely know any further details. Out of habit, they turn to national enforcement orders, which arise from an exequatur procedure, namely that from Regulation No. 44/2001 of 22 December 2000 which legal practitioners know well.

<table>
<thead>
<tr>
<th>Country</th>
<th>Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Italy</td>
<td>No data available.</td>
</tr>
<tr>
<td>Cyprus</td>
<td>Lawyers are informed by a system which notifies them by email if a law is enacted or amended.</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>Lawyers know about optional instruments. They use them and practise them within the scope of their advisory activities (in both company law and litigation), as well as for procedural acts (especially enforcement orders, etc.).</td>
</tr>
<tr>
<td>Hungary</td>
<td>As explained in detail in the introductory responses, the general point of view of lawyers in different areas of law is that clients do not need OIs to be applied during the administration of their cases or when dealing with their disputes; therefore most lawyers will not apply these OIs. Another problem is the fact that many lawyers are not competent in European law (perhaps they never studied it at university, they do not deal with European law during their day-to-day work, or their clients are not affected enough by European law for them to ask their legal representatives to call on European legal issues). However, a great deal of effort is being invested in educating lawyers in European law, and keeping them up-to-date with knowledge of a certain number or level of areas of European law. There are specialised European law training programmes which deal with these OIs. Hungarian lawyers generally cite a lack of interest, information and infrastructure with regard to the application of OIs.</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>Practising lawyers are supposed to know about all of the aforementioned instruments. However, this depends of the type of lawyer or firm concerned. Large law firms rely heavily on company law optional instruments in order to be able to advise their clients, and they especially consider the SE as an alternative to the different types of company in the Netherlands. Trademark law OIs are forming an increasingly large part of daily practice. Procedural law OIs are known by all lawyers practising in that area. They have become an integral part of satisfactory legal practice as a means of showing clients alternative remedies which may be available.</td>
</tr>
<tr>
<td>Austria</td>
<td>Please refer to the previous responses provided in order to answer this question.</td>
</tr>
<tr>
<td>Poland</td>
<td>There is without a doubt some knowledge of OIs. However, it would be</td>
</tr>
</tbody>
</table>
difficult to statistically evaluate how many defence lawyers are sufficiently familiar with these OIs to be able to use them. Certain law firms offer their services in this area. A crucial problem is the lack of a distinct course on European procedural law during a lawyer's initial training. Young lawyers' knowledge in this field is often particularly poor.

In all cases, lawyers are more encouraged to apply OIs concerning SEs, EEIGs and SCEs. Given that there are very few of these instruments in Poland, it is difficult to say how OIs are applied.

<table>
<thead>
<tr>
<th>Country</th>
<th>Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Portugal</td>
<td>No information available.</td>
</tr>
<tr>
<td>Slovakia</td>
<td>A survey of Slovakian lawyers was undertaken to answer this question (see table in annex to Slovakian report). It appears that 60% of operators opt for the European Company, 0% for the European Economic Interest Grouping, 0% for the European Cooperative Society, 80% for the European Enforcement Order, 0% for the European small claims procedure, and 60% for the European payment order. Responses referring to a figure of 0% are due to the lack of information regarding optional instruments, the presumed complexity of their practical use and the mistrust of instruments which are different from national ones. According to the respondents of the questionnaire, company law optional instruments are used if specifically requested by a client who has been advised in this area by a professional. According to lawyers, procedural law optional instruments are used when parties disagree as to the procedure which should be used.</td>
</tr>
<tr>
<td>Sweden</td>
<td>The Ministry’s response The response is the same as the one for Question 20.</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>The Ministry’s response No information available. Academic response Lawyers know that these OIs exist, but rarely use them at present. In addition, the system is different in the British legal system. For example, the English and Scottish legal systems can be divided into two separate branches with regard to intellectual property: solicitors and advocates. In the Court of Session, solicitors may have the right to process a claim if the conditions are met. If they do so, they will be referred to as 'solicitor advocates'.</td>
</tr>
</tbody>
</table>
In Scotland, solicitors who advise on trademark law are specialists in the area of intellectual property law.

In England, barristers who specialise in intellectual property law are members of patent bars. Solicitors mainly advise on aspects linked to the registration, maintenance and use of trademarks. Most of them have the right to be heard at the Supreme Court. Some solicitors have established their own trademark filing practices.

There is no bar for patents in Scotland: advocates' roles are more broad than those of their English counterparts. They work from the Court of Session, where they are based (The Advocates' Library).
CHAPTER 22: COMMERCIAL LEGAL PRACTITIONERS AND OPTIONAL INSTRUMENTS

As with the other legal professionals, this questionnaire asked rapporteurs about commercial legal practitioners' knowledge and use of optional instruments.

This section analyses the responses one-by-one (1.), before presenting a table with a more detailed overview of the different answers by country (2.).

1. ANALYSIS OF THE RESPONSES

1.1. Lack of precise data

No rapporteur was able to obtain precise data for commercial legal practitioners.

The Slovakian report reveals that this is due to the fact that the profession is extremely varied. For this reason, some reports set aside legal practitioners in large companies, who are more likely to be aware of optional instruments than legal practitioners in small companies.

1.2. Relevant optional instruments

Commercial legal practitioners are not required to directly use procedural optional instruments.

However, several reports mention that they have a good knowledge of intellectual property optional instruments (see the French report and the report from the Swedish Ministry of Justice). On the other hand, the Bulgarian Report states that commercial legal practitioners are not 'authorised representatives' in intellectual property law.

Several reports also indicate that lawyers in large businesses have a good knowledge of association law optional instruments, and use them, essentially in order to create such associations.

The Polish report also reveals:

'Company lawyers know the OI but they would have chance to apply the OI about SE, EEIG or SCE if they had contact with SE, EEIG or SCE. Since there are not too many of them in Poland it is difficult to say how they would apply them.'

Information on commercial legal practitioners' knowledge of optional instruments is therefore very empirical and subjective.
### 2. COUNTRY-BY-COUNTRY SUMMARY OF RESPONSES TO QUESTION 22

<table>
<thead>
<tr>
<th>Member State</th>
<th>Table 22</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>Given that commercial legal practitioners do not practise procedural law, they do not use dispute settlement methods. However, they know about these other methods.</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>Commercial legal practitioners who work for companies undertaking international commercial activities know about these OIs. However, no case has been found of a commercial legal practitioner who has used an OI. Notwithstanding, it is worth mentioning that commercial legal practitioners generally do not directly use the most popular OIs (in the area of industrial property), because they are not authorised representatives in industrial property law.</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>No information available.</td>
</tr>
<tr>
<td>Germany</td>
<td><strong>Academic response</strong>&lt;br&gt;The situation of commercial legal practitioners undoubtedly corresponds to that of lawyers.&lt;br&gt;&lt;br&gt;&lt;em&gt;The Ministry's response&lt;/em&gt;&lt;br&gt;For the EEO and small claims, please refer to the responses given previously.</td>
</tr>
<tr>
<td>Greece</td>
<td>Same response as the one for Question 21.</td>
</tr>
<tr>
<td>Spain</td>
<td>The commercial legal practitioners consulted have occasionally used OIs relating to European Companies and to the European Grouping.</td>
</tr>
<tr>
<td>France</td>
<td>Commercial legal practitioners are well-informed about intellectual property OIs, and use them. However, legal practitioners who do not work for large companies are less well-informed about European Groupings.</td>
</tr>
<tr>
<td>Italy</td>
<td>No information available.</td>
</tr>
<tr>
<td>Cyprus</td>
<td>We do not have this area of law in Cyprus.</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>It has not been possible to obtain information relevant to this question.</td>
</tr>
<tr>
<td>Hungary</td>
<td>As previously explained, it is generally the case that, due to clients’ or operators’ indifference with regard to company law OIs, commercial legal practitioners do not generally use the OIs in question, even if they</td>
</tr>
</tbody>
</table>
are aware that they exist. For example, with regard to the transnational commercial enterprises referred to in the questionnaire, certain procedural rules can be found in the Law on Firms (Law V of 2006), to the extent that commercial legal practitioners are aware of and informed about relevant aspects of OIs.

<table>
<thead>
<tr>
<th>Country</th>
<th>Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Netherlands</td>
<td>Commercial legal practitioners most certainly know about company law OIs. In particular, the SE is seen as a viable alternative to national legal forms. Legal practitioners use them when they are looking for the best available legal form for new or ongoing cases.</td>
</tr>
<tr>
<td>Austria</td>
<td>Please refer to the responses given previously.</td>
</tr>
</tbody>
</table>
| Poland        | Commercial legal practitioners know about these OIs and use them where necessary. They cite the relevant documents and provisions, as well as court decisions.  
In all cases, they are more encouraged to apply OIs concerning SEs, EEIGs and SCEs. Given that there are very few of these instruments in Poland, it is difficult to say how OIs are applied. |
| Portugal      | No information available.                                                   |
| Slovakia      | Commercial legal practitioners in Slovakia are in a very wide-ranging group, with regard both to their activities and their professional areas of interest. This is why no general information could be obtained as a representation of the general practices of this group of legal practitioners. |
| Sweden        | The Ministry’s response: The response is the same as the one for Question 20. |
| United Kingdom | The Ministry’s response: No information available.  
Academic response  
We have noticed the same situation for commercial legal practitioners as for lawyers: they know that these optional instruments exist, but because the OIs are obviously optional and the legal practitioners do not know them very well, they have little use at present.  
This could change in the future, but it will take some time. |
HEADING 4 – OTHER RELEVANT PLAYERS IN THE EU

CHAPTER 23: CONSUMER ASSOCIATIONS OR CITIZEN-CONSUMER ASSOCIATIONS AND OPTIONAL INSTRUMENTS

Rapporteurs were asked to state whether these associations know about the optional instruments concerned by this study, especially procedural ones. If yes, do they recommend using them? Do they mention them on their websites?

This section analyses the responses one-by-one (1), before presenting a table with a more detailed overview of the different answers by country (2).

1. ANALYSIS OF THE RESPONSES

It is procedural optional instruments which may be especially affected. This could obviously change if the optional instruments were adopted for a Common European Sales Law. It would be in the interest of consumer associations to inform consumers of the results of this questionnaire.

Consumer associations may of course be concerned with other optional instruments besides procedural ones, but this remains only in rare cases. For example, the Federation of German Consumer Organisations (Vzbv) sent an open letter to the European Patent Office, stating its opposition to patents on animals. It reiterated this stance in a press release.

Furthermore, certain optional instruments, such as the optional matrimonial system, are of interest to other associations, including those working in the family and women’s protection sectors.

The different reports on procedural optional instruments contain highly varied responses across the countries which responded.

1.1. Member States in which consumer associations are not aware of optional instruments

Several rapporteurs emphasise that consumer associations in their countries are not aware of optional instruments or do not use them, and therefore do not promote them, especially on their websites (see the Greek, Spanish, Polish and Slovakian reports).

For example, the Belgian report reveals that the two largest Belgian consumer protection associations (CRIOC and Test-achat) claim never to have consulted these instruments. In addition, these two associations make no mention of OIs on their websites. The Bulgarian report, which questioned Mr Bogomil NIKOLOV, Chairman of the Bulgarian National Consumer Association, states that according to Mr Nikolov, consumer

267 See https://www.vzbv.de/go/presse/1145/4/16/index.html.
268 CRIOC (Centre de recherche et d’information des organisations de consommateurs – Consumer Organisation Research and Information Centre) has published a preliminary study on consumers’ awareness of alternative dispute resolution methods (http://www.oivo-crioc.org/files/fr/5135fr.pdf), but its results were unclear.
270 Association’s website http://www.aktnivnipotrebiteli.bg.
associations know about procedural optional instruments but do not use them. It adds that there are no references to optional instruments on these associations' websites\textsuperscript{271}.

Similarly, the German report states:

'The Federation of German Consumer Organisations (vzbv) and the Consumer Initiative (Verbraucherinitiative) make no mention of the enforcement order method. The Baden-Württemburg consumer portal, as well as the website of the German branch of the European Consumers' Organisation, inform operators of the European order for payment procedure and the small claims procedure (see: \url{http://www.verbraucherportal-bw.de/servlet/PB/menu/1333810_l2/index.html}; \url{http://www.eu-verbraucher.de/en/legal-procedures/european-legal-procedures}/).'

They list the advantages of the procedures and state the steps that debtors must take to defend themselves.

In the French report, Ms Gaëlle Patetta, former Legal Director of the 'UFC Que Choisir' consumer association, reveals that consumer associations (including regional consumer technical centres) have little knowledge of procedural optional instruments, because these associations are above all supposed to know about contracts concluded between consumers and French businesses or professional persons. The only cases of cross-border contracts have occurred in areas geographically close to borders. Consumers generally submit these files to 'European Consumer Centres', which specialise in these issues. There is also a European Consumption Centre (ECC), which is a Franco-German association based in Kehl (Germany), a member of the European Consumer Centres Network (this centre was created in 2005 by the European Commission).

Ms Patetta adds:

'Therefore, as regards civil procedure, the European Enforcement Order is not known by 'classic' consumer associations or by CTRCs (regional consumer technical centres). Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (OJ L 399 of 30.12.2006) is known but is not used as it is believed to be too complicated. Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (OJ L 199 of 31.07.2007) is known by the large associations and the CTRCs. However, it is very seldom applied because it brings with it cost problems (mainly due to translations). Associations also cite uncertainty with regard to the possibility of eventually having the decision enforced. The 'Institut National de la Consummation' (INC – a major consumer association) uses this procedure in one of its files, namely the declaration to the officer of the court. The European Consumer Centre in Kehl can certainly then provide assistance, but there is still the problem of translation costs (and enforcement costs if it must be enforced). There may therefore be a problem of clearly identifying against whom legal action should be brought.'

The Italian rapporteurs have browsed the websites of the different consumer associations, and have found no mention of optional instruments\(^{272}\). The same goes for the Austrian report\(^{273}\).

### 1.2. Member States in which consumer associations are aware of optional instruments and recommend their use

On the other hand, consumer associations in four Member States promote procedural optional instruments.

In addition, the following can be found on the website of the Czech consumer protection association:

*'Nebojte se přeshraničních sporů.'*

\[Měli jste nárok vůči zahraniční osobě, avšak z důvodu složitosti vymáhání přeshraničního nároku jste od jeho vymáhání upustili? V takovýchto sporech velmi záleží na částce nároku vzhledem k tomu, že se snížující částkou, klesá vůle takovýto spor vymáhat. Právu by však mělo být učiněno za dost i v případě nižších nároků, a proto bylo vydáno nařízení Evropského parlamentu a rady (ES) č. 861/2007, kterým se zavádí evropské řízení o drobných nárocích.\]

For a translation, see footnote\(^{274}\):

*'Don't be scared of cross-border disputes.'*

*'Have you wanted to make a claim against a foreign person, but hesitated due to the complexity of the cross-border complaints procedure?... (there exists) Regulation (EC) No 861/2007 establishing a European procedure.'*

And the website of this association states that this Regulation is best adapted to regulate small claims of a value lower than EUR 2 000, especially if the consumer has bought the product on the Internet\(^{275}\).

And this promotion of the optional instrument is in addition to what can be achieved through public bodies in the Czech Republic\(^{276}\).

Similarly, in Luxembourg, the Luxembourg Consumer Union refers on its website to the small claims procedure and advises consumers to use them, stating the precise steps that the consumer should take within the scope of this procedure\(^{277}\). The title of the article translates as 'Cross-border small claims dispute resolution - How to do it (04/2009)', which would not fail to draw the consumer's attention. However, it is followed by a long - and fairly complex - description, which may put off the consumer.


\(^{273}\) http://www.konsumentenfragen.at/konsumentenfragen/KonsumentInnen-Leitfaden/Themenbereiche/Rechtsdurchsetzung/.

\(^{274}\) Free translation.


The Swedish consumer association *ECC-net Konsument Europa* also published information on its website regarding the small claims procedure\(^{278}\) and the European payment order\(^{279}\). This is all referred to in a document entitled 'dispute resolution in the EU', and the consumer has access to order for payment forms by way of a hyperlink which links to the Europa sites\(^{280}\).

Finally, the English rapporteurs also mention that consumer associations in England actively promote optional instruments:

‘The UK European Consumer Centre\(^{281}\) (ECC) provides information on civil procedure optional instruments to professionals. The ECC is one of 29 centers across Europe which provides consumers with information on their rights when shopping across borders and supports them seeking redress when something goes wrong.

For instance it produced a guide in order to understand and practice the European Small Claims procedure, so yes they mention them on their websites, and they do recommend their use.

The other consumer rights organization named 'Which? was founded in 1957 by Michael Young, it is independent and produces several Guides, and explains how you can use the small claims court for most consumer-related disputes\(^{282}\). Which? Ltd is a powerful lobby among the European parliament and is one of the famous consumer associations in the UK.’

Ultimately, two observations stand out:

- Firstly, there are truly only four Member States in which consumer associations have decided to communicate and promote cross-border consumer protection.

- Secondly, looking at messages that can be read on websites promoting optional instruments, the difficulties in communicating are clear to see:
  
  • either the information is attractive, simple, brief, and can make the consumer want to act, but does not give them the means to do so;
  
  • or, on the other hand, the communication is complete enough for the consumer to act if they decide to, but it is too complex and risks dissuading the consumer from taking action.

It would seem that a major effort in informing about and communicating optional instruments to consumers is vital.

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\(^{279}\) [http://www.konsumenteuropa.se/Tjanster/Tvistlosning/Europeiskt-betalningsforelaggande/](http://www.konsumenteuropa.se/Tjanster/Tvistlosning/Europeiskt-betalningsforelaggande/)


\(^{281}\) UK European Consumer Center website, consulted on May 10th, [http://www.ukecc.net/](http://www.ukecc.net/)

\(^{282}\) Small claims procedure, Which? Website [http://search.which.co.uk/search?w=european+small+claims&mainresult=mainresult %3Ayes](http://search.which.co.uk/search?w=european+small+claims&mainresult=mainresult %3Ayes)
## 2. COUNTRY-BY-COUNTRY SUMMARY OF RESPONSES TO QUESTION 23

<table>
<thead>
<tr>
<th>Member State</th>
<th>Table 23</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Do consumer associations or citizen-consumer associations know about these OIs, especially procedural ones? Do they recommend using them? Do they mention them on their websites?</td>
</tr>
<tr>
<td>Belgium</td>
<td>The two largest Belgian consumer protection associations (CRIOC and Test-achat) claim never to have consulted either the European Enforcement Order or the European payment order. In addition, these two associations make no mention of OIs on their websites. For the Regulation establishing a small claims procedure, CRIOC has published a study into consumers' awareness of alternative dispute resolution methods. Test-achat condemns the lack of information, but it does not reveal on its website that it does in fact have documentation on this method.</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>For the purpose of this preliminary study, an interview with Mr Bogomil Nikolov, President of the Bulgarian National Consumer Association, took place, during which he stated that barely any claims had been brought by consumers with the help of his association. In conclusion, representatives of these associations know about the OIs, but do not use them in practice. However, they recommend using them if necessary in specific cases. No information on OIs could be found on the websites of either consumer associations or citizen-consumer associations.</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>Some associations know about procedural instruments (especially the European order for payment procedure and the small claims procedure) and recommend them on their websites. Furthermore, some public bodies are attempting to increase awareness of these OIs amongst consumers.</td>
</tr>
<tr>
<td>Germany</td>
<td><strong>Academic response</strong></td>
</tr>
<tr>
<td></td>
<td>The Federation of German Consumer Organisations (vzbv) and the Consumer Initiative (Verbraucherinitiative) make no mention of the Enforcement Order method. The Baden-Württemburg consumer portal, as well as the website of the German branch of the European Consumers' Organisation, informs operators about the European order for payment procedure and the small claims procedure.</td>
</tr>
</tbody>
</table>
They list the advantages of the procedures and state the steps that debtors must take to defend themselves. Furthermore, the consumer association stated its opposition to patents on animals in an open letter to the European Patent Office, as well as through a press release.

Nevertheless, with the exception of those in the area of civil procedure, the OIs referred to in this questionnaire are generally of little importance to consumers.

The Ministry’s response

No information available for the EEO. For the small claims procedure, please refer to the response to Question 20.

<table>
<thead>
<tr>
<th>Country</th>
<th>Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Greece</td>
<td>Consumer associations in Greece are not aware of these OIs.</td>
</tr>
<tr>
<td>Spain</td>
<td>The most important consumer associations (FAQUA and UCO) do not mention procedural law OIs on their websites.</td>
</tr>
<tr>
<td>France</td>
<td>There is no mention of OIs on the websites or 'UFC Que Choisir' and CLCV, two of the largest French consumer associations. There is not even any mention of European optional procedure with regard to small claims. Gaëlle Patetta, the former Legal Director of UFC Que Choisir, states that with regard to civil procedure, the European Enforcement Order is not known by 'classic' consumer associations or by CTRCs (regional consumer technical centres). Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (OJ L 399 of 30.12.2006) is known, but it is not used as it is believed to be too complicated. Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (OJ L 199 of 31.07.2007) is known by major associations and the CTRCs. However, it is very seldom applied because it brings with it cost problems (mainly due to translations). Associations also cite uncertainty with regard to the possibility of eventually having the decision enforced. The 'Institut National de la Consommation' (INC – a major consumer association) uses this procedure in one of its files, namely the declaration to the officer of the court. The European Consumer Centre in Kehl can certainly then provide assistance, but there is still the problem of translation costs (and enforcement costs if it must be enforced). There may therefore be a problem of clearly identifying against whom legal action should be brought.</td>
</tr>
<tr>
<td>Italy</td>
<td>Pursuant to Article 137 of the Consumer Code, a list of registered consumer associations is published by ministerial decree. The last decree from the Ministry of Economic Development was promulgated on 14 February 2008. Research has therefore been carried out on the official websites of all associations registered in the 2008 decree. There is no mention (that is...</td>
</tr>
</tbody>
</table>
easily accessible) of these OIs.

'Federconsumatori Brescia' expressly responded to the questions concerning OIs, and confirmed the above findings. According to members of the union of associations and certain lawyers, no query has ever been made with regard to the OIs concerned by this questionnaire.

The OIs are neither mentioned nor recommended on websites.

<table>
<thead>
<tr>
<th>Country</th>
<th>Information Available</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cyprus</td>
<td>No information available.</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>Consumer associations know about these instruments, especially procedural ones. The Luxembourg Consumer Union refers on its website to the small claims procedure and advises consumers to use them, stating the precise steps that the consumer should take within the scope of this procedure.</td>
</tr>
<tr>
<td>Hungary</td>
<td>According to the people questioned, information campaigns by the ONG and OSC are rare – even non-existent – in this area. No relevant information was found during the independent enquiry. Some public bodies may publish brochures or other guides for citizens from time to time. Some are available online, but nothing concerning OIs was found on the websites.</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>Yes. The aim of procedural law OIs is to make life easier for all parties. Consumer associations know about these possibilities, and occasionally mention them on their websites or in other sources of information.</td>
</tr>
<tr>
<td>Austria</td>
<td>The only OIs relevant for consumers appear to be civil procedure OIs. There seems to be some information about these OIs on the websites of consumer associations. For example, information on the EEO and the European small claims procedure can be found on the website of the Consumer Information Association (Verein für Konsumenteninformation, VKI). However, this information is not easy to find. In addition, no information on OIs is available on the consumer information site of the Federal Ministry of Labour, Social Affairs and Consumer Protection (Bundesministerium für Arbeit, Soziales und Konsumentenschutz).</td>
</tr>
<tr>
<td>Poland</td>
<td>Neither the main Polish consumer associations, nor the state institution appointed by the Office of Competition and Consumer Protection, publish information about OIs. There is also no information on their websites.</td>
</tr>
<tr>
<td>Portugal</td>
<td>No information available.</td>
</tr>
<tr>
<td>Country</td>
<td>Implementation of optional instruments within European civil law</td>
</tr>
<tr>
<td>-----------</td>
<td>------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>Slovakia</strong></td>
<td>These associations have not yet started fully using these optional instruments. None of these instruments are mentioned on their websites.</td>
</tr>
<tr>
<td><strong>Sweden</strong></td>
<td><strong>The Ministry’s response</strong>&lt;br&gt;The Swedish ECC has published information about the small claims procedure on its website: (<a href="http://www.konsumenteuropa.se/Tjanster/Tvistlosning/Europeiska-smamal/">http://www.konsumenteuropa.se/Tjanster/Tvistlosning/Europeiska-smamal/</a>). It has also published information about the European order for payment procedure: (<a href="http://www.konsumenteuropa.se/Tjanster/Tvistlosning/Europeiskt-betalningsforelaggande/">http://www.konsumenteuropa.se/Tjanster/Tvistlosning/Europeiskt-betalningsforelaggande/</a>).</td>
</tr>
<tr>
<td><strong>United Kingdom</strong></td>
<td><strong>The Ministry's response</strong>: No information available.&lt;br&gt;&lt;br&gt;&lt;strong&gt;Academic response**&lt;br&gt;The United Kingdom's European Consumer Centre (ECC) provides information about these civil procedure optional instruments for professionals. The ECC is one of 29 centres across Europe. It provides information to consumers about their rights when they make purchases in other countries, and helps them make claims when they encounter difficulties.&lt;br&gt;&lt;br&gt;For example, it has produced a guide to understanding and putting into practice the European small claims procedure. It therefore mentions them on its website, and recommends using them.&lt;br&gt;&lt;br&gt;'Which?', the other consumer rights protection organisation, was founded in 1957 by Michael Young. It is independent and has produced several guides explaining how to use the small claims procedure in most consumer disputes. Which? Ltd is a powerful lobbyist at the European Parliament, and is one of the most famous consumer associations in the United Kingdom.</td>
</tr>
</tbody>
</table>
PART 4 – DO OPTIONAL INSTRUMENTS IMPROVE THE SITUATION?

The aim of optional instruments is to improve the situation: to simplify cross-border disputes and trade; to surpass the territoriality of certain rights, such as intellectual property rights, in order to facilitate the assertion of these rights beyond the country of their creation; etc.

It is therefore essential to know if optional instruments, the object of this study, have achieved this goal.

In order to do this, rapporteurs have been asked (1) if each of the optional instruments has improved the situation for consumers, citizens and companies in cross-border relations (Chapter 24); and (2) if these optional instruments facilitate the implementation of the unique common market, or if this objective would be better achieved by a method of maximum or minimum harmonisation (Chapter 25).

A more precise question was asked in relation to procedural optional instruments: have they facilitated the cross-border claims procedure (Chapter 26)?

And finally, when faults in optional instruments are criticised by operators, have these faults put them off using the instrument (Chapter 27)?
CHAPTER 24: FOR EACH OPTIONAL INSTRUMENT CONCERNED BY THIS QUESTIONNAIRE, HAS THE OPTIONAL INSTRUMENT IMPROVED THE SITUATION FOR CONSUMERS, CITIZENS AND BUSINESSES IN CROSS-BORDER RELATIONS?

Rapporteurs were asked to justify their responses particularly with regard to costs, simplicity, the neutrality of the optional instrument, the legal certainty provided by the optional instrument, and any other factor that they considered relevant.

This section analyses the responses one-by-one (1.), before presenting a table with a more detailed overview of the different answers by country (2.).

1. ANALYSIS OF THE RESPONSES

The question was premature for some rapporteurs because there is no history of use of many of the optional instruments.

Firstly, certain rapporteurs believe that these optional instruments are not applied often enough to be able to respond satisfactorily to this question (for example, the Greek and French reports for civil procedure optional instruments, and the Cypriot, Luxembourgeois, Portuguese and Slovakian reports for the small claims procedure).

Some rapporteurs also believe that the improvement is still not enough, but is potentially far-reaching (see the Italian and French reports for matrimonial law, the Polish report for the SCE, and the Bulgarian report for civil procedure optional instruments).

Others believe that optional instruments have so far not really changed the situation (English report).

In any case, it appears that the response cannot be unequivocal.

This is mainly because some rapporteurs believe that optional instruments improve the situation for businesses more than they do for consumers (see Spanish report). But this distinction is rare in the reports.

On the other hand, the majority of rapporteurs (in any case, those who responded) distinguish according to the categories of optional instruments, and sometimes even according to optional instruments in the same category.

Procedural optional instruments

Some reports acknowledge that procedural optional instruments have improved the situation for European citizens:

- The Belgian report states that civil procedure optional instruments have "without a doubt" improved "the situation for consumers, insofar as they offer them simple and cheap methods of asserting claims for their losses."
- In the Hungarian report, the National Chamber of Notaries believes that procedural optional instruments have improved the situation for European citizens.
The Dutch report agrees: it states that procedural optional instruments have improved the situation for European citizens since they are easy to use.

The same goes for the Austrian and Polish reports.

The Slovakian report believes that the European Enforcement Order and the European payment order have improved the situation for European citizens.

The German Ministry of Justice believes that the European payment order and the European Enforcement Order have improved the situation.

The Swedish report is also optimistic with regard to procedural optional instruments. It states that 'According to the Swedish Consumer Agency, simplified court procedures can ease consumers' access to justice and the Consumer Agency is of the opinion that the procedure set up by the European Small Claims Regulation will improve the situation for cross-border claims.' But Swedish lawyers are more doubtful due to language barriers and the fact that in order to use a procedural optional instrument, a local lawyer must still be consulted, which limits the decrease in costs afforded by optional instruments.

Other reports are more cautious:

- The Bulgarian report is more sceptical. It believes that civil procedure optional instruments have not had a significant impact for either citizens, consumers or businesses, but this may well be because of their novelty. Their impact thus awaits to be seen.
- The German (university) report distinguishes between different procedural optional instruments. The report concludes that the European payment order has improved the situation. It states the same for the small claims optional instrument, even if it is currently of little importance. Finally, it states that the European Enforcement order is - or will be - an efficient means of improving the situation once obstacles are overcome with regard to translation, other formalities and legal certainty.

Overall, it appears that the procedural optional instrument carrying with it the most doubt as regards to whether it can bring any improvement, is the small claims optional instrument, which has not yet had time to prove itself.

- Intellectual property optional instruments

There is widespread agreement amongst the rapporteurs: intellectual property optional instruments have improved the situation for businesses (according to the Belgian, Bulgarian, Czech, German, Spanish, French, Italian, Dutch, Austrian and Swedish reports).

- Association law optional instruments

Once again, opinions are highly divided.

Some reports acknowledge that these optional instruments have improved the situation, or are in the process of improving it, while at the same time raising certain reservations.

- The Belgian report states that these optional instruments have improved the situation for businesses by facilitating the creation of these associations, but it adds that it would be more accurate to say that 'these methods tend to improve the situation for businesses in their cross-border relations' because problems as to legal certainty remain.
The German (university) report is optimistic about this issue, since it reveals that 'despite these OIs' fairly limited success in practice in Germany, one must not forget that the very existence of these OIs has increased legal practitioners' awareness of the issue of freedom of establishment in the European Union, and has certainly contributed to the development of European company law.'

The French report believes that optional instruments improve the situation with regard to SEs and EEIGs, but is more doubtful about SECs. The CCIP (Paris Chamber of Commerce and Industry) acknowledges that the status of the SE has improved the situation for businesses.

The Dutch report acknowledges the usefulness of SEs, but is cautious about legal uncertainty, and concludes: 'In all cases, it can be said that the more self-standing the OI is, the more legal security it brings and the more popular it is among parties. If the choice for an OI still means that large parts of some national law applies, it is not so attractive to choose for it.' In other words, an optional instrument which is not autonomous and which requires the application of domestic laws, does not improve the situation.

The Polish report acknowledges that SEs and EEIGs have improved the situation, but SCEs have yet to do so, as this instrument is too new.

Other reports consider that the overall assessment of these optional instruments with regard to the question asked is a negative one.

The Hungarian report is pessimistic about these optional instruments, which it states have not improved the situation in cross-border relations for Hungarian businesses.

The same goes for the Austrian report.

The Bulgarian report believes that SEs, SCEs and EEIGs have not had a significant impact on Bulgarian operators.

The Czech report acknowledges that association law optional instruments may allow for interesting business strategies in the European Union, but it remains convinced that the development of these optional instruments will be limited. 'However, in our opinion, the impact of these instruments is and will be limited. Most businesses in the cross-border trade prefer the traditional schemes of freedom of establishment (subsidiaries, agencies, branches) and free movement of services.'

The Slovakian report states that the extreme complexity of SEs means that the situation has not improved. The same goes for EEIGs which, despite being more simple, remain an obstacle to legal certainty. SCEs have also not improved the situation.

The Swedish Ministry of Justice believes that association law optional instruments have not brought with them any significant advantages for consumers.

It is, therefore, only intellectual property optional instruments which are largely approved of. Opinions are divided for procedural and association law optional instruments.
## 2. COUNTRY-BY-COUNTRY SUMMARY OF RESPONSES TO QUESTION 24

<table>
<thead>
<tr>
<th>Member State</th>
<th>Table 24</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>Table 24 For each OI referred to above, do you believe that the OI has improved the situation in cross-border relations for consumers, citizens and businesses? Please justify your response, particularly with regard to costs, simplicity, the neutrality of the OI, the legal certainty provided by the OI, and any other factor which you consider relevant.</td>
</tr>
<tr>
<td>Belgium</td>
<td>Without a doubt, civil procedure methods improve the situation for consumers, insofar as they offer them simple and cheap methods of asserting claims for their losses.</td>
</tr>
<tr>
<td>Belgium</td>
<td>Both company law and intellectual property methods certainly improve the situation for businesses. Thanks to the communitisation of intellectual property rights, companies will be able to protect their trademarks, designs and patents throughout the entire territory of the European Union. Company law methods facilitate the creation of the above.</td>
</tr>
<tr>
<td>Belgium</td>
<td>These methods tend to improve the situation for businesses in their cross-border relations. Nevertheless, certain obstacles/questions remain, especially with regard to legal certainty.</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>Trademarks and designs are essentially marketing tools for modern businesses operating in the internal market. Businesses in Bulgaria rely on these OIs. The introduction of these Community trademarks and designs has allowed operators in Bulgaria to benefit from a standardised legal system, which ensures standardised and stable protection throughout the EU. Costs are reduced (for example, the registration and publication costs for a Community design are 350 euros for a protection period of 5 years). Operators also benefit from the simplicity of the procedure – one single application; the possibility to chose between any of the official languages of the EU; one administrative body; only one search and inspection of the request; only one tax to pay; and the possibility to obtain protection for more than one trademark / design within the scope of a single application. The European patent has improved the situation for operators due to the simplicity of the procedure – one single application with a central administrative body – the European Patent Office, with only one search and inspection of the request, which saves time and money. Nevertheless, this procedure brings with it some inconvenience with regard to the Community trademark and design. For example, the European patent does not automatically apply to all parties to the agreement; it must be 'validated' in the specified countries. This incurs additional costs.</td>
</tr>
</tbody>
</table>
SEs, SCEs and EEIGs have not had a significant impact on Bulgarian operators, since there are no such entities registered in Bulgaria. The main reasons for this are detailed in the response to Question 11.

Civil procedure OIs have also not yet had a significant impact on Bulgarian operators (for neither businesses nor consumers). The main reason is that they are still relatively new and unknown. However, certain OIs (European payment order and European Enforcement Order for uncontested claims) are already used by Bulgarian operators from time to time, and it is expected that they will become more popular in the future. In effect, these OIs allow costs to be decreased, and the procedures will be beneficial to operators thanks to their simplicity and their applicability in all Member States.

Unfortunately, at this stage, the small claims procedure has not improved the situation for consumers or businesses, mainly because they are not very well informed of the advantages that they bring. In order to improve the situation in this area, more efficient awareness campaigns will be necessary, which should be addressed to citizens and small businesses, who tend to be the members of society who do not use professional legal services at this stage.

Czech Republic

The advantage of EU intellectual property optional instruments is that they enable protection to be obtained in all Member States (+ EEA), instead of having to register each time in different states. The situation with the European patent is similar, although not as simple.

For procedural instruments, please refer to the response to Question 26.

The advantage of company law instruments is that they facilitate certain types of corporate behaviour and strategies. For example, the headquarters of a European Company (SE) may be relocated to another country without having to liquidate the company, i.e. the continuity of the legal entity is guaranteed. This could be attractive to certain businesses. However, the impact of these instruments is – and will be – limited for them. Most businesses involved in cross-border commerce prefer the traditional systems for freedom of establishment (branches, agencies, outlets) and the free movement of services.

Germany

Academic response

On the one hand, the European Enforcement Order is perceived as being an efficient means of enforcing judgments. Furthermore, the 'confirmation' fees of a European Enforcement Order are relatively low (12 or 15 euros). On the other hand, it must be acknowledged that there are still considerable problems when applying the EEO, due to translation obligations and other formal obstacles. This is in addition to the problem of legal certainty in the country of enforcement, which is subject to harsh criticism from academics. At the same time, the Enforcement Order is generally rarely used in practice (see above).

With regard to the payment order, no real problems with legal certainty
are posed by the fact that the procedure is standardised across all Member States (as opposed to the European Enforcement Order, which arises from a domestic right whose legal quality could obviously differ from one Member State to the next). They therefore generally support the use of this OI.

The implementation of the small claims procedure guarantees the consolidation of common standards which, by way of an Enforcement Order, are simply 'presumed' by the legislator. As a result, the renunciation of an exequatur procedure does not cause any problems. Fees are calculated in relation to the sum of the claim. Small claims are incorporated by an OI which represents the core of a uniform European civil procedure law. Even if this OI is not yet of great importance in cross-border commercial relations, legal practitioners believe that overall, it deserves positive appreciation.

European trademarks and designs and European patents are instruments which are frequently used by German operators, and therefore they have without a doubt facilitated and improved the situation for businesses in their cross-border commercial relations.

Regarding the European (Cooperative) Society and the EEIG: despite these OIs' fairly limited success in practice in Germany, one must not forget that the very existence of these OIs has increased legal practitioners' awareness of the issue of freedom of establishment in the European Union, and has certainly contributed to the development of European company law (see the ECJ's decision in the SEVIC case regarding the prejudicial issue raised by the German Supreme Court of Justice) as well as German private international law (see the recent reform of German private international law concerning companies).

The Ministry’s response

For the payment order: yes, this method facilitates the solution for businesses thanks to the uniformity of the forms.

For the EEO: when it is applicable, it offers a cheaper and faster alternative to the exequatur procedure by virtue of the Brussels I Regulation. However, the EEO does not solve problems which arise later, which could occur to a certain extent during the enforcement process, due to variations in the different systems of enforcement.

With regard to family law: no data currently available.

For small claims: due to the lack of practical experience with this procedure, the decision was made not to respond to this question.

Greece

The very low number of applications of OIs in Greece (mentioned previously) means that there is not a clear picture of these OIs. It is therefore not possible to respond with certainty to the question as to whether OIs have improved the situation for Greek consumers and businesses in their cross-border relations. However, the rapporteurs are
of the general opinion that OIs improve the situation for consumers and businesses at the cross-border level.

| Spain | The most commonly used instrument is the Community trademark procedure. It reduces costs for businesses, as they do not need to register a trademark with each individual national legislative body. Company law instruments will probably be applied more often in future. At present, their advantages for consumers do not seem to be conclusive enough. The matrimonial property system agreed between France and Germany has not improved the current situation in Spain, since despite a multitude of participation schemes, parties are very reluctant to use any of them. On the other hand, a European Certificate of Succession could be advantageous for cross-border successions, because it would take into account the differences between national laws regarding which documents prove someone's capacity of heir or administrator in a certain State. This would allow a standardised instrument to be introduced, which would allow estates to be liquidated more easily when there are assets in several countries. |
| France | For association law OIs: According to M. Lecourt: Without a doubt, the response for the SE is positive. The positive points already raised in the previous questions (increased mobility, restructuring tool...) encourage large businesses to opt for this instrument within the scope of the development of their Community activities. The response is the same for the EEIG. However, for the SEC, the overall response is negative, due to issues surrounding the references to national laws and the difficulty of interpreting its members' statutory freedom. According to the CCIP: The SE aims to facilitate multinational businesses' cross-border activities, by removing certain obstacles which caused disparity and restrictions on territorial application of domestic company laws. In doing so, this European corporate form has achieved the improved situation, which was necessary for business which had used it in their cross-border relations. However, with regard to the aforementioned criteria (costs, simplicity...), it is clear that the SE remains a highly imperfect instrument, mainly because it is very costly and complex. For civil procedure OIs: According to P. Callé: it is difficult to say whether civil procedure optional instruments have improved the situation for consumers and businesses in cross-border relations. The procedures implemented by the three civil procedure optional instruments are certainly simple and not expensive. But because legal practitioners are not very familiar with them, they... |
mainly have recourse to national enforcement orders coupled with an exequatur procedure, most often by applying Regulation 44/2001 of 22 December 2000. On the other hand, if the entirety of the legalisation, certification and exequatur procedure within the scope of Regulation No. 44/2001 of 22 December 2000 were removed, the situation would then improve for consumers and businesses in cross-border relations.

According to Maître Michaux: Once their existence becomes known, OIs will improve the situation for consumers. They are very easy to use, especially as the majority of the population has access to the Internet, and young people are becoming more and more accustomed to searching online.

They are also indispensable because – contrary to what some people say, believe or want others to believe – small claims cannot be dealt with by professionals (except those specialising in this particular area), due to the ratio between the cost of bringing a claim and the financial gains arising from it, as well as the limitation period. But this type of litigation must be very simple to resolve, and non-professionals involved in it are not always aware of the situation. It remains to be seen how quickly courts really deal with these issues; they are not familiar with processes in other countries. There is indeed a link with the development of 'alternative dispute resolution methods'. Progress has truly been made with regard to the Enforcement Order, but true progress (which does not exist in this case) would be to facilitate the means of identifying possibilities for seizing or freezing accounts; this would dispel the criticism that has been levelled throughout Europe. This has not yet occurred in France.

For intellectual property OIs:

As has also been emphasised above, they allow for uniform protection across the entire territory of the EU, using simplified and standardised registration methods: Reduced costs thanks to the protection provided (1 registration confers protection in 27 States).

For example:

- For the registration of a Community trademark, a single tax is owed, which has been reduced by 40% since 2009: Basic tax: EUR 900 for electronic filing (e-filing) or EUR 1 050 if the paper form is used. In each case, if the application contains more than three classes of product and service, a supplement of EUR 150 is payable for each supplementary class.

- For the registration of a domestic trademark: Paper filing (EUR 225 for products and/or services belonging to one, two, or three classes). Electronic filing costs EUR 200. And there is a cost of EUR 40 for every supplementary class of product and/or service. Payment of fees must be made on the day of filing. In the case of filing by fax, there is a supplementary fee of EUR 100.
Simplified formalities and procedures are achieved by one single claim/application, one language for the procedure, one administrative centre and only one file to deal with. The claims/applications can be submitted either directly to the Community Office or to the central industrial property services. The claim/application can also be submitted electronically. OHMI services ensure that: a receipt is issued in real time; the claim/application is verified online; the filing is faultless; the filing date is guaranteed; the commencement of the registration procedure is accelerated; and data on online forms is saved for future claims/applications.

Community legislation offers an additional possibility for Community trademarks and designs, which could be useful for some parties within the scope of certain filing strategies. From this prospective, it is an improvement. But it does not mean that Community instruments have simplified the system. To the contrary, discrepancies in interpretation have emerged in some areas. With regard to consumers, commentators have noted that interpretations made by offices had the potential to cause confusion as to the origin of products and services. This last observation is debatable. Furthermore, it is not an established fact that the European patent has brought advantages to consumers. Opinions differ on this issue.

With regard to legal certainty, the situation for businesses has probably improved with the European patent, due to the fact that information on protection sought in Europe is now centralised. As for this matter, it is specified that applications for European patents must be published and made easy accessible to everyone, by way of a European patent bulletin, available on a website that is simple to navigate and use. To the contrary, it could be considered that the huge reliance by important players on the European patent is likely to enlarge the geographical areas in which commerce is not subject to domestic competition laws.

For patrimonial family law OIs: most certainly.

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<tr>
<th>Country</th>
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<tbody>
<tr>
<td>Italy</td>
<td>First of all, there is clearly a dichotomy. On the one hand, the role of intellectual property instruments in the internal market seems to be increasing. On the other hand, Italian operators are not yet familiar with civil procedure OIs and company law instruments. Nevertheless, they are potentially important tools, which aim to improve the functioning of the internal market and the free movement of persons and capital. For these reasons, their adoption has been warmly received by national commentators. The reluctance seen in practice appears to be attributed to several factors. Firstly, the existence of domestic alternatives, which do not lead operators down the path to using unknown legal instruments. Similarly, the lowering of costs that the EU claims OIs will bring, is not an absolutely crucial factor for those who use them. Finally, only legal professionals seem to be aware of the existence of OIs, whereas citizens have a poor awareness of them (see the response on consumer websites).</td>
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<tr>
<td>Cyprus</td>
<td>No information available.</td>
</tr>
<tr>
<td>Country</td>
<td>Statement</td>
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</tr>
<tr>
<td>Luxembourg</td>
<td>Due to the rare use of these optional instruments, it is difficult to provide an objective response.</td>
</tr>
<tr>
<td>Hungary</td>
<td>OIs have only partially improved the situation in Europe. OIs are efficient because they increase the range of different choices of systems.</td>
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<td>According to National Chamber of Civil Law Notaries (HNCCNLN): Yes. The instruments have created alternative European civil procedure systems which improve the situation. Since they have existed, it has been easier for consumers and businesses to assert their rights and claim money owed to them. This factor ensures legal certainty.</td>
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<tr>
<td></td>
<td>With regard to company law: OIs had not, and still have not, improved the situation for Hungarian businesses in cross-border relations (due to costs, time, results, etc.).</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>A distinction must be made between OIs in the three main areas where they are found: procedural law, intellectual property law and company law.</td>
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<td>The three civil procedure law instruments are generally considered to be very useful for parties, in the sense that they allow the parties to conduct cross-border relations more easily. Certain parties (such as banks) even request a European Enforcement Order as if it is standard procedure, even if the parties are located in the same country. The forms are easily accessible (to download from websites), which makes OIs particularly easy to use.</td>
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<td>The same is true for intellectual property rights: the success of OIs in this area rests particularly on the fact that trademarks and other intellectual property rights are international in nature. There is therefore hardly ever a case where domestic protection only is sought. On the other hand, the European patenting system does of course have its faults, especially due to the fact that it only creates a domestic patenting body, rather than truly pan-European protection.</td>
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<tr>
<td></td>
<td>Success in company law differs from one instrument to the next. In effect, the SE is seen as a useful legal arbitration tool. It allows parties to come to optimal arrangements for the legal form in which they undertake their activities. In all cases, it can be said that the most important aspect for these OIs is the great legal certainty that they provide, and they are most popular between individual parties. If the choice of an OI still results in large parts of a domestic law still applying, then they are not an attractive choice.</td>
</tr>
<tr>
<td>Austria</td>
<td>We believe that in the area of civil procedure, the situation for both consumers and businesses has considerably improved thanks to OIs, which have made it a lot easier for consumers and businesses to assert their rights in a cross-border context.</td>
</tr>
<tr>
<td></td>
<td>With regard to the registration systems used by the WIPO, the EU's standardised systems – i.e. large-scale protection of trademarks and</td>
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</table>
Implementation of optional instruments within European civil law

designs – constitute a new improvement in the situation for businesses and individuals who wish to protect their intellectual property. Furthermore, if the EU is a territory in which protection can be requested, at least in certain cases, the registration fees for using OIs are less than those charged within the scope of the Madrid and the Hague systems (this estimate was made with regard to unique designs and trademarks for the three classes of products).

However, as far as European company law OIs are concerned, there remains a lot to be done.

<table>
<thead>
<tr>
<th>Poland</th>
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<tr>
<td>There is a relatively low awareness of European procedural law, as well as a lack of mandatory courses in this area, both at law schools and during the vocational training period. This explains why the advantages of applying OIs are still insignificant. This assertion can be supported by a simple argument. There have been few publications in relevant legal journals. OIs remain mainly a subject of interest for law schools.</td>
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</table>

The OI concerning the SE is a very important instrument for large international companies active in the markets of all EU Member States. The SE allows for a reduction in businesses’ operational costs, because all of the separate companies in Member States can be combined into the same SE. This is a practical instrument, seeing as the rules for all EU Member States are the same, whether it is for the creation of the SE, its structure or the possibility of choosing between a monist and a dualist system.

The EEIG promotes cooperation between businesses, and allows this cooperation to expand in the future, mainly thanks to publicity in the EU. The costs of creating and operating an EEIG are relatively low, and its structure is not complicated.

The SCE is a new instrument, which has not yet been very popular in Poland. National cooperative societies are fairly strong, but the SCE could be very useful in border areas.

If the OIs are well managed, they could be a useful tool for cross-border B2C contracts. But their mechanisms must be laid out in minute detail, and the two parties to the contract must genuinely consent to using them. Possible advantages are as follows:

- Greater access to the market. At the time of writing, there are some international / cross-border businesses which do not allow Polish citizens to conclude contracts. Research shows that numerous on-line shops do not accept Polish credit cards, do not want to sell to Poland, etc. This situation is caused by several factors, but according to the Polish Ministry of Justice, one of the reasons is the 'low confidence in the Polish legal system'.
- Common rules would encourage lower-level cross-border B2C e-commerce, where parties to contracts are local to the area.
- Costs will probably be a less important factor for business negotiations, as they will result in lower prices. It is possible to
imagine consumers willing to use OIs instead of domestic law, due
to the lower costs of using the OIs.
- Simplified rules for personal disputes, as judges will have the
  same set of rules.

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<th>Country</th>
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<tr>
<td>Portugal</td>
<td>No information available.</td>
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| Slovakia | There are unofficial statistics which show that the European Enforcement Order obviously improves the situation for parties who want their actions to be worthwhile, in the event that an authenticated act is certified as a European Enforcement Order. Up until now, there are no domestic rules governing application abroad, and in order to obtain an Enforcement Order in another country, the request must be accepted by the court.

For the European small claims procedure, as it is impossible to determine the exact number of these procedures, there is an assumption being made that this procedure is not often used, and it is difficult to evaluate the impact that this procedure has had for consumers and businesses in cross-border relations.

The European payment order has filled a loophole in domestic legislation, which allowed payment orders to only be issued where the defending party was in Slovakian territory. The situation for creditors in cross-border disputes has improved thanks to the speeding up of the procedure. The only exceptions are specific Slovakian laws governing payment orders for bills of exchange and cheques, i.e. special orders for the payment of debts which result in a bill of exchange or a cheque. Slovakian legislation allows these payment orders to be served abroad. According to this law, the payment order must become binding and enforceable, even if its recipient has not been notified (provided that legal requirements are complied with). If objections to the payment order are raised, they are dealt with in a simplified procedure, by removing certain procedural defences which are available in other types of procedure. As this instrument is very efficient (and has been used in a relatively large number of cases in Slovakia), then if it aims to be enforceable in Slovakian territory, it is also preferred in cross-border disputes. However, it is more difficult to issue an Enforcement Order using these recognised and enforceable procedures in other EU Member States.

The European Company has not succeeded in improving the situation for businesses in cross-border relations. Due to the reasons given in the response to Question 11 it has not become a widely used instrument, and as a result, this OI has had hardly any impact on the situation for businesses in cross-border relations. The European Company has become a complicated instrument which, thanks to its incorporation into domestic law, cannot be considered as impartial. Combined with the existence of several sources of law, such a Regulation also leads to a decrease in legal certainty. A price comparison (a capital of EUR 120 000 the incorporation and administration costs), as well as a review of its advantages, have resulted in a clear lack of preference for the European Company.
The European Economic Interest Grouping has also failed to improve the situation for businesses in cross-border relations. Due to the reasons given in the response to Question 11 it has not become a widely used instrument by businesses, and as a result, this OI has had hardly any impact on the situation for businesses in cross-border relations. Even though the rules for EEIGs are relatively simple thanks to the application of domestic law, they cannot be considered as neutral instruments. Combined with the existence of several sources of law, such a Regulation also leads to a decrease in legal certainty. Therefore, even low costs do not bring the benefits and improvements that were expected. This is corroborated by the low number of existing EEIGs – even though the EEIG was introduced more than 20 years ago, only around 1 500 EEIGs have been established.

The European Cooperative Society has also failed to improve the situation for businesses in cross-border relations. Due to the reasons given in the response to Question 11 it has not become a widely used instrument, and as a result, this OI has had hardly any impact on the situation for businesses in cross-border relations. It has become a complicated instrument which, thanks to its incorporation into domestic law, cannot be considered as impartial. Combined with the existence of several sources of law, such a Regulation also leads to a decrease in legal certainty. A price comparison (a capital of EUR 30 000 the incorporation and administration costs), as well as a review of its advantages, have resulted in a clear lack of preference for the European Cooperative Society.

Overall, it can be concluded that the cost/efficiency ratio of OIs is comparable to that of similar domestic instruments (for example, legal fees for these optional instruments which are laid down in law, are the same as those for similar domestic instruments). In this regard, however, it is also necessary to take into account the costs of legal advice, which could (but not necessarily) be higher for certain instruments, due to their complexity. However, the increase in costs for legal advice cannot be objectively quantified, since they depend on an individual agreement between the client and the lawyer. This opinion obviously rests on the comparability of the cost/efficiency ratio of European optional instruments with that of similar domestic instruments, which does not take mandatory European and domestic company law capital requirements into consideration.

**Sweden**

**The Ministry’s response**

According to the Swedish Companies Registration Office, European Companies registered in Sweden were created in order to reduce the costs associated with cross-border mergers. There is therefore no significant advantage for consumers. According to the Centre of Commercial Law at the University of Stockholm, the legal system governing European Companies is fairly complicated, and some parties find it difficult to understand. This could be one of the reasons why its use has been limited in Sweden.
European Economic Interest Groupings were created in order to facilitate cross-border cooperation and the running of small and medium-sized businesses. There are only a few European Economic Interest Groupings registered in Sweden. Considering that the rules of the EEIG have now been in force for many years, the Centre for Commercial Law at the University of Stockholm has come to the conclusion that up until now, the rules have only had a limited impact on the situation for both consumers and businesses in cross-border relations.

Users of the Community trademark and Community designs are generally satisfied with these instruments. The Community trademark and Community designs are considered to be relatively simple and not too expensive to use. The instruments have helped to improve the situation for users who wish to obtain protection throughout the European Union.

According to the Swedish Consumer Agency, the simplified legal procedures could help consumers obtain access to justice, and the Agency believes that the procedure implemented by the European small claims procedure will improve the situation for cross-border disputes.

Some lawyers believe that procedural OIs have improved the situation for consumers who are involved in disputes or claims in other Member States, because it is easier to apply the OIs' procedural formalities. However, it is likely that many consumers are not aware of OIs. As a result, OIs are probably not considered as an option. Lawyers also believe that despite the OI, it could be difficult for consumers to assert claims due to language barriers. However, even if the aim of OIs is to contribute to a reduction in costs for consumers, lawyers believe that a local lawyer will be considered as a necessity for asserting claims. As regards businesses in cross-border relations, some lawyers do not believe that the OI procedure has improved the situation very much. They believe that most businesses will employ local lawyers in the event of disputes or claims. The cost of doing so is without a doubt not much higher than if they were to employ a lawyer in their own Member States.

**United Kingdom**

**The Ministry’s response:** No information available.

**Academic response**

This has not really changed the situation for businesses in cross-border relations. The European small claims procedure and the EEO of course make it easier, but major changes will probably arise in the future.
CHAPTER 25: DO THE OPTIONAL INSTRUMENTS CITED FACILITATE CREATION OF THE GREAT SINGLE MARKET, OR WOULD THIS OBJECTIVE BE BETTER SERVED BY A MAXIMUM OR MINIMUM HARMONISATION METHOD?

This section analyses the responses one by one (1.) before presenting a table with a more detailed overview of the responses of the different countries (2.).

1. ANALYSIS OF THE RESPONSES

There are actually two parts to the question: has the optional instrument enabled creation of the internal market (1.1)? What are the comparative merits of the optional instrument and minimum or maximum harmonisation for achieving this result (1.2)?

1.1. Has the optional instrument facilitated creation of the internal market?

Some reports give a generally positive response to the question, without differentiating between the optional instruments.

The Bulgarian report recognises the advantage of an optional instrument as a 28th system: ‘Thus, operators receive legal certainty for the whole EU territory, without suppressing the Member States’ liberty to develop their own national systems.’

The Greek report adopts a similar viewpoint, stating that a discretionary 2nd system offers the parties a choice, without the problems of the maximum or minimum harmonisation method.

The Italian report qualifies the use of optional instruments as an important step towards improving the internal market. It states that ‘they play a double role. As ‘legal irritants’, on one side, they raise the debate at European level provoking reactions and reflection boosting the common debate. On the other side, they constitute a common model for national legislators, aiming to promote a slow process of volunteer harmonisation’. It concludes my commenting that in practice, however, optional instruments are still marginal assumptions.

The Polish report recognises that the optional instrument is a very good instrument for creating the single market, and that this is particularly the case for the optional SE.

According to other reports, only certain optional instruments have encouraged creation of the single market.

The Czech report responds that it is impossible to give a general response to this question. It also notes that there are some areas in which the optional instrument would be ineffective: ‘However, there are other areas where the optional scheme could not serve its purpose and where unified or harmonised solutions are necessary (e.g. customs union, the basic system of the four fundamental freedoms etc.).’

283 Emphasis supplied.
The Belgian report accepts that some optional instruments may encourage creation of the internal market: this is unreservedly the case, according to this report, for the EEO, Community trademarks, Community designs, or the European patent (even though a unitary patent would be even better). The Belgian report is slightly more reserved but still positive for the European payment order and the small claims procedure. However, its response becomes much more uncertain for the SE. Of course, the Regulation encourages creation of the single market, in that it enables cross-border mergers and the cross-border transfer of registered offices. But the Regulation does not govern any aspect of taxation, competition, intellectual property, insolvency and financial law, which means that it still has a long way to go.

The Bulgarian report also accepts that creation of the single market is encouraged by optional instruments in intellectual property law.

Some rapporteurs would first of all like it to be established whether there is a need for optional instruments for operators (see the Swedish report).

Lastly, according to some reports, some optional instruments have not facilitated creation of the internal market (see the Belgian report for the EEIG). The French report also states that the SE has not really facilitated the single market because the instrument has facilitated the creation, not of a European company, but of a Community-type national company. In the French report, the CCIP (Paris Chamber of Commerce and Industry) advocates the creation of a European Private Company (SPE) that would suit SMEs and encourage creation of the single market.

These opinions on improving the internal market by the optional instrument are sometimes independent of the issue of knowing whether minimum or total harmonisation would be better or worse for the development of the single market.

**1.2. What are the comparative merits of the optional instrument and minimum or maximum harmonisation for achieving this result?**

Opinions on this question vary greatly.

For some, the fact that the optional instrument may be effective does not preclude the fact that maximum harmonisation could be even more effective (see the Belgian report for the EEO).

Some reports, such as the Hungarian report, acknowledge the merits of the optional instrument for facilitating creation of the single market, but conclude in the end that the best solution would be to choose total harmonisation "respecting certain branches of law covered by the questionnaire'.

Some reports are more sceptical about the use of the optional instrument method.

The Slovak report, for example, considers that optional instruments only have a limited, indirect effect on creation of the single market. In this respect, in order to achieve the integration objectives of the internal market, the 'selective' harmonisation method seems to the Slovak rapporteur to be the most appropriate.
The Swedish report is also fairly sceptical about the optional instrument and prefers minimum, or even total, harmonisation. It does, however, recognise that while total harmonisation may be appropriate in certain areas (corporate law, intellectual property), it is not in other areas such as family law.

For others still, the use of the optional instrument is a slow, more consensual route towards harmonisation:

According to the German report (Academic response), procedural optional instruments 'still represent the first step towards a uniform European civil procedure, which is an overwhelming innovation on the subject'.

The same goes for the Spanish report: 'Optional Instruments entail a piecemeal and slower way towards harmonisation, but on the other hand it allows a more convinced Europeanisation of legal practices and testing the advantages of a European optional system'.

Last but not least, some reports actually prefer the optional instrument to the harmonisation systems.

For example, the report from the Germany Ministry of Justice states that a specific Regulation for the European payment order procedure, limited to cross-border situations, is 'far preferable' to the harmonisation attempts of the 27 national systems.

The Dutch report also prefers the optional instrument to total harmonisation, in the areas covered by this questionnaire.

The Austrian report is also in favour of the optional instrument: 'OI are to be preferred to minimum or total harmonisation. The first reason is that they achieve a much higher degree of European integration, as operators from all Member States rely on one single set of rules. The second reason is that they leave the national legal systems untouched, avoiding the disruptive effect of harmonisation'.

The Polish report also considers that, thanks to optional instruments, there is no need for maximum harmonisation: 'Obviously, extension of European civil procedure, including optional instruments, strengthens the common market. There is no need for maximum harmonization.'

Lastly, other reports show that both methods can be used.

Thus, the French report emphasises the specific nature of optional instruments in intellectual property law coupled with Directives on the harmonisation of national laws controlling domestic rights, which contributes to the great single market. It cites the conclusions of the Advocate General DÁMASO RUIZ-JARABO COLOMER, presented on 18 January 2001 in case C-517/99 Merz & Krell GmbH & Co: "There are two dimensions to Community trademark rights, resulting from the dual intervention referred to above and achieved by means of various legislative instruments which, despite their different legal
effects, have a single aim and a shared goal: the establishment and functioning of the internal market\textsuperscript{286}. 

The same could be thought if an optional instrument came into being in contract law or simply in sales law. Such an optional instrument does not preclude that the harmonisation method may continue to be used in consumer law, which is the case with the adoption on 23 June 2011 of the Directive on Consumer Rights\textsuperscript{287}.

In conclusion, it should be noted that none of the reports emphasised the fact that optional instruments were particularly appropriate when the use of maximum harmonisation proved too difficult (see part five of the study).

2. COUNTRY-BY-COUNTRY SUMMARY OF RESPONSES TO QUESTION 25

<table>
<thead>
<tr>
<th>Member State</th>
<th>Table 25</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>Do you think that the OIs mentioned above facilitate the creation of the great single market, or do you think that this objective would be better served by a maximum or minimum harmonisation method?</td>
</tr>
<tr>
<td></td>
<td>With regard to the European Enforcement Order: yes, its application facilitates the creation of the single market in that it encourages recovery of debt when the dispute is cross-border. G. de Leval qualifies it as a 'European passport'. It is, however, clear that maximum harmonisation would be more effective insofar as it would be obligatory for everyone.</td>
</tr>
<tr>
<td></td>
<td>With regard to the European order for payment procedure: yes. One of the objectives of this Regulation is to ensure the free movement of payment orders and to enable them to be enforced, without an intermediate procedure in the executing Member State being required. However, there are gaps in the Regulation and internal legislators must take measures. Its effectiveness and its contribution to the development of free movement of orders will therefore depend, partly, on the content of the internal legislation.</td>
</tr>
<tr>
<td></td>
<td>With regard to the European Small Claims Procedure: yes, as with the other two Regulations mentioned above, not only do they facilitate the legal proceedings but they also provide enforceability.</td>
</tr>
</tbody>
</table>
|              | With regard to Community trademarks, companies or businesses are increasingly developing their service beyond the national territory. The possibility of using a Community procedure to protect trademarks presents a significant advantage for these companies and their development. In addition, the abundant autonomous interpretation of \textsuperscript{\textsuperscript{286} Free translation of the Greek: 'Κατά συνέπεια, το κοινοτικό δίκαιο των σημάτων έχει διπλή διάσταση: αυτή που απορρέει από τον διττό χαρακτήρα της παρεμβάσεως μέσω έξερχομένων κανονιστικών εργαλείων που παράγουν διαφορετικά έννομα αποτελέσματα (27), αλλά που έχουν ένα συντονισμένο και επιδιώκουν τον ίδιο σκοπό, δηλαδή τη δημιουργία και τη λειτουργία της εσωτερικής αγοράς'.}

the Court of Justice on this subject ensures uniform application of the rules established in the Regulation and further encourages the development of a single market.

With regard to Community designs, the Regulation provides a single right, producing uniform effects across the territory of the European Union. It improves the free movement of products since the right is protected uniformly throughout the Union. The protection, as well as being uniform, is more accessible and more suited to the internal market, which enables development of the Community economy. However, it brings in new concepts, which, in the absence of definitions, will give rise to uniform interpretations and could then endanger correct application of the Regulation.

With regard to the European patent: yes, as it centralises the procedure for obtaining patents. As such, once the patent has been obtained, it is subject to the internal legislation of each State. Its contribution to the development of the internal market is therefore limited. Adoption of the Community Patent Regulation is eagerly awaited. A draft Regulation was already adopted in December 2009. Having a Community patent will promote innovation, growth and competitiveness, necessary for the development of the internal market.

With regard to the European Company, some aspects point to it encouraging the creation of the single market. Some aspects show that there are still obstacles to such creation. One of the objectives of the Regulation is to enable businesses whose activity goes beyond the local framework to extend their undertaking and organise themselves at Community level.

However, the Regulation provides that national provisions apply as soon as one aspect is not governed by the Regulation. Although the national legal systems of the Member States still regulate the European company, the harmonisation objective will not be achieved while there are as many European businesses as there are Member States. The Regulation also encourages forum shopping, thus enabling businesses to choose the most advantageous jurisdiction from a legal and taxation point of view. It thus enables the free movement of businesses. The advantage of the Regulation is that it provides the company with the option of cross-border merger and cross-border transfer of its registered office. The Regulation does not govern any aspect of taxation, competition, intellectual property, insolvency and financial law. In conclusion, it can be said that it contains elements designed to encourage free movement of businesses but it also contains certain obstacles.

With regard to the European Economic Interest Grouping, its objective is, in any case, to encourage cooperation between businesses but the various difficulties involved with its implementation and how it operates stand in the way of its success.

With regard to the European Cooperative Society, as for the SE, the many referrals to national law and the absence of provisions in fiscal
matters risk damaging operation of the Regulation.

**Bulgaria**

OIs, particularly in the field of industrial property, have already proved to be an effective tool for creating the single market. They provide legal certainty in cross-border transactions and disputes, without other modifications being needed in the national laws. Another advantage of the OIs is that they provide a 28th system that coexists with the 27 national laws of the Union, which may be chosen by the operators. In this way, the operators receive legal certainty for the whole EU territory, without replacing the freedom of the Member States to develop their own national systems.

**Czech Republic**

It is impossible to give a general response to this question. These instruments are undoubtedly useful for the internal market in their own context. However, there are other field in which the discretionary systems do not allow this objective to be achieved and in which unified or harmonised solutions are necessary (for example a customs union, the basic system of the four fundamental freedoms, etc.)

**Germany**

**Academic response**

With regard to the European Enforcement Order, the payment order and the Small Claims Procedure, these instruments are too recent to be able to assess their contribution to the great internal market. The limited scope leads us to assume that any direct contribution will not be a very significant one. However, these OIs do represent the first step towards a uniform European civil procedure, which is an overwhelming innovation on the subject.

For European trademarks, designs and patents, these instruments have been very successful in that the creation of the great single market has undoubtedly been encouraged by the introduction of these OIs.

**The Ministry’s response**

For the European order for payment procedure: a specific Regulation targeted at cross-border situations is far preferable to attempting to harmonise the 27 existing national systems.

With regard to the EEO and the small claims procedure, they refer to the previous responses. There is, however, no data available for family law on this matter.

**Greece**

They are of the opinion that as long as the OIs create a discretionary instrument, which would be characterised as a 'second system' in each Member State, it offers the parties a choice between two national law systems. This encourages creation of a great single market without the problems associated with the maximum or minimum harmonisation method.
### Spain

Optional instruments entail a piecemeal and slower way towards harmonisation, but on the other hand it allows a more convinced Europeanisation of legal practices and testing the advantages of a European optional system. An OI is more than just an ideological piece of work. Minimum harmonisation and total harmonisation also have their disadvantages: minimum harmonisation does not guarantee true harmonisation as national laws may still differ from this minimum with a low minimum standard and significant national differences, while total harmonisation would not be welcomed if the previous situation contains disparities in the levels of protection, which the proposal for a Directive on consumer rights has already highlighted.

### France

I. Law of economic interest groups

According to the CCIP, the case of the SE is not conclusive: of course, as a European Company form, the objective of the SE status was precisely to contribute to the creation of the single market. But this initial ambition has almost been destroyed for one 'simple' reason: the legal and political difficulties in the successful completion of this project have led to the creation, not of a true company under Community law, but rather a Community-type national company. Given the many referrals to national law and the options left open to the Member States, there is no single uniform type of SE, but rather 27. The result is poor readability of SE statues, legal certainty that is far from perfect and heightened competition between the States. The option businesses now have to form European Companies means that there is still a long way to go before all the needs of the Union's economic players are met. It was designed for companies of a certain size and does not therefore correspond to the needs of SMEs. This is why, with a view to creating the great single market, the CCIP has for many years encouraged the adoption of a European Private Company (SPE) statute, which has four main advantages:

- first of all, the SPE would be a structure open to anybody who could encourage entrepreneurial spirit;

- secondly, the choice of the SPE would lead to a significant reduction in the costs to bring the creation and operation of companies into line and the application of simple administrative rules, reduced to a minimum. It would enable businesses to make real economies of scale by refocussing their efforts on commercial development;

- thirdly, the SPE is characterised by its modernity and would be the first European company to actually encourage mobility in Europe. This would also be the first truly supranational structure, in that the recourse to national laws would be reduced to a strict minimum;

- fourthly, and this is a very important point, the SPE would have very great European symbolism. This would undoubtedly create added value, a true seal of approval in Europe and worldwide, for any entrepreneur choosing it as a legal vehicle.
II. Civil procedure

Civil procedure optional instruments certainly facilitate the creation of the great single market as a last resort, but they are too rarely used to make a very effective contribution. The removal of any legislation, apostil and exequatur procedure within the context of Regulation No. 44/2001 of 22 December 2000 would probably contribute more.

III. Intellectual property law

From the point of view of trade, the question does not seem to be asked in these terms. Indeed, the Community territory is perceived by businesses as a territory in its own right, incorporated into their strategy as such, alongside the national territories for which protection strategies continue to be used simultaneously. From the legal practitioner's point of view, the maximum harmonisation method is more effective, as it enables the same reasoning and the same legal effects to be transposed in different territories, but does not bring with it the same benefits (choice between a unitary right or 'à la carte' protection). However, it is worth noting the singularity of Community intervention in terms of industrial property and more specifically regarding trademark and design law. Indeed, in addition to the optional instrument, Directives harmonise national legislation governing national rights, which contributes doubly to creation of the great single market.

According to the Conclusions of the Advocate General, Damaso Ruiz-Jarabo Colomer, presented on 18 January 2001 in case C-517/99 Merz & Krell GmbH & Co, there are two dimensions to Community trademark rights, resulting from the dual intervention referred to above and achieved by means of various legislative instruments which, despite their different legal effects, have a single aim and a shared goal: the establishment and functioning of the internal market.

Mention is also made in recital 2 of Regulation 207/2009 of 26 February 2009, which states: 'It is desirable to promote throughout the Community a harmonious development of economic activities and a continuous and balanced expansion by completing an internal market which functions properly and offers conditions which are similar to those obtaining [sic] in a national market. In order to create a market of this kind and make it increasingly a single market, not only must barriers to free movement of goods and services be removed and arrangements be instituted which ensure that competition is not distorted, but, in addition, legal conditions must be created which enable undertakings to adapt their activities to the scale of the Community, whether in manufacturing and distributing goods or in providing services. For those purposes, trademarks enabling the products and services of undertakings to be distinguished by identical means throughout the entire Community, regardless of frontiers, should feature amongst the legal instruments which undertakings have at their disposal'.
<table>
<thead>
<tr>
<th>Country</th>
<th>Notes</th>
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<tbody>
<tr>
<td>Italy</td>
<td>In theory, these instruments represent an important step towards improving the internal market. They have been very well received by Italian legal commentators. However, with regard to the payment order, many commentators have widened its scope to also include national disputes. With regard to the legal technique they incorporate, it represents very valuable solutions. Moreover, in accordance with their optional nature, they do not impose any improvement of existing national legislation and do not therefore lead to all of the questions raised by discussions relating to harmonisation. In this way, they play a double role. As 'legal irritants', on the one hand, raising the debate at European level and provoking reactions and reflection that boosts the common debate. On the other hand, they are a common model for national legislators, designed to promote a slow, voluntary process of harmonisation. Furthermore, in practice, they are still completely marginal experiments that are very slowly incorporated into the market. This situation is the weakness of this approach, inevitably associated with the process dedicated to the circulation of related information. It is difficult and too expensive for consumers and SMEs to access these OIs. The same phenomenon seems to affect legal professionals.</td>
</tr>
<tr>
<td>Cyprus</td>
<td>No information available.</td>
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<tr>
<td>Luxembourg</td>
<td>No information available.</td>
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<tr>
<td>Hungary</td>
<td>The majority of the OIs facilitate creation of the single market, but in the end the best solution would be to choose total harmonisation while respecting certain branches of the law covered by the questionnaire. Optional instruments have certainly given fresh impetus to harmonisation in terms of consumer protection, company law and competition. Legal procedural standardisation (by way of Regulations and Directives) of the enforcement of claims in private law should also be taken into account.</td>
</tr>
<tr>
<td>Netherlands</td>
<td>It is a contentious issue in academic literature of knowing how best to create the European internal market. It is always a matter of achieving a balance between compulsory law and choice of the parties. In the areas where there are currently OIs, they emphasise that the freedom of the parties to choose is better than harmonisation for a European system. However, the prerequisite is that there needs to be enough information on the possibility of making this choice.</td>
</tr>
<tr>
<td>Austria</td>
<td>OIs are preferable to minimum or total harmonisation. The first reason is that they achieve a much higher level of European integration given that operators in all the Member States rely on a single set of rules. The second reason is that they leave the national legal systems intact, avoiding the disruptive effect of harmonisation.</td>
</tr>
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</table>
Poland

Of course, the extension of the European Civil Procedure, using optional instruments in particular, strengthens the common market. There is no need for maximum harmonisation. They draw very heavily from the Polish model. The introduction of certain provisions of the OIs into the national Civil Procedure shows that national and European legal orders form a mutually complementary system.

OIs are very good instruments for facilitating creation of a great single market. Thanks to the OIs on the SE, it is now possible to make a company, considered as a supranational company, work in the same way in all of the EU Member States. This would not be achieved by minimum harmonisation, as national Regulations could differ considerably from one another. With regard to the total harmonisation imposed by a uniform model, this could sometimes be too far removed from national Regulations.

Portugal

No information available.

Slovakia

The disadvantage of these optional instruments, as regards the objective of achieving integration of the internal market, is that they only have an indirect, limited effect of creation of a single market, in relation to both their scope and their content. The character and the legal nature of the optional instruments involved in legal order in Slovakia, where the parties are free to decide whether to use them or not, means that these instruments have no real impact on the situation within the internal market.

The significance of these optional instruments could grow in the long term. The fundamental condition for increasing the extent of their practical use is, amongst others, the awareness amongst professionals and the general public of the possibilities offered by these optional instruments, compared to the same national instruments.

From the point of view of the Slovak legal environment, the impact of these instruments in terms of eliminating the differences between the national legal systems of the Member States is, at present, minimal at the very most. One of the reasons for this is the very nature of these optional instruments as they allow the parties to decide if and how to apply a given optional instrument. In this respect, in order to achieve the integration objectives of the internal market, the selective harmonisation method seems to be the most appropriate.

Sweden

The Ministry's response

The three types of European instruments in company law have, although they have not been used a lot thus far, had a certain positive effect on the harmonisation of European company law. However, before any new European legal entity is introduced, it should be established whether there is a real need from a cross-border perspective. In general, minimum harmonisation is the method that has the most chance of success by helping European businesses to grow under the best possible conditions.
The OIs for the Community trademark and Community designs work well. The Community trademark has been a great success. They should, however, be optional instruments that complement the national systems. The protection of national trademarks and the protection of designs meets the needs of a large number of candidates. Indeed, the majority of Swedish claimants request protection in accordance with the national systems. It is only possible to see the advantages by being able to choose between several systems relating to trademarks and designs.

Some lawyers have expressed the opinion that the creation of a great single market cannot come about mainly as a result of the OIs mentioned above. However, in the near future, these lawyers do not think that it is possible to achieve total harmonisation between the Member States in all of the areas covered by the OIs mentioned above. They feel it is important for the Union and the Member States to make extra effort to examine the actual need for new OIs before they are introduced. Extra effort should be made to improve circulation of the current OIs. Perhaps the introduction of optional instruments is not the best tool for achieving the single market. However, some areas of the law, namely company law and intellectually property law, are, according to lawyers, more suited to harmonisation, even if not total harmonisation, than others, such as family law.

<table>
<thead>
<tr>
<th>United Kingdom</th>
<th>The Ministry’s response</th>
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<tbody>
<tr>
<td></td>
<td>No information available.</td>
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<table>
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<tr>
<th>Academic response</th>
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<tbody>
<tr>
<td>At present, there is no significant change for businesses, but this may happen in the future.</td>
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</tbody>
</table>
CHAPTER 26: HAVE PROCEDURAL OPTIONAL INSTRUMENTS FACILITATED SETTLEMENT OF CROSS-BORDER DISPUTES?

This section analyses the responses one by one (1) before presenting a table with a more detailed overview of the responses of the different countries (2).

1. ANALYSIS OF THE RESPONSES

For some, the response is premature.

The English report states the following:

'A period is needed to see if the procedural OI have facilitated the settlement of cross-border disputes. For instance when Brussels Regulations appeared, it took some time for the lawyers to apply them, and now they are very familiar to UK practitioners. However, we have to notice that those Regulations were not optional. By consequence concerning those optional instruments, it will take time in the UK for them to be applied and to facilitate the settlement of cross-border disputes'.

In the same vein, some reports consider that procedural optional instruments have not yet greatly facilitated the settlement of cross-border disputes (Spanish, Italian and Slovak reports, all three due to the fact that these instruments are rarely used), but they could do in the future (see the Bulgarian and French reports).

For others, it can already be said that there has been an improvement in cross-border disputes thanks to procedural optional instruments.

The Belgian report, for instance, for the EEO and the Regulation creating a small claims procedure, as the procedure is less laborious for small debts than the simplified exequatur of the Brussels I Regulation. It states also that the EEO Regulation 'encourages the settlement of disputes before they are brought before the competent jurisdiction. A sharp increase in dispute settlements has been observed from service of summons in bailiffs' studies, especially when cross-border disputes are involved'.

This seems to be proof of the effectiveness of the European Enforcement Order.

The Belgian report is slightly more sceptical regarding the European payment order.

The response to the question from the German rapporteur is also positive, stating however that the scope of these instruments is limited. The Polish rapporteur also accepts that procedural optional instruments have facilitated the settlement of cross-border disputes.

The German Ministry of Justice notes the improvements made by the European payment order, improvements that can only grow in the future. The Slovak report states as well that the European payment order has filled a gap in Slovak law and that this instrument has accelerated cross-border dispute resolution.

The Czech report states that there has been an improvement as operators now have a choice they did not have before.
The Dutch report acknowledges that the success of the EEO is clear.

Some more negative opinions have however been submitted.

In Slovakia, the issue of a European Enforcement Order certificate may lengthen the enforcement procedure (Slovak report).

In addition, the scope of these procedural optional instruments is too limited as they would only be useful for small claims. If the dispute is large, the claimant and the defendant will get local lawyers who have better knowledge of national law, thus reducing the usefulness of these instruments (report from the Swedish Ministry of Justice, reporting the opinion submitted by Swedish lawyers).

Some reports also state that these optional instruments are only useful for uncontested debts. Indeed, if the European payment order, or the judgment made on a small claim, is contested by the defendant, the procedure moves over to national law. These optional instruments are therefore no longer useful in this case (see the Czech report and the Greek report).

Finally, some reports consider that due to the language barrier, it is ‘much easier to enter into conflict with an Australian party than a German one’ (Hungarian report).

2. COUNTRY-BY-COUNTRY SUMMARY OF RESPONSES TO QUESTION 26

<table>
<thead>
<tr>
<th>Member State</th>
<th>Table 26</th>
<th>Do you think that procedural OIs have facilitated settlement of cross-border disputes?</th>
</tr>
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<tbody>
<tr>
<td>Belgium</td>
<td></td>
<td>With regard to the European Enforcement Order, certainly. Before this Regulation entered into force, the only way a creditor could recover its debt when the debtor was domiciled outside the original State was to invoke the Brussels I Regulation. And yet, the simplified exequatur procedure provided for by this Regulation is too expensive for small debts. In addition, this Regulation encourages the settlement of disputes before they are brought before the competent jurisdiction. A sharp increase in dispute settlements has been observed from service of summons in bailiffs' studies, especially when cross-border disputes are involved.</td>
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<tr>
<td></td>
<td></td>
<td>With regard to the European payment order, certainly as its objective is precisely to simplify, accelerate and reduce the costs of settlement in cross-border disputes. However, as mentioned above, there are gaps in the Regulation and internal legislators are therefore obliged to take measures. Its effectiveness and its contribution to the development of free movement of orders will therefore depend, partly, on the content of the internal legislation.</td>
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<tr>
<td></td>
<td></td>
<td>With regard to the Regulation creating a small claims procedure, it enables an economic balance to be restored within the European Union. Indeed, it was often the case that the debts of small businesses went</td>
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</tbody>
</table>
unpaid but in view of the time and money required for the debt recovery procedure, these businesses preferred not to attempt to recover their debt from their debtor. They then found themselves in financial difficulties.

With regard to the Community trademark, as it stands, the purpose of the Regulation on the Community trademark is not to facilitate the settlement of cross-border disputes but it establishes a uniform jurisdictional conflict rule, which enables companies or individuals with a Community trademark to predict the courts before which they may potentially be summoned. In that regard, the Regulation provides a certain amount of legal certainty. In the same vein, the Regulation sets out a conflict-of-laws rule.

With regard to the European patent, no. The European patent only facilitates the procedure for obtaining a patent. Instead of having to submit applications in each State, the Munich Convention centralises the procedure. However, once the patent has been granted it will be governed, in each State, by the relevant internal legislation. If a dispute arises in a State, it will be governed by the law of that State. If there is a cross-border dispute, it will be governed by the rules of private international law taken from either a European Regulation or from the common law of the States.

<table>
<thead>
<tr>
<th>Country</th>
<th>Response</th>
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<tbody>
<tr>
<td>Bulgaria</td>
<td>The number of cases in which these optional instruments are used at this stage is insufficient to evaluate their effect on the settlement of cross-border disputes. In general, it might be predicted that procedural optional instruments will facilitate the settlement of cross-border disputes. However, if these optional instruments are appropriate and effective, their popularity will grow and they will be used more frequently by operators in the future.</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>Yes, to a certain extent. Now, claimants have several instruments at their disposal. The EEO Regulation facilitates cross-border enforcement of judgments relating to uncontested debts. Thanks to the small claims procedure and the payment order procedure, the introduction of a procedure in another Member State is easier for claimants. However, at a later stage, if the payment order (if possible under the respective national law) or the decisions made in the small claims procedure are contested by the defendant, the procedure moves over to national procedural law. Thus, in general, the impact is limited for uncontested debts.</td>
</tr>
<tr>
<td>Germany</td>
<td><strong>Academic response</strong>&lt;br&gt;In the scope (unfortunately relatively limited) of civil procedure optional instruments, the settlement of cross-border disputes has certainly been facilitated by optional instruments. <strong>The Ministry’s response</strong>&lt;br&gt;For the payment order: yes and it will become increasingly significant when the relevant documents can be used online.</td>
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</table>
For the EEO and small claims, reference should be made to the responses given previously. As for family law, there is no data on this subject.

<table>
<thead>
<tr>
<th>Country</th>
<th>Response</th>
</tr>
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<tbody>
<tr>
<td>Greece</td>
<td>Yes. With regard to specified and due monetary claims.</td>
</tr>
<tr>
<td>Spain</td>
<td>Procedural optional instruments are very rarely used in Spain. Therefore, at present, it cannot be said that it has facilitated the settlement of cross-border disputes.</td>
</tr>
<tr>
<td>France</td>
<td>Procedural optional instruments should, in principle, facilitate settlement of cross-border disputes, but this assumes that practitioners are familiar with them and that they are therefore frequently used, which at present is not the case.</td>
</tr>
<tr>
<td>Italy</td>
<td>In consideration of what has already been said, no conclusion can be drawn about whether, in practice, the OIs have facilitated settlement of cross-border disputes, given that they have not been used much so far.</td>
</tr>
<tr>
<td>Cyprus</td>
<td>No information available.</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>Given the way in which these procedural optional instruments have been used so far, a negative response to this question seems necessary. It is however possible to estimate that the settlement of cross-border disputes would be facilitated if economic operators were more familiar with these optional instruments.</td>
</tr>
<tr>
<td>Hungary</td>
<td>Generally speaking, there are positive and negative responses to this question. Primarily, the nature of the responses depends on the professional environment in which the person questioned works. On the whole, these individuals have given positive responses in this respect. Most of them have highlighted that because of the language barrier and hindrances to the circulation of information, and because of procedural issues (such as establishment of hearing dates with a long period of time between them), it was much easier to enter into conflict with an Australian party than a German one.</td>
</tr>
<tr>
<td>Netherlands</td>
<td>This is undoubtedly the case. The success of the EEO, in particular, is proof of this.</td>
</tr>
<tr>
<td>Austria</td>
<td>See previous response.</td>
</tr>
<tr>
<td>Poland</td>
<td>This is the case. National procedural law, as a type of public law, has many supporters who criticise the acceptance of foreign grounds and solutions. The attachment to national traditions and the fear of competition from lawyers from other States leads to a situation in which only the harmonisation imposed by the EU institutions creates opportunities for development of EU civil procedure legislation. Procedural OIs have facilitated the settlement of cross-border disputes.</td>
</tr>
<tr>
<td>Country</td>
<td>The same can be said of B2C disputes.</td>
</tr>
<tr>
<td>-------------</td>
<td>--------------------------------------</td>
</tr>
<tr>
<td>Slovakia</td>
<td>The European Enforcement Order has not yet had a major impact on the legal practice of settlement of cross-border claims in Slovakia. As a result, we cannot say whether or not it has facilitated the settlement of cross-border disputes. However, the conclusion may be drawn that if a European Enforcement Order has to be enforced in Slovakia, the process of issuing a European Enforcement Order certificate may lengthen the enforcement procedure compared to enforcement procedures by virtue of national law. According to Slovak law, a foreign enforcement order, as it is, may serve as a basis for the enforcement application. In this case, there is no procedure for special recognition of the enforcement order abroad. Only the debtor can bring special action, within 15 days of the request, with regard to recognition of the foreign judgment. If the debtor fails to do this, the enforcement procedure continues in the same way as in the case of a national enforcement order. If the debtor is likely to dispute the recognition of the application order - a foreign judgment - the procedure provided for by the Regulation may facilitate enforcement.</td>
</tr>
<tr>
<td></td>
<td>For the European small claims procedure, as it is impossible to determine the exact number of these procedures, this leads to the assumption being made that this procedure is not often used and it is difficult to evaluate the effects of this procedure in Slovakia.</td>
</tr>
<tr>
<td></td>
<td>The European payment order has filled a gap in national law enabling a payment order to be served only if served in the Slovak territory. As a result, many cross-border disputes have been excluded from the accelerated procedure. The introduction of this instrument has facilitated the settlement of several cross-border disputes.</td>
</tr>
<tr>
<td>Sweden</td>
<td>The Ministry’s response</td>
</tr>
<tr>
<td></td>
<td>For some lawyers, procedural OIs can, to a certain extent, facilitate settlement of cross-border disputes for small claims or consumer complaints. With regard to large claims, they estimate that the claimant and the defendant must employ local lawyers who are used to the legal systems in the respective countries. From this point of view, procedural OIs cannot be considered as a helpful tool in such cases.</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>The Ministry’s response: No information available.</td>
</tr>
<tr>
<td></td>
<td>Academic response</td>
</tr>
<tr>
<td></td>
<td>More time is needed to see whether or not procedural OIs have facilitated the settlement of cross-border disputes.</td>
</tr>
<tr>
<td></td>
<td>For example, when the Brussels Regulations appeared, it took time for the lawyers to apply them. Today, these Regulations are familiar to British practitioners. However, it has been noted that these Regulations</td>
</tr>
</tbody>
</table>
are not optional. As a result, with regard to these optional instruments, the United Kingdom needs time to apply them and for them to contribute to facilitation of the settlement of cross-border disputes.
CHAPTER 27: HAVE OPERATORS REPORTED FLAWS WITH THE OPTIONAL INSTRUMENTS THAT HAVE PUT THEM OFF USING THEM?

This section analyses the responses one by one (1.) before presenting a table with a more detailed overview of the responses of the different countries (2.).

1. ANALYSIS OF THE RESPONSES

Generally, there do not seem to have been any major defects reported with the optional instruments (Belgian report, Czech report, English report).

However, for some rapporteurs, this is explained by the optional instruments not being used enough (Bulgarian report, Slovak report: 'Having regard to the relatively small extent of practical use of these optional instruments in Slovakia, it may be concluded that any potential flaws of these instruments could not be identified due to their insufficient practical use."

The Dutch report stresses, however, the consistent flaw of an optional instrument not being independent enough compared to national laws.

In general, the Austrian report also points out the poor quality of the writing of certain optional instruments, their loopholes and their ambiguities.

The Swedish Ministry of Justice stresses the need for the costs of an optional instrument to be low.

Criticism is stronger when a specific optional instrument is examined.

First of all, with regard to civil procedure optional instruments, the following criticisms are found:

- With regard to small claims, the Belgian report relates the opinion that the fact that the procedure it establishes is only open to cross-border debts could constitute discrimination if the creditor is less protected under this assumption.
- The German report stresses the relatively narrow scope of procedural optional instruments and the legal uncertainty problems of the European Enforcement Order.
- According to the Slovak report, the European payment order is flawed. The report mentions the technical shortcomings of the forms, the obligation to submit the form in the language of the destination country and the lack of information about potential reimbursement of legal costs.
- The German Ministry of Justice adds that it is regrettable that the payment order cannot be used online.

With regard to optional instruments within law of economic interest groups, the criticisms are slightly stronger:

- The German report highlights the complexity of their implementation (European Company).
The French report also reiterates that there have actually been criticisms of the SE from the professional world and from universities\textsuperscript{288}. The CCIP has, in particular, reported an expensive and time-consuming constitution, the complexity of the employee involvement mechanism, etc.

The Slovak report denounces the requirements relating to capital and employee involvement for the SE, and the fact that in the EEIG, the grouping cannot seek funds for its activities from the public, and cannot belong to another EEIG.

Similarly, the report from the Swedish Ministry of Justice denounces the too high administrative charge for creating an SE, as well as the too high capital and the complexity of the rules on employee involvement.

Opinions are, however, divided. The Polish report states, on the contrary, that operators have not complained of any flaws with optional instruments within law of economic interest groups.

There is no mention of flaws with intellectual property optional instruments. At the very least, operators are impatiently awaiting the unitary patent.

Many reports do not answer the question asking about whether the flaws of optional instruments have put operators off using them.

Those who have responded to the question admit that the flaws of optional instruments have not put people off using them.

This is asserted by the Austrian report, which mentions the poor quality of the writing of the optional instruments, but admits that this has not put judges and professionals off using them.

The Spanish report also mentions that the flaws found by the universities have not had a significant effect.

At the very most, the French report states on the SE issue that ‘the flaws found have not completely put economic players off these instruments but arguably they slow down their adoption.’

In truth, it is very difficult to know what has put a potential user familiar with the optional instrument off using it (hence the difficulty in answering the question). It is still possible that cost or legal uncertainty issues make operators think twice, but it is also likely that a combination of factors is involved.

## 2. COUNTRY-BY-COUNTRY SUMMARY OF RESPONSES TO QUESTION 27

<table>
<thead>
<tr>
<th>Member State</th>
<th>Table 27</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>Apparently not. With regard to the Regulation creating a small claims procedure, one author considers that the fact that the procedure it establishes is only open to cross-border debts could constitute discrimination if the creditor is less protected under this assumption.</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>No, operators have not generally complained about flaws with the OIs mentioned above. That said, they are not used much but this is due to the relatively low number of cross-border cases and the lack of information available to interested parties, particularly regarding the European small claims procedure. At this stage, there is no indication that the potential flaws of the OIs put operators off using them.</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>They are not aware of any situation of this kind.</td>
</tr>
<tr>
<td>Germany</td>
<td><strong>Academic response</strong></td>
</tr>
<tr>
<td></td>
<td>The flaws mentioned on both sides relate, on the one hand, to the relatively narrow scope of certain OIs (civil procedure) and the complexity of their implementation (European companies) and, on the other hand, a certain legal uncertainty (in particular relating to the European Enforcement Order)</td>
</tr>
<tr>
<td></td>
<td><strong>The Ministry’s response</strong></td>
</tr>
<tr>
<td></td>
<td>For the payment order: the absence of the possibility to use it online is highlighted.</td>
</tr>
<tr>
<td></td>
<td>For the EEO and the small claims procedure, they are not familiar with any situation of this kind. For family law, however, they have no information on this question.</td>
</tr>
<tr>
<td>Greece</td>
<td>No information available.</td>
</tr>
<tr>
<td>Spain</td>
<td>As OIs are rarely used, the flaws detected by the universities have no significant effect.</td>
</tr>
<tr>
<td>France</td>
<td>With regard to optional instruments within law of economic interest groups</td>
</tr>
<tr>
<td></td>
<td>According to Mr Lecourt, when the European Commission launched a public consultation on the application of the European company in 2009, he and Catherine Cathiard answered the many questions that</td>
</tr>
</tbody>
</table>
were asked about the constitution of the instrument in question, how it would work, etc. Their observations appeased most of the criticisms from the professional world and the universities. These observations were presented to the Commission in May 2009. The flaws found have not completely put economic actors off these instruments but arguably they slow down their adoption.

According to the CCIP: The stakeholders who responded to the consultation ordered by the European Commission in 2010 clearly stated, in light of the six years of experience since the Regulation was adopted, many flaws with the SE (previously mentioned in response 11): expensive and time-consuming constitution, complexity of the employee involvement mechanism, etc.

While the operators were not completely put off this OI, it should be stressed that its appeal was greatly affected: there are now fewer than 800 SEs. In addition, the development of inactive SEs, known as 'shells', demonstrates that operators are seeking to get around the complex constitution rules of SEs and sidestep the negotiation procedure, which theoretically applies for creation of any SE.

With regard to civil procedure OIs

No operators have expressly denounced the flaws of civil procedure optional instruments.

With regard to intellectual property OIs

According to J. Collin, on the subject of trademarks and designs, operators have not denounced the flaws of OIs. On the subject of patents, a growing number of stakeholders are now awaiting the creation of a mechanism (like a European patent jurisdiction) that will harmonise – and even unify – patent disputes, currently governed exclusively by the national courts.

<table>
<thead>
<tr>
<th>Country</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Italy</td>
<td>No information available.</td>
</tr>
<tr>
<td>Cyprus</td>
<td>No information available.</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>No relevant information has been found to enable a response to be given to this question.</td>
</tr>
<tr>
<td>Hungary</td>
<td>There is no information available on these complaints to date.</td>
</tr>
<tr>
<td>Netherlands</td>
<td>As has already been mentioned in the foregoing, complaints have been made about the fact that the OIs are not always autonomous enough and are therefore too dependent on national legislation. Complaints regarding individual OIs have of course also been expressed, but this is not a direct consequence of the fact that the instruments are optional: all legislative measures have some flaws.</td>
</tr>
</tbody>
</table>
### Austria
Apart from the area of company law (see above), there have been complaints regarding the poor quality of the writing of certain OIs, with many loopholes and ambiguities. This has not, however, prevented judges and professional from using them.

### Poland
There is no relevant data on this subject in university and legal documents. Operators have not reported any flaws with OIs relating to the SE, the EEIG or the SCE.

### Portugal
No information available.

### Slovakia
Given the relatively low use in practice of these optional instruments in Slovakia, it is reasonable to assume that the potential flaws with these instruments could not be identified due to insufficient use.

In the survey, lawyers made the following observations with regard to optional instruments:

With regard to the European company, it is rarely used, in their opinion due to the requirements relating to capital and employee involvement.

For the European Economic Interest Grouping: they highlight its ineffectiveness as a result of the responsibility of the members, the fact that the grouping cannot seek funds for its activities from the public, that it cannot belong to another EEIG and for the division of profits and losses.

For the E, they stress the technical shortcomings of the forms, the fact that forms must be submitted in the language of the destination country, that knowledge of the legal costs in various countries is required and the lack of information about potential reimbursement of costs.

### Sweden
The Ministry’s response

According to the Swedish Company Registration Office, the differences between the national legislations with regard to company law means there is a relatively high administrative cost for founders of European companies. The other difficulties perceived are the request for capital and the complexity of the rules on employee involvement.

In general, with regard to intellectual property, they highlight that it is important to keep costs low. OIs - particularly for trademarks and patents - are generally accepted by industry, proven by the success of the OHIM and the EPO. Still many would like to encourage ‘and improved patent system in Europe’ (with unitary patent protection and a litigation system for unitary patents). However, the opinions expressed by operators also relate to the procedure time.
<table>
<thead>
<tr>
<th>United Kingdom</th>
<th><strong>The Ministry’s response:</strong> No information available.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><strong>Academic response</strong></td>
</tr>
<tr>
<td></td>
<td>The universities are not currently aware of any flaws with the OIs mentioned.</td>
</tr>
</tbody>
</table>
PART 5 - COULD OPTIONAL INSTRUMENTS BE USEFUL IN OTHER AREAS OF CIVIL LAW?

The survey asked rapporteurs about whether it would be useful to adopt optional instruments in other areas of civil law (Chapter 28) and about the added value of an optional instrument with regard to the rules of private international law (Chapter 29).

The rapporteurs were then asked more in-depth questions regarding whether it would be useful to adopt an optional instrument in family law (Chapter 30), in surety law (Chapter 31), and in property law (Chapter 32).

CHAPTER 28: GENERALLY SPEAKING, WHAT WOULD THE ADDED VALUE BE OF OPTIONAL INSTRUMENTS IN OTHER AREAS OF CIVIL LAW?

This section analyses the responses one by one (1.) before presenting a table with a more detailed overview of the responses of the different countries (2.).

1. ANALYSIS OF THE RESPONSES

Some reports started by stating that it is impossible to give a general answer to the question.

The German Ministry of Justice highlighted the fact that:

‘Whether an OI has additional value, cannot be answered in an abstract way, but only in relation to a specific area of law’.

This is also the opinion of the Swedish Ministry of Justice: ‘It is therefore difficult, not to say impossible, to give a general answer as to the value or appropriateness of an optional instrument, without having a clear picture of what one intends to achieve with the instrument’.

The different reports saw this question as a general question about the added value of optional instruments.

In favour of the optional instrument, the following can be cited:

• greater predictability of legal solutions (see the Belgian report)
• increased legal certainty thanks to the uniform effect when combined with instruments available in the legislation of all Member States (German report)
• the choice available to operators or legal practitioners (report from the Swedish Ministry of Justice):

‘In general, the added value of an OI in other areas of civil law would be the existence of a 'second system' in each Member State, a discretionary instrument available to operators, who would decide whether to continue being subject to the State law normally applicable or to submit to the European optional system’ (Greek report).
The first and most fundamental argument is that in today’s world the question of what is fair and just necessarily receives different answers from different people. This reality does not easily fit in with the way in which law is considered since the emergence of the nation state, namely as the product of (democratic) decision making at the national level. This decision making process usually leads to one solution that has to be accepted by all citizens of the state because they were able to choose for the parliament that adopted the majority solution. However, even if Parliament, after long deliberation, comes up with the ‘best’ national solution (often in the form of a compromise), many people may still disagree with that solution. This is because there is no longer one ideal social arrangement but only competing views of what is right. If this is the reality, it is better, at least for certain topics, to leave the choice with the citizens themselves and allow them to choose for the solution they prefer. Having the possibility to opt for an alternative system allows this’ (Dutch report).

- The creation of an integrated single market (see the Hungarian report).
- The absence of disruption of national legal order, as the instrument is discretionary (Dutch report).
- The practical nature of the optional instrument for parties active at international level (Dutch report).
- The optional instrument is a good demonstration of the European sense of belonging today, to a nation on the one hand and to Europe on the other: ‘OI are an excellent means to enhance the awareness among the European legal community that we are all nationals of a particular Member State and have our own legal tradition, but that we are at the same time Europeans, with a genuine European identity’ (Austrian response).

Cautions do however appear in the reports:

- within civil law, a successful awareness campaign would be essential (Bulgarian response).
- an increase in the number of optional instruments could generate a feeling of great insecurity by making the law more complex (Luxembourg report, report from the Swedish Ministry of Justice), and by being unfamiliar to professionals (Luxembourg report).
- There is only a real choice if it is clear (report from the Swedish Ministry of Justice).
- Optional instruments are likely to enable mandatory national rules to be bypassed (report from the Swedish Ministry of Justice): ‘Another problem with optional instruments is that they, in order to bring any added value, may need to entail that national mandatory rules are put out of effect. However, national mandatory rules are normally put in place to protect one of the parties (usually the perceived weaker party). In so far national (existing) rules have an impact on third parties (i.e. parties that are not involved in the choice of the optional instrument) it is necessary to assess whether it is appropriate and reasonable that a party or parties can deviate from those rules by choosing an optional instrument’.

It should be acknowledged though that one report feels that the optional instrument would only have limited added value in civil law (Slovak report). Two reports anticipated a special
civil law optional instrument, likely to be adopted, namely the European Certificate of Succession.

On 14 October 2009, the Commission adopted a proposal for a Regulation designed to simplify the rules on successions with an international dimension in the European Union in which it proposed creating a European Certificate of Succession enabling any heir or administrator of a succession to easily prove this status throughout the Union.

The Polish report states its support for the European Certificate of Succession, which would improve the situation of heirs, increasingly faced with international, and in particular European, situations. Conversely, the English report (Academic response) explains that following a public consultation launched by the Ministry of Justice in 2009 on the European Certificate of Succession, concerns were expressed:

'A concern was expressed about the absence of a definition of 'habitual residence', fearing that this would lead to considerable uncertainty; and also about the proposal to permit clawback if the lex successionis so provides, fearing that this would be damaging to the interests both of the trusts industry and of charities'.

As a result, it was announced on 16 December 2009 that the United Kingdom was against the Regulation on the European Certificate of Succession.

It should also be pointed out that some reports wanted the creation of other optional instruments that need mentioning even though they are not part of civil law (in the French sense of the term).

Requirements for the following were expressed:

- the unitary patent (Czech and Slovak reports)
- the European Private Company (SPE) (Czech report)
- a European bill of exchange or cheque, or more precisely 'an optional instrument allowing orders for payment based on bills of exchange and cheques' (Slovak report)
- a special enforcement order for bills of exchange or cheques: 'a special optional enforcement title for cross-border disputes (e.g. a European order for payment of bills of exchange and a European order for payment of cheques)' (see the Slovak report)
- a European enforcement order 'a European order for performance' (Slovak report)
## 2. COUNTRY-BY-COUNTRY SUMMARY OF RESPONSES TO QUESTION 28

<table>
<thead>
<tr>
<th>Member State</th>
<th>Table 28</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>Generally speaking, what would the added value be of optional instruments in other areas of civil law?</td>
</tr>
<tr>
<td></td>
<td>Great predictability of legal solutions will be achieved; indeed, better management of the system applicable to a cross-border legal operation is a considerable and free guarantee.</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>In general, an OI that would allow operators to use an alternative instrument to protect their rights and interests by following a single procedure in all Member States would probably be the most beneficial for cross-border business relations in the EU.</td>
</tr>
<tr>
<td></td>
<td>The success of OIs in the area of industrial property proves that operators are interested in instruments that allow them to achieve certain results in all Member States through a single procedure. However, based on the results discussed previously, the added value of an OI depends on many factors. On the one hand, in the areas of civil law, and in particular with OIs addressed to clients or natural persons and not to business entities, a successful awareness campaign is as important as the legal Regulation proposed. On the other hand, for OIs that affect the life of businesses, the greatest advantages they can have are the cost and the time-efficiency.</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>See the response to question 29.</td>
</tr>
<tr>
<td></td>
<td>However, the Czech rapporteurs would like to see the completion of two current projects with high added value: These are the projects for the EU patent and the Private European Company.</td>
</tr>
<tr>
<td>Germany</td>
<td>Academic response</td>
</tr>
<tr>
<td></td>
<td>The added value of an OI in other areas of civil law may lead to increased legal certainty through the uniform effect of instruments available in the legislation of all Member States.</td>
</tr>
<tr>
<td></td>
<td>The Ministry’s response</td>
</tr>
<tr>
<td></td>
<td>With regard to small claims: the question as to whether an OI brings added value can only be answered in relation to a particular area of law. In general, the question of added value is likely to depend primarily on the extent to which the OI is accepted in practice, for example knowing to what extent it is chosen by the party(-ies).</td>
</tr>
<tr>
<td>Country</td>
<td>见解</td>
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<tr>
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<td>---------</td>
</tr>
<tr>
<td>Greece</td>
<td>In general, the added value of an OI in other areas of civil law would be the existence of a 'second system' in each Member State, a discretionary instrument available to operators, which would allow them to choose whether to submit to the State law normally applicable or to submit to the European optional system. The decision of whether to submit to the European optional system would make life easier for operators, especially within the context of their cross-border relations.</td>
</tr>
<tr>
<td>Spain</td>
<td>Many researchers are awaiting an OI dedicated to contract law. The Green Paper suggests the possibility of turning the CFR into an OI. This would enable the CFR to be transformed into an applicable law, even if the parties must agree on this point. Furthermore, the CFR would enjoy a more visible status.</td>
</tr>
<tr>
<td>France</td>
<td>In terms of intellectual property, the authors of the response have shown that truly optional instruments, except for the European patent, are special in that they provide extra protection to their holders, which inevitably increases their appeal compared with other optional instruments, which would perhaps be less attractive.</td>
</tr>
<tr>
<td>Italy</td>
<td>No response apart from a contribution in contract law.</td>
</tr>
<tr>
<td>Cyprus</td>
<td>No information available.</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>It seems that increasing the number of optional instruments in other areas of civil law is likely to generate great legal uncertainty. To take the example of the payment order, the existence of two sets of rules does not simplify legal practice. On the one hand, professional unfamiliarity with optional instruments may result in them being poorly handled. On the other hand, increasing the number of instruments does nothing to simplify a legal scene overrun by different rules governing the same type of situation, which can be confusing to professionals and people seeking justice alike.</td>
</tr>
<tr>
<td>Hungary</td>
<td>Citizens have a certain advantage in being able to choose between existing national systems and the European optional systems provided by OIs. The added value of OIs in other areas of civil law would be the creation of an integrated single market through continuous harmonisation and unification of European law.</td>
</tr>
<tr>
<td>Netherlands</td>
<td>There are three main arguments in favour of the European Union using optional instruments. The first and most fundamental argument is that in today's world the question of what is right and fair inevitably receives different responses from different people. This reality does not marry easily with how the law is considered since the emergency of the nation-state, namely the result of making decisions (democratic) at</td>
</tr>
</tbody>
</table>
Implementation of optional instruments within European civil law

this decision-making process generally leads to a solution being adopted by the Parliamentary majority that is not necessarily approved by all citizens of the State. It is now preferable, at least for some subjects, to leave the decision up to the citizens themselves and allow them to choose an alternative system if they wish.

The second argument in favour of an optional law is that it is less disruptive for national legal order. The harmonisation of substantive private law has, until now, mainly occurred by way of European Directives. This harmonisation method is not considered to be very satisfactory: not only does it threaten the consistency of the national legal system, but from the European point of view, it is often a political compromise with harmful consequences for the expected effects of the given rules. It is in this context that the optional law can offer an alternative. It leaves national systems intact and ensures that application of the European system depends on the willingness of private stakeholders (with the added advantage of clearly indicating a bottom-up approach if the parties are in need of a European system). It is not only better for the consistency of national law, but it can also result in a better quality optional system: if the Member States do not have to abandon their own legal system, they are more inclined to accept the European rules.

The third argument is that for parties active at international level, OIs can be a practical alternative as they give an overview of (and make use of) all sorts of different national legislations.

Austria
OIs are an excellent way of increasing awareness amongst the European legal community that we are all nationals of a particular Member State and that we all have our own legal tradition, but that we are, at the same time, Europeans with a real European identity.

Poland
The initiative for the European Certificate of Succession has been welcomed in Poland as a factor to improve the position of heirs. The question is becoming increasingly import in Poland today as more and more Polish citizens are connected, through their activities, with a territory no longer limited to their country.

There is widespread support in Poland for adoption of an OI in contract law. At the moment, this area is at the centre of a discussion currently taking place in Poland.

Portugal
No information available.

Slovakia
Within intellectual property law, an optional instrument in the form of a Community patent (EU Patent) would certainly be an advantage. The most important added value of optional instruments, based on the experience of national instruments, is seemingly the professional discussion associated with their
preparation and the legislative process.

However, in general, depending on the area of civil law they affect, the added value of optional instruments must be considered as limited in practice. Nonetheless, an optional instrument enabling payment orders based on bills of exchange and cheques would be an advantage. In Slovakia, payment orders based on bills of exchange and cheques can be issued with a simplified procedure, even if it has not been possible to deliver the enforcement order to the other party (the replacement service is sufficient).

Given that the recognition and enforcement of enforcement orders within the context of cross-border disputes are complicated, a special optional enforcement order for cross-border disputes (for example a European payment order for bills of exchange and a European payment order for cheques) could be introduced to simplify the procedure if objections are raised against the payment order. Such an optional instrument should also govern the whole order for payment procedures, including the procedure relating to objections raised against the payment order.

A European enforcement order (for action) established in a simplified procedure would also be an advantage in cross-border disputes in which the claimant is seeking enforcement (of an obligation to act) in addition to payment. Such a European enforcement order procedure should be enforceable in all EU Member States.

Sweden

The Ministry’s response

The relevance of any discretionary instrument, whether focussing on contract law, civil law, property law, private international law or in any other legal field, must be assessed on the basis of the problems it intends to attack. It is therefore difficult, or perhaps even possible, to give a general response regarding the value or relevance of an optional instrument without having a clean view of what is intended by the instrument.

Generally speaking, it can be stated that these discretionary instruments bring added value in the sense that they are optional for the parties. Thus, they provide the parties with a multitude of rules to choose from. It could be said that this give the parties the opportunity to apply rules that perfectly suit their situation.

On the other hand, optional instruments can, at the same time, be justifiably criticised because they entail a multitude of rules to choose from. Optional rules can complicate the legal environment and it can be difficult for the parties, especially individuals, to make well-informed choices. There is also a risk of the stronger party imposing a set of rules on the weaker party. The rules of an optional instrument must also agree with national rules on the issues not covered in the instrument and preferably also be capable of coexisting with national rules on the same subject.
without causing undesirable differences.

Another problem with optional instruments is that, in order to bring added value, they may need to overrule mandatory national rules. However, mandatory national rules are normally put in place to protect one of the parties (generally the party seen as the weaker party). Until now (existing) national rules have an impact on third parties (for example parties not involved in choosing the optional instrument) and it needs to be assessed whether it is appropriate and reasonable for the party or parties to ignore these rules by choosing an optional instrument.

It should therefore be concluded that, first of all, exactly what areas in the Community or what national legislation may cause problems for the internal market or the parties should be analysed and identified. This is necessary in order to decide which issues an optional instrument should cover and what scope it should have. It is only when this is done that it is possible to assess whether an optional instrument is appropriate and brings added value to certain legal domains or if, in fact, it complicates the legal environment or is even harmful to uninformed parties, weaker parties or third parties.

United Kingdom

The Ministry’s response: No information available.

Academic response

Optional instruments could be adopted in other areas of the law and their impact will of course depend on their usefulness. One of the main problems with optional instruments is that they are not considered to help resolve an existing problem and are not considered as an improvement to the existing law. If something is optional, people do not choose it unless they perceive it as better than what is in place already.

If they do not see an optional instrument as being advantageous in some way, they will quite simply not choose it. But this is the case with any law: reform of a law must improve the law, otherwise it should not be undertaken. Citizens and legal practitioners in the United Kingdom would be in favour of using optional instruments if there was a clear understanding of how and in what way these instruments are better than the existing ones. Without this their use will remain low.

With regard to the European Certificate of Succession, a public consultation was launched by the Ministry of Justice in 2009 inviting citizens to give their opinion on whether the United Kingdom should opt for the Regulation. A concern was expressed about the absence of a definition of 'habitual residence', fearing that this would lead to considerable uncertainty; and also about the proposal to permit clawback if the lex successionis so provides, fearing that this would be damaging to the interests both of the
trusts industry and of charities. The proposal was also examined by the European Union Committee of the House of Lords.

Finally, it was announced on 16 December 2009 that the United Kingdom would not opt for the proposal. The Ministry of Justice, however, will continue to participate in negotiations on the final version of the Regulation, with a view to opting for the proposal if the final Regulation would be in the national British interest. The response to the public consultation was published on 24 August 2010 and revealed that only two percent of people who responded thought that the government should opt for the Commission's proposal.

In general, the added value of a discretionary instrument would depend on its usefulness, its simplicity and its clarity, and would be advantageous for citizens beyond the advantages already provided for by the law.
CHAPTER 29: WHAT WOULD BE THE ADDED VALUE OF AN OPTIONAL INSTRUMENT WITH REGARD TO THE RULES OF PRIVATE INTERNATIONAL LAW?

This section analyses the responses one by one (1.) before presenting a table with a more detailed overview of the responses of the different countries (2.).

1. ANALYSIS OF THE RESPONSES

Some reports feel that optional instruments have had or would have considerable added value in private international law.

- Thus, optional instruments would simplify cross-border relations (see the Bulgarian and German reports).
- It would mean that judges and legal practitioners would not need to be familiar with or research the content of foreign laws (see Czech report).
- It would mean that a neutral law, particularly suited to cross-border relations, could be chosen (Dutch report).
- It would lead to a reduction in the role of private international law. The Hungarian report states that ‘if there is no longer any need to apply the rules of private international law in the national law of a Member State because of the application of other optional systems introduced by OIs, these and these optional systems would now be applied in cross-border relations to the detriment of the rules of private international law’.
- The optional instrument would even be an alternative to the rules of private international law (Austrian report).
- However, the nature of the optional instrument and the nature of the choice of law it enables would still need to be specified. Is it a real choice of law (submission to the optional instrument) or an ‘incorporation by reference’? According to the Polish rapporteur, the difference would be that incorporation would only happen if the mandatory national laws so allow and to the extent that these laws allow. But if the mandatory rules prevail over the optional instrument, there would no longer be any interest.

Many are those on which the added value of the optional instrument depend and its level of acceptance in practice (see German Ministry of Justice) and the confidence of legal practitioners (see the Bulgarian report).

However, some reports consider that OIs are very disruptive to private international law.

The Spanish report, while being shared, states as follows: ‘It is clear that optional instruments are not considered an appropriate tool to regulate issues of classical private international law. By contrast, an optional instrument on substantive law may serve to begin to introduce a truly European law that, in a first stage, coexists with the national Regulations, but that, in the medium or the long term, is capable of becoming a single –and unified– Regulation for all European Union Member States’.

The Luxembourg report is sceptical about the question: The fact of making the legal scene more complex as a result of the use of an optional instrument leads us to doubt the actual added value of such an instrument. Increasing the number of sources of law does not help to make it legible.
Some reports warn against the difficulties caused by differences between language versions of the optional instrument (Polish report) and stress the fact that the choice of optional instrument must itself be subject to a validity check (Polish report) and that there is a risk of discrepancies between mandatory laws of the Member States and the optional instrument (see the Polish and Slovak reports). Others stress the fact that relations between a contract law optional instrument and the Rome I Regulation should be clarified (see the Belgian report).

But according to some, the optional instrument is not just a replacement for the rules of private international law, as it could affect both cross-border relations and internal relations (see the Italian report).

2. COUNTRY-BY-COUNTRY SUMMARY OF RESPONSES TO QUESTION 29

<table>
<thead>
<tr>
<th>Member State</th>
<th>Table 29</th>
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<tbody>
<tr>
<td>Belgium</td>
<td>What would be the added value of an OI with regard to the rules of private international law?</td>
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<tr>
<td></td>
<td>The question is ambiguous. They wonder whether the question was about knowing what would be the added value of an OI in contract law, in the eyes of PIL, or what would be the added value of an OI in PIL. In the first case, the relationship between the Rome I Regulation and the OI would need to be clarified. There are three main possibilities:</td>
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<tr>
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<td>- Either the Rome I Regulation is not affected</td>
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<td></td>
<td>- Or the Rome I Regulation is affected: the parties can choose either the optional instrument or appoint the applicable law pursuant to the Regulation.</td>
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<tr>
<td></td>
<td>- Or the Rome I Regulation is modified, more specifically Article 3 thereof: the parties would thus be able to choose an instrument not from the State. The question is then one of knowing whether, insofar as the use of an optional instrument is allowed, the UNIDROIT principles could also be deemed applicable. There is also the question about how such a possibility is connected to Article 9 of the Regulation on police laws and Article 3, section 3 and 4 on mandatory provisions.</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>With regard to the complexity of these rules, an appropriate and effective OI would undoubtedly simplify and facilitate operators in their activities. However, knowledge and operator confidence in the effectiveness of such an OI would be crucial.</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>It seems that the Commission is right when it suggests that an optional instrument in a field such as contract law, if widely used by the parties in cross-border transactions, could replace the need for judges and legal practitioners to do research into foreign case law,</td>
</tr>
</tbody>
</table>
which is currently the case in conflict of laws. However, this added value is not without its disadvantages.

### Germany

**Academic response**

Optional instruments in particular avoid the need for complex reasoning, often the source of errors and legal conflicts in terms of determination of the applicable national law.

**The Ministry’s response**

With regard to the EEO, it is impossible to answer the question about whether an OI has added value in a abstract manner, but only in relation to a specific area of the law. In general, the question is added value is likely to depend primarily on the extent to which the OI is applied in practice, for example looking at whether it is actually chosen by the party/parties.

With regard to family law, and more specifically the concept of the matrimonial property system, private international law is not affected.

### Greece

No information available.

### Spain

From the point of view of private international law, the value of OIs, as understood in question 1, is debatable. The process of 'communitising' European private international law, which began in the wake of the revision of the Treaties Establishing the European Community issued by the Treaty of Amsterdam, enables the conclusion to be drawn that in the traditional areas of private international law, the competent jurisdiction, the applicable law and the appropriate recognition and enforcement of decisions, the path taken is one of unification of EU rules by way of European Regulations. Whenever a consensus has not been great enough to unify conflicts of laws across the Union - Regulation No. 1259/2010 ('Rome III') of 20 December 2010 on the law applicable to divorce and legal separation - the enhanced cooperation mechanism provided for in Articles 326 to 334 of the Treaty on the Functioning of the European Union has been implemented. Mandatory Regulation has been preferred, even if they have only become applicable for States that have accepted this specific instrument. In conclusion, it is clear that optional instruments are not considered an appropriate tool to regulate issues of classical private international law. By contrast, an optional instrument on substantive law may serve to begin to introduce a truly European law that, in a first stage, coexists with the national Regulations, but that, in the medium or the long term, is capable of becoming a single –and unified– Regulation for all European Union Member States.

### France

No response has been given to this question.
<table>
<thead>
<tr>
<th>Country</th>
<th>Response</th>
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<tbody>
<tr>
<td>Italy</td>
<td>Same response as for question 28.</td>
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<tr>
<td>Cyprus</td>
<td>No information available.</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>The fact of making the legal scene more complex as a result of the use of an optional instrument leads us to doubt the actual added value of such an instrument. Increasing the number of sources of law does not help to make it legible. Furthermore, the attachment of the States to the exercise of their national sovereignty perhaps means that they will not necessarily accept easily that these instruments will eventually replace the national law.</td>
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<tr>
<td>Hungary</td>
<td>The added value of an OI in this area of law would result in a narrowing of the scope of private international law on the subject, which would certainly be an advantage from a European point of view. If there is no longer any need to apply the rules of private international law in the national law of a Member State because of the application of other optional systems introduced by OIs, these and these optional systems would now be applied in cross-border relations to the detriment of the rules of private international law.</td>
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<tr>
<td>Netherlands</td>
<td>The three arguments used in the response to question 28 also apply here. An added advantage is that in areas where the choice is already possible, a European OI can offer a more neutral law than the national system, particularly suited to cross-border situations.</td>
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<tr>
<td>Austria</td>
<td>Until now, it has not been possible, by virtue of private international law, in which conflict rules leave room for the autonomy of the parties, to opt for something other than a particular national legal system. An OI could change this by offering the parties an additional legal system to choose from. However, the relationship between private international law and an OI is fairly complex, and an OI can also be seen as an alternative to private international law.</td>
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<tr>
<td>Poland</td>
<td>Special attention must be paid to the mutual relationship between private international law (PIL) and the OI. The nature of PIL (the appointment of a foreign, sometimes unknown, legal system) and the complicated nature of PIL Regulations, particularly in the field of consumer contracts, may encourage consumers and businesses to use an OI in their contracts. It could encourage the business to set aside the Rome I Regulation and its protective measures because of application of an OI. The effectiveness and broad application of the OI could only be achieved if the mandatory national rules are replaced by the instrument. The legal nature of the OI and the nature of the choice of law should be explicitly explained in the OI. The OI must precisely identify its relationship with the Rome I and II Regulations, other private international provisions of the EU and certain international conventions. The OI should settle the problem of the law applicable to the issues it will not govern. The existence of many different</td>
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language versions of the OI may create problems from the point of view of the choice of law, which will have to be overcome.

The first question to be dealt with is the question of the legal nature of the OI in the eyes of PIL. First of all, the nature of the choice of the parties must be stipulated. Is it a choice of law in a PIL sense ('real choice') or is it just an 'incorporation by reference' as indicated in recital 13 of the Rome I Regulation? The practical consequence of this distinction mainly involves the question of the mandatory rules of a legal system. In the case of 'incorporation by reference' the parties do not actually choose the law but only supplement the law governing the contract with the chosen rules, but only insofar as is permitted by the mandatory rules of the legal system governing the contract. If the OI must be seen as just an 'incorporation by reference', its actual importance and usefulness will be minor. The parties will again have the choice of tackling problems of law and looking for a law appropriate to the contract. Such a 'choice' will also not be able to prevent application of mandatory national consumer laws, which will again render the OI pointless.

The other question to be dealt with concerns the current law that could be chosen by the parties. The idea of the OI is often combined with the 'blue button' concept. How, the question emerges - what version of the OI will the parties choose? While it is suggested (and must be fully executed) that the OIs will be available in all EU languages, differences between the different versions will be inevitable. Will the parties choose the seller's version or the buyer's version? What about interpretation? The best solution would be for there to be same interpretation throughout the EU but this is very difficult to put into practice. Indeed, it is possible that three national versions of the OI and three different interpretations may be taken into account (in the case where two parties from different Member States settle their disputes before the courts of a third Member State). Once again, we wonder if such a conflict may be resolved, there will surely be a need for certain deliberations.

Another question to tackle is that of the 'quantity' of the chosen law - is it just a part of a national legal system - namely the OI – that is chosen, or is it the whole national legal system in which 'traditional' provisions will be replaced by the provisions of the OI?

If the first possibility is correct, the fact must be kept in mind that in the areas covered by the OIs, referral to PIL rules will again be required to find the law that will govern remaining issues. This may lead to 'carving up' with more that one legal system applying to a contract.

The second possibility involves, when the OI is chosen, the parties agreeing to apply a certain national legal system for the contract. The question is - which system? If the parties do not stipulate clearly that, for example, they are choosing the national legal system of a buyer combined with an OI that replaces certain 'traditional'
provisions, then how will the judge go about determining the law governing the contract?

Taking this into consideration, the only reasonable solution is for the parties, when choosing an OI, not to determine the law that will govern issues not covered by the OI at the same time. In order to make the OI compulsory for the parties, they have the choice between the opt-in or opt-out solution (the latter, for example, being used in the VIM Convention). It seems that the opt-out solution would be difficult to achieve. The opt-in solution involves the parties being able to choose an OI to govern the contract. Such a choice, like any act of law, should also be subject to a validity check. The prerequisites of such an examination must be laid down in the OI.

The substantive scope of the OI must be fairly broad if the 'danger' of using PIL has to be avoided. Nonetheless, it is impossible for the instrument to cover all of the issues that may arise in this case. As a result, it would be necessary to establish the law governing the contract in matters not governed by the OI. The best possible solution is the application of the Rome I Regulation. It should, however, determine whether all of the rules of the Rome I Regulation should be taken into account, or if exceptions are to be anticipated.

In the field covered by the OI, the application of the Rome I Regulation should be, at least to some extent, excluded in order to avoid possible confrontations between the rules of the OI and the rules indicated by the Rome I Regulation. This involves in particular Articles 3.3, 3.4, 6 and (with doubts) Article 9 of the Rome I Regulation. Potential application of these rules may lead to the application of the mandatory national or international rules with the OI. As the mandatory rules would prevail over the provisions of the OI, the OI would lose its significance, its usefulness and its practicability. It must be precisely indicated whether application of the Rome I Regulation must be totally excluded, or if the exclusion is to be limited to certain provisions, such as Article 6 of the Rome I Regulation.

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<tr>
<th>Country</th>
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<tr>
<td>Portugal</td>
<td>No information available.</td>
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<tr>
<td>Slovakia</td>
<td>There are three ways to look at this question.</td>
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</table>

First of all, the optional instrument contains basic relevant rules and conflict of law rules with a view to filling the gaps in the basic rules. In this case, the conflict of law rules would be to determine the applicable national law to be applied to issues not governed by the optional instrument. Of course, such a solution would call for very precise choice of the conflict of law rules with regard to the existing unified rules on the subject of conflict of laws (Rome I and Rome II Regulations).

Secondly, the optional instrument does not contain conflict of law
rules to fill the gaps in the basic rules. In the latter case, as long as the gaps can be filled by way of interpretation, they must be filled with the national rules determined in the cross-border relations based on the rules applicable on the subject of conflict of laws.

Thirdly, which is a rather theoretical issue in private international law, the optional instrument would only contain conflict of law rules relating to certain areas of the law. These areas of law would correspond, in particular, to the areas in which no agreement of the Member States within the context of the harmonisation process for the institutions in question and unification of conflict of law rules has been successfully reached. The areas where there is, at present, no political desire to adopt unified conflict of law rules include, in particular, property rights (particularly those relating to immovable property), personal rights and matrimonial property rights.

An optional instrument could, theoretically, be introduced in these areas. Adoption of such an instrument, however, would involve a real risk of conflict between the mandatory national laws and the optional instrument.

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<thead>
<tr>
<th>Sweden</th>
<th>The Ministry’s response</th>
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<tr>
<td></td>
<td>Same response as for question 28. However, it is difficult to understand what such an optional instrument would involve. It seems inherent to the nature of an optional instrument that it contains basic rules relating to the subject it covers. The aim of private international law is to highlight which basic rules apply to a given situation. Insofar as this does not conflict with mandatory rules, it is often already possible to choose which basic rules govern a given situation.</td>
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<tr>
<th>United Kingdom</th>
<th>The Ministry’s response</th>
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<td>No information available.</td>
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<td></td>
<td>Academic response</td>
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<td></td>
<td>Same response as for question 28.</td>
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</table>
CHAPTER 30: HOW USEFUL WOULD AN OPTIONAL INSTRUMENT BE IN FAMILY LAW?

This question relates to both family property law (in particular the optional matrimonial system for cross-border couples) and the non-property aspects of family law (in particular for better management of the situation after the divorce of cross-border couples, or issues surrounding custody of the children of separated couples whether they were married or not).

There is a new area of intervention in European Union law in the field of family matters, through various recent or draft European regulations that standardise the rules if international legal competence and effects of judgments and sometimes also conflict of law rules (see, for example, the proposals for regulations on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property systems (COM(2011)0126) and regulations on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships (COM(2011)0127). This movement, presented as a corollary of the protection of free movement of people, is accompanied by a certain liberalism, which manifests itself in various ways and, in particular, by a wider choice of jurisdiction available to the claimant or even, through the option available to the parties to choose the law applicable to their divorce, their matrimonial property system or their succession (and, now, why not an optional European system?).

The 'Brussels IIA' Regulation on jurisdiction and the recognition and enforcement of judgements in matrimonial matters and in matters of parental responsibility supplements, by absorbing it, the Brussels II Regulation on jurisdiction and the recognition and enforcement of judgements in matrimonial matters and in matters of parental responsibility. A practical guide has been produced by the Commission.

It had been anticipated to add conflict of law rules on the subject of divorce, and to dedicate the law for the couple to choose, subject to certain conditions, the competent jurisdiction, but in the end the Rome III Regulation was limited to the law applicable to divorce, setting aside revision of the legal competence rules in this area. It provides the possibility for the couple to choose the law that will apply to their divorce proceedings.

The difficulties encountered during negotiation of these instruments are an argument in favour of an optional instrument in these areas.

It is also what seems to emerge from the reports of which the responses will first of all be analysed (1.) before giving a more complete country-by-country summary (2.).
1. ANALYSIS OF THE RESPONSES

Curiously, while it could be thought that family law is the area that could be the most sensitive with regard to the question asked, the vast majority, although not all, of the reports are in favour of creation of an optional instrument in this area, often beyond a simple optional matrimonial system (see the Belgian, Greek, Bulgarian, German (with reservations), Spanish, French, Italian, Luxembourg, Hungarian, Slovak, Austrian, Dutch and Polish (with reservations) reports).

Almost all of the reports noted that a solution should be found to the problem of separation of European bi-national couples. The Belgian report reiterates that there are 137 000 international divorces every year in Europe and considers that, although certain instruments already exist, it is appropriate to better regulate problems caused by the separation of these couples. Many reports then stress the fact that the focus should not just be on married couples, but also the separation of unmarried couples (see in particular the Belgian, Greek and Spanish reports).

And yet, insofar as family law is deeply rooted in the culture of each country (see the Italian report), the optional instrument seems particularly suited in family property matters (for all the above-mentioned reports), but also, for some reports, in non-property aspects of family law (see in particular the Belgian, Greek and Slovak reports), while others consider that there is too much mandatory policy in the non-property aspects of family law for an optional instrument to truly have a place (Italian, Luxembourg and Polish reports).

But, is it not precisely in the areas in which maximum harmonisation can be envisaged that the optional instrument could be an appropriate alternative solution? The reasons for the opportunity of an optional instrument (at least in family property law) are its neutrality and its permanence, wherever the couple goes in Europe (see the Austrian report).

Only a few reports are a little more reserved:

- The German university report is in favour of an optional instrument in family law, but only depending on the legal protection this optional instrument will give.
- Without limiting its reservations to the non-property aspects of family law, Swedish Ministry of Justice is also sceptical of the opportunity to adopt an optional instrument in family law because of the many public order rules in family law. It would be unacceptable, in its opinion, for them to be got around by adoption of such an optional instrument.

We can add that certain precautions could be taken in family law, if an optional instrument was envisaged to go beyond matrimonial property system law, and deal with all of the problems associated with separation of the couple. On the one hand, such an optional instrument would need to be balanced and non-discriminatory and would need to protect the interests of the children and the interests of the family. On the other hand, it could be anticipated that the couple's agreement to submit to the optional instrument be subject to the approval of a judge (with the same nationality or domicile as one of the parties), who would check the reality of the consent given and, on the other hand, that the interests of the family are respected in the specific context of the type to submit to the optional instrument. In other words, it can be anticipated that the choice of optional instrument in family law (of the instrument in question is not simply an optional matrimonial system) be subject to a slightly more restrictive system, to take into account the interests at stake in family law.
2. **COUNTRY-BY-COUNTRY SUMMARY OF RESPONSES TO QUESTION 30**

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<th>Member State</th>
<th>Table 30</th>
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| Belgium      | In the last ten years or so, the European Union has adopted some fifteen private international law instruments in civil and commercial matters and in family law. These instruments facilitate the free movement of judgments and access to justice in Europe. However, to convey the state of mind of practitioners regarding the need for an optional instrument in family law in the broadest sense, we can refer to what Viviane Reding, Vice-President of the European Commission, quite rightly said at extraordinary meeting of the General Assembly of the National Council of the French Bars held in Paris on 15 October 2010: 'Each year there are 137 000 international divorces in the European Union. They represent approximately 13 % of the total divorces in the Member States. For international couples, it involves reducing the current legal uncertainty. Fourteen Member States are currently in the process of negotiation to resolve this problem. To do this, the Commission has, for the first time, used the enhanced cooperation procedure for adopting conflict of law rules in cross-border divorces (Rome III). In the same vein, a proposal on successions is being examined by the Council and the Parliament. A proposal on matrimonial property systems will be presented as soon as possible'. It is worth adding that with regard to international family relations, foreign decisions already benefit from the mechanism of full mutual recognition, sanctioned by Article 22 of the Code on Private International Law. This mechanism is also adopted generally in treaty law and in European law. Pursuant to the principle of full mutual recognition, the foreign decision may be accepted with no other formalities, except for the public order exception of private international law (sometimes tempered in particular by the assessment of the 'best interests of the child') and respect of defence laws (see the requirement on the opportunity for the child to have been heard or for the husband/wife to have been able to assert his/her rights). It should also be added that the European legislator has abolished exequatur in precise areas, and the European decision can now be enforced as a local decision (see Regulation 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims). In conclusion, while certain instruments are already in existence, the opportunity for an OI in family property law (in particular the optional matrimonial system for cross-border couples) or in the non-property aspects of family law (in particular for better management of the...
situation after the divorce of cross-border couples, or issues surrounding custody of the children of separated couples (whether they were married or cohabiting or common-law spouses) is real. On this occasion, the need for European judicial training can also be pointed out, at the same time, both for lawyers and magistrates. 

**Bulgaria**

Almost 16 million marriages in the EU (13%) are international. For couples with different nationalities, the diversity of the matrimonial property systems in the Member States may create major legal and practical difficulties. The adoption of an OI in family law, by introducing simple and unified rules, would be consistent with the tendency to simplify and the promotion of legal certainty for EU citizens. A common system for family property law is in the interests of international couples, their creditors and debtors and legal practitioners.

Unification in the form of an OI would, on the one hand, guarantee legal certainty for couples throughout the EU territory without abolishing for the Member States the freedom to develop their own national systems and without having to deal with the problems involved with harmonisation of very different national systems.

**Czech Republic**

According to the Czech report, an OI in family law should not enable the mandatory rules of the Member State in question to be bypassed in purely internal cases. This situation would result in reduction of the significance of national Regulations. The optional instrument in this case would not only be a possible intermediate step towards final unification but would, in some way, become the unification law. The report adds that, if it were to be adopted, the optional instrument should be limited to cross-border cases in order to avoid the possibility of mandatory national rules being bypassed in purely internal situations.

**Germany**

**Academic response**

The opportunity of an OI in family law should be assessed according to the level of legal protection this instrument will give to cross-border couples.

**The Ministry’s response**

With regard to matrimonial property systems, an additional matrimonial system relating to property is acceptable. With regard to custody of children, OIs have not yet been examined.

**Greece**

It could be estimated that when married life is normal, married couples in general – even cross-border couples – do not encounter problems with arranging the relations of their married life (i.e. personal relations in the family group, the matrimonial property system, etc.) using national law.

The same comment even applies to co-habitation which, according to Greek law, is governed by Regulations that are particularly provision and contract-based. In the above-mentioned areas, an OI could not get widespread support from the public and from professionals, because
couples (married or not) are almost always mutually prepared to submit to national law.

On the other hand, an OI, with the aim of obtaining minimum, basic harmonisation, would be necessary when the relationships of married couples break down. A 'second system' would be very useful, for example, in the area of de facto separation, divorce, maintenance after divorce and with regard to issues surround custody of the children of separated couples whether they were married or not.

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<tr>
<th>Country</th>
<th>Response</th>
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<tbody>
<tr>
<td>Spain</td>
<td>As already stated in the response to question 29, OIs are relevant for substantive law. They are particularly relevant within property law, particularly in contract law, and it is not by chance that it is in this area that Community law has come the furthest. In the near future, this could be considered within family law, in such a way that cross-border couple, married or otherwise, could, instead of their national legislation, use European Regulations in areas such as marital property, as with the agreement between France and German of 4 February 2010 the personal and financial effects of divorce, etc. This would increase the independence of the parties and will provide a European legal framework for European private law relations.</td>
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<tr>
<td>France</td>
<td>The opportunity of an optional instrument in matrimonial property system law seems evident, with practical considerations associated with the difficulties encountered by French-German couples being the origin of this instrument. Only the option of an optional instrument was conceivable on the subject, given the major differences that emerged between French law and German law on matrimonial property systems.</td>
</tr>
<tr>
<td>Italy</td>
<td>Given the specific nature of family law, firmly rooted in the national legal tradition, the OI approach seems to be particularly suited to property-related issues insofar as no national mandatory policy issues are involved. Indeed, the provisions of the matrimonial property systems correspond to different models, which have changed along with national society, but which remain the expression of balance between proprietary interests. Be adopting a discretionary instrument, the parties could find a solution that better meets the expectations associated with their actual situation. At the same time, it would not be necessary for national legislators to modify their own legislation and their specific rules could be kept.</td>
</tr>
<tr>
<td>Cyprus</td>
<td>No information available.</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>It would be appropriate to adopt an optional instrument at European level for family property law in order to avoid couples coming up against certain national legal rigidities. Indeed, at present, couples can choose between opting for the matrimonial property system of the country of origin of one of the parties – which, amongst other things, may complicate divorce Regulations - or establishing a marriage contract, which is unquestionably useful from the point of view of governing</td>
</tr>
</tbody>
</table>
international situations. Use of the marriage contract does, however, remain limited as only couples receiving legal counsel sign such a contract.

And yet, the establishment of such an instrument would be likely to deprive couples of the freedom of choice that the diversity of national legislations, which can prove to be very advantageous, offers them. With regard to the opportunity for an extra-family property law instrument, in light of the legal challenges (child custody, allocation of parental authority, etc.), it would be preferable to steer towards a restrictive instrument.

<table>
<thead>
<tr>
<th>Country</th>
<th>Note</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hungary</td>
<td>An alternative system through OIs would be greatly appreciated in terms of family law. The proposal that Hungarian family law, and in particular family property law, be opened up to OIs has for a long time been anticipated by legislation.</td>
</tr>
<tr>
<td>Netherlands</td>
<td>The rapporteurs are in favour of the idea of having as many OIs as possible in order to create a real 28th European legal system in as many areas as possible. This includes family law.</td>
</tr>
<tr>
<td>Austria</td>
<td>Indeed, an OI in family law could be beneficial. To start with, because it is a neutral system that is not biased towards either of the parties involved as it allows the parties to apply their own national law. Secondly, it would avoid the need for changes in applicable law if a family moves to another Member State.</td>
</tr>
<tr>
<td>Poland</td>
<td>The use of OIs for family relations is disputed by some authors, particularly in the non-property aspects of family law. The main question is: who would decide on its use - just the parents? They can be used in family property law. The choice must however be made at the time of marriage or when the matrimonial property system is modified.</td>
</tr>
<tr>
<td>Portugal</td>
<td>No information available.</td>
</tr>
<tr>
<td>Slovakia</td>
<td>According to them, such a discretionairy instrument, both for family property law and for extra-family property law, would be an advantage. With regard to extra-family property law, such an instrument could, in particular, make it easier for the courts to make decisions regarding alternate custody granted to parents living in different Member States.</td>
</tr>
<tr>
<td>Sweden</td>
<td>The Ministry’s response See the response to question 28. Furthermore, it is worth noting that many provisions in national family law are mandatory. This is because they govern issues as central as the well-being of individuals and the well-being of children. From a general point of view, it would not be acceptable for the parties to be able to ignore these mandatory rules.</td>
</tr>
</tbody>
</table>
| United Kingdom | **The Ministry’s response:** No information available.  
**Academic response** No available expert was able to answer this question. |
CHAPTER 31: HOW USEFUL WOULD AN OPTIONAL INSTRUMENT, SUCH AS THE EURO-MORTGAGE, BE IN SURETY LAW?

The questionnaire asked the precise question of whether the Euro-mortgage would be likely to improve cross-border credit.

This section analyses the responses one by one (1.) before presenting a table with a more detailed overview of the responses of the different countries (2.).

1. ANALYSIS OF THE RESPONSES

Many reports note, first of all, that there are needs in this area:

- There is first of all a need to improve cross-border credit, which often proves difficult, or even impossible, and to create real competition between the banks, thus reducing the cost of mortgage loans (Belgian, Bulgarian, German (universities), Greek, Spanish, Hungarian, Dutch and Austrian reports).
- This would also help to improve the secondary cross-border credit market, i.e. the market on which the banks themselves mobilise the loans they have obtained from borrowers (see the Spanish report) (this market is often known as the mortgage market).
- This would improve the cross-border insolvency proceedings solution (German university report).
- It would then be useful to have an instrument that would allow a mortgage to be granted on several properties in different EU countries (see the Polish report, which states: 'Still there is a need of creation a legal instrument which will allow to create one joined mortgage covering real estates situated in different countries.‘)

Some reports are more sceptical (Czech, Italian\textsuperscript{293}, Slovak and Polish\textsuperscript{294} reports), and some even declare their support for a restrictive instrument (Luxembourg report). There are, however, some difficulties with creating an optional instrument within surety law:

- The issue is, first of all, closely linked to property law, which is a very sensitive subject. The Euro-mortgage should be based on properties as they are recorded in the land registration systems of the different countries (Bulgarian and Spanish reports).
- A European register for Euro-mortgages would be needed, with easy and free access from each Member State (Polish report)
- But the creation of a Euro-mortgage would pose the problem of the order of securities (Polish report), as regards the securities registered on the property on the national register.


The question of the type of mortgage to be chosen an optional instrument would also arise. According to the Spanish report, there are two kinds in Europe (causal and non-causal). Which should be chosen? According to the Polish report, the differences between the different countries on this subject are too great to make a choice that is acceptable to everyone.

What would be the EU's jurisdiction on the subject (Polish report)?

Lastly, given the great financial challenges, there is a risk that there would be too much pressure from lobbyists, and that the initial product, perhaps well thought-out, would be distorted by this pressure (see the Slovak report).

2. COUNTRY-BY-COUNTRY SUMMAR OF RESPONSES TO QUESTION 31

<table>
<thead>
<tr>
<th>Member State</th>
<th>Table 31</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>What do you think of the opportunity for an optional instrument in surety law?</td>
</tr>
<tr>
<td></td>
<td>Specifically, would the Euro-mortgage be likely to improve cross-border credit?</td>
</tr>
<tr>
<td></td>
<td>If the whole procedure for obtaining a mortgage loan was the same in all States, this would encourage competition. It will now no longer be necessary to limit yourself to just the banks in your own State to obtain such a loan. This does, however, require complete harmonisation of the mortgage system.</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>Mortgage credit markets vary greatly from one Member State to the next. The integration of the European mortgage credit markets is essential for the economy of the European Union and the internal market. The abolition of legal and economic barriers will pave the way for the improved efficiency and competitiveness of the mortgage credit market. For the time being, national legislations make it impossible to establish a transnational credit market. Furthermore, it could be anticipated insofar as the mortgage system refers to the territory's property system, which is the very sensitive area of the Regulation. For example, the application of certain OIs covered by this study is limited in Bulgaria, specifically from the viewpoint of landowners. Thus, OIs within surety law that do not relate to mortgages could be more appropriate.</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>The added value of such a measure is not clear.</td>
</tr>
<tr>
<td>Germany</td>
<td>Academic response</td>
</tr>
<tr>
<td></td>
<td>The creation of an OI within surety law could not only facilitate cross-border credit transactions but also provide more legal certainty in cross-border insolvency proceedings.</td>
</tr>
<tr>
<td></td>
<td>The Ministry’s response</td>
</tr>
<tr>
<td>Country</td>
<td>Response</td>
</tr>
<tr>
<td>----------</td>
<td>----------</td>
</tr>
<tr>
<td>Greece</td>
<td>According to them, the Euro-mortgage would be likely to improve cross-border credit as this OI would lead, as the Green Paper indicates, to an overall reduction in the cost of mortgage or housing loans and would offer a more comprehensive range of related products, as well as key mortgage credit products.</td>
</tr>
<tr>
<td>Spain</td>
<td>The Euro-mortgage, and in general all European titles, could obviously increase cross-border credit. On the one hand, it could improve the primary cross-border credit market by encouraging real investment in other countries. On the other hand, it could also encourage the secondary cross-border credit market by way of mortgages being established at European level. The problem lies in the mortgage model, as two main models coexist in Europe: the abstract model and the causal model. In this way, the use of an OI would help to maintain the respective national mortgage loan models and a European model. We should remember that the mortgage model must correspond to the land registration system, which also varies between European States.</td>
</tr>
<tr>
<td>France</td>
<td>No response on this point.</td>
</tr>
<tr>
<td>Italy</td>
<td>The Euro-mortgage would represent a 28th system in the Community legal order. It is commonly considered that national surety law is a controversial subject in Europe. The study of this sector seems to favour comparative analysis of laws in order to illustrate and explain the differences between the national legal orders rather than find a path to a harmonisation process. In this respect, Italian literature remains open to debate, but is still fairly sceptical about its development in the future. Titles are again strongly linked to property law (see the response to question 32).</td>
</tr>
<tr>
<td>Cyprus</td>
<td>No information available.</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>With regard to the opportunity of an optional instrument within surety law, the adoption of such an instrument would, in practice, be likely to go unheeded, as practitioners are often reluctant to use a new instrument, often preferring a law they themselves have helped to establish, particularly through the practice and uses they have implemented. The adoption of an optional instrument within real property security law would be inappropriate insofar as the various legal systems of the Member States relating to real property security law not only originate from the same model, based on the accessory character of the security, but have developed in a relatively similar way. Use of an optional instrument such as the Euro-mortgage would, in our opinion, be insufficient. Indeed, there is an issue concerning both moveable/immovable property law and land registration issues. Only a restrictive instrument covering this whole area seems</td>
</tr>
<tr>
<td>Country</td>
<td>Discussion</td>
</tr>
<tr>
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<td>------------</td>
</tr>
<tr>
<td>Hungary</td>
<td>An OI within surety law would certainly be welcome. An OI such as the Euro-mortgage could increase cross-border credits if the information available is correctly circulated and made available to the general public. Based on the objective to increase competitiveness, intervention on the European mortgage credit markets is certainly an option worth considering, particularly in light of the establishment of the objectives of the Lisbon Treaty.</td>
</tr>
<tr>
<td>Netherlands</td>
<td>For the reasons given above, they are in favour of an optional instrument within surety law. What's more, it is probable that, particularly in this area, there is a need for OIs in cross-border cases.</td>
</tr>
<tr>
<td>Austria</td>
<td>The Euro-mortgage could significantly improve cross-border credit. Comparing the credit agreements available in the different Member States is particularly important where credit for immovable property is involved as large sums are at stake. However, at the present time, it is very difficult to finance immovable property in State A by way of a credit agreement signed with a creditor in State B. The creditor often does not trust foreign surety laws and may therefore refuse to sign an agreement or only make a credit offer at a considerably higher price.</td>
</tr>
</tbody>
</table>
| Poland | The Euro-mortgage is currently being discussed in Poland. The 2005 Green Paper and a publication on the 'Basic guidelines for a Eurohypotec' have been translated into Polish. There are also two other publications, one of which put forward the idea that the Euro-mortgage project should be continued, but that unification of this issue within the EU is impossible. This may be a drive for harmonisation of securities. The Euro-mortgage idea does not have much chance of success given that:  
- the national Regulations are too different. This should be an instrument used alongside national mortgage rules. As a result, the problem of supremacy between the national mortgage and the European mortgage could emerge. Then, the issue of enforcement must be written precisely.  
- it would be necessary to create mortgage registers, a step that will lead to the issue of free access to the database of these registers and the problem of supremacy of the record in the event of conflict between the national mortgage and the European mortgage.  
- finally, does the EU have jurisdiction in immovable property? There is a need to create a legal instrument that would help create a mortgage covering immovable property located in different |
Implementation of optional instruments within European civil law

countries. There would then be the option of using a legal system in a situation that can be introduced into a legal cooperation and joint enforcement scheme.

<table>
<thead>
<tr>
<th>Country</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>Portugal</td>
<td>No information available.</td>
</tr>
<tr>
<td>Slovakia</td>
<td>The Euro-mortgage would not be an advantage. Seemingly, the creation of standard banking products by way of legislation cannot reflect economic reality. In this regard, it can be noted that a basic bank account has been planned in Slovakia, but this project failed and was abandoned. The success of a banking product in all Member States is hindered by diametrically different conditions in real estate and the national mortgage markets. Furthermore, even if the legislator has succeeded in creating an instrument that reflects national specificities, it would be based on divergent national rules and, at the end of the day, it would not be a neutral supranational instrument. As the issues involved are very lucrative, the legislative process would be subjected to considerable pressure from the national government and lobbyists. As a result, the result could turn out somewhat different from the original idea. However, the legislative process itself and its preparation would be an advantage. Just as in the case of roaming, the determination of the European legislator to regulate a specific area may provoke the banks and help to achieve the desired objectives.</td>
</tr>
<tr>
<td>Sweden</td>
<td>The Ministry’s response: see the response to question 28.</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>The Ministry’s response: No information available. Academic response No expert was available to answer this question.</td>
</tr>
</tbody>
</table>
CHAPTER 32: HOW USEFUL WOULD AN OPTIONAL INSTRUMENT BE IN PROPERTY LAW?

This section analyses the responses one by one (1.) before presenting a table with a more detailed overview of the responses of the different countries (2.).

1. ANALYSIS OF THE RESPONSES

According to the Spanish report: ‘Art. 17 Charter of Fundamental Rights of the European Union lists the right to property among the fundamental rights of every European citizen. That is obviously a magnificent starting point…. Many German, French, Dutch and British citizens own properties in Spain’.

The Italian report stresses that property law is also protected by Protocol 1 Article 1 of the European Convention on Human Rights, even if Article 295 of the Treaty states that ‘the EC Treaty shall in no way prejudice the rules in Member States governing the system of property ownership’.

The same report explains the differences between the systems:

'Combining the two main registration models (land/title registration and deed registration) with the intervention of professionals in the transfer of title and/or in filing for registration, three major models of registration procedures become apparent:

(i) Registration procedures are combined with the compulsory intervention of a civil law notary/private lawyer at the moment when registration is made (Austria, England and Wales, Belgium, France, Germany, Hungary, Ireland, Italy, Luxembourg, Netherlands, Poland, Portugal, and Spain);

(ii) Registration procedures are combined with the compulsory intervention of a civil-law notary for the entire process, that is, from the drafting of the deed to the registration filing (Austria, England and Wales, Germany, Lithuania and Poland);

and

(iii) Registration procedures are combined with the voluntary (non-compulsory) intervention of a public notary/private lawyer, who supervises the entire process (Czech Republic, Denmark, Norway, and Sweden)'.

In this context, it is scepticism that seems to prevail in the various reports relating to an optional instrument within property law.

Except for a few reports that would be somewhat in favour of such an optional instrument (Belgian and Austrian reports), others that would support a unified European property register (Hungarian report), and others still that would support an optional instrument but only in very specific matters, such as rights in trust ('fiducie' in French law, 'trust' in Anglo-American law and 'Treuhand' in German law) (see the German universities report), the creation of an optional instrument in property law seems very difficult as the subject is very sensitive (see the Bulgarian, Polish and Slovak reports) and because there are too many differences between 'civil law' countries and 'common law' countries (Luxembourg report).
## 2. COUNTRY-BY-COUNTRY SUMMARY OF RESPONSES TO QUESTION 32

<table>
<thead>
<tr>
<th>Member State</th>
<th>Table 32</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>Property law varies greatly from one legislation to another and such an instrument could be a big step forward. However, as a result, many other rules will need to be harmonised given that property law is linked to the location of these. The purpose of the Certificate of Succession is to enable easier, more cost-effective Regulation of international successions. It will unquestionably improve Regulation of successions and is eagerly awaited as 450,000 new international successions are opened each year. Although the loopholes and ambiguities of the draft are already being pointed out in some camps, the ECS is an important step forward in the quest for easier enforcement of international successions.</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>Property law, and in particular the rules relating to title to land, is a very specific and sensitive area of the Regulation. In this respect, adoption of an OI would be a very difficult process. An OI within property law would be particularly appropriate for real estate property. An OI could benefit from free movement of goods within the internal market.</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>The same arguments as for question 30 apply 'mutatis mutandis'.</td>
</tr>
<tr>
<td>Germany</td>
<td>Academic response</td>
</tr>
<tr>
<td></td>
<td>The opportunity for an OI within property law (a subject governed by the <em>Lex rei sitae</em> rule) could, in particular, be justified in very specific areas of business law, such as rights in trust ('fiducie' in French law, 'trust' in Anglo-American law and 'Treuhand' in German law). The Ministry's response: No information available.</td>
</tr>
<tr>
<td>Greece</td>
<td>No information available.</td>
</tr>
<tr>
<td>Spain</td>
<td>Article 17 of the Charter of Fundamental Rights of the European Union lists the right to property among the fundamental rights of every European citizen. This is obviously a magnificent starting point. However, there are significant differences between civil law and common law countries with regard to the limited rights in rem. Finding a compromise could prove to be hard work. However, in some respects, harmonisation could be an advantage for property owners. Many German, French, Dutch and British citizens own properties in Spain. Harmonisation could be particularly useful in certain areas of horizontal</td>
</tr>
</tbody>
</table>
property: owner meetings, owner announcements, the quorum for adopting proposals, etc. But the huge costs of such harmonisation are a serious obstacle.

France
No information available.

Italy
Even if Article 295 of the Treaty states that 'the EC Treaty shall in no way prejudice the rules in Member States governing the system of property ownership', property law is also recognised in the Charter of Fundamental Rights of the European Union (Article 17) and in the European Convention on Human Rights (ECHR, additional protocol 1 Article 1). In addition, investment by citizens of the Member States in real estate in another EU State is increasingly common. A resolution recently approved by the European Parliament, expressly aims to resolve the issues surrounding the citizens of Member States and foreigners obliged to give up a private property lawfully acquired, without benefiting from a standard procedure or adequate compensation, while at the same time being obliged to pay arbitrary costs for infrastructure developments that were not requested and that are often pointless.

Three types of value can be identified for the integration of European real estate: 1) A value for EU citizens, at private individual level, who are involved in cross-border real estate transactions; 2) A value for equally important lenders involved in financing these transactions, and 3) A value for the European Union family of nations, perceived as a whole, which reiterates the need to have an integrated and interdependent market, particularly with regard to the basic property law of real estate (by means of levels of protection for increasingly harmonised rights corresponding to levels of confidence, thanks to the intersection of interests and the coordination of the res publica and the res privata).

As has been highlighted on many occasions, this greater integration of immovable property rights would, through the European Union, be first and foremost beneficial for buildings of the Union itself, the individuals and families coming from different Member States, in their efforts to access housing and other real estate throughout the Union. In the same vein, the defence of cross-border immovable property rights and access to immovable property is a fundamental factor supporting one of the fundamental rights of European citizens, the right to free movement and residence in the Union.

The common European real estate market needs a more consistent level of certainty with regard to rights and interests in the area of immovable property. A significant increase in cross-border real estate transactions in the European Union has led to growing demand from EU citizens for greater (and easier) access to the information held by the national authorities of the Member States.

Combining the two main registration models (land/title registration and deed registration) with the intervention of professionals in the transfer
of title and/or in filing for registration, three major models of registration procedures become apparent:

(i) Registration procedures are combined with the compulsory intervention of a civil law notary/private lawyer at the moment when registration is made (Austria, England and Wales, Belgium, France, Germany, Hungary, Ireland, Italy, Luxembourg, Netherlands, Poland, Portugal, and Spain);

(ii) Registration procedures are combined with the compulsory intervention of a civil-law notary for the entire process, that is, from the drafting of the deed to the registration filing (Austria, England and Wales, Germany, Lithuania and Poland); and

(iii) Registration procedures are combined with the voluntary (non-compulsory) intervention of a public notary/private lawyer, who supervises the entire process (Czech Republic, Denmark, Norway, and Sweden).

In the three models mentioned above, the level of certainty and reliability varies according to the following issues:

(a) the content of the registers, as the registration systems vary regarding what is actually published in land registers.

(b) the possibility of making a reservation on these legal effects through what is known as the preliminary opinion (or the provisional/conditional registration). A strategic tool for completing the registration procedure is the preliminary rating with the relevant register. Most European countries have adopted a procedure that provides the buyer with a 'reservation' for the future registration of his title.

(c) the quantity of land actually registered.

(d) electronic transmission, as it provides the simplest way of filling the 'registration gap' and improving levels of certainty.

One possible alternative approach for ensuring the transparency and reliability of land registers is a warranty of title based on the concept of private insurance. In other countries outside the European Union, where the registration gap is very wide, insurance is used to provide protection against the risks of this period, generally supplied by specialist insurance companies or banks.

However, this instrument is not only questionable, but could never be seen as a realistic alternative to national legislation in property law.

<table>
<thead>
<tr>
<th>Country</th>
<th>Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cyprus</td>
<td>No information available.</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>With regard to the opportunity of an optional instrument within property law, only a restrictive instrument, guaranteeing legal certainty</td>
</tr>
</tbody>
</table>
and avoiding complication of the sources, seems conceivable. However, such an instrument is not desirable in the state of positive law of the Member States, as the diversity of legal traditions goes against it (particularly with regard to UK law). In addition, the subject of property law innervates a large part of the legal system and its harmonisation could result in significant disruption of other areas of the law (particularly with regard to tax law, law of succession, etc.)

<table>
<thead>
<tr>
<th>Country</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hungary</td>
<td>An OI within property law would be very effective, for example in terms of a unified system for land registration systems that would result in a true land/property register leading to quicker, more transparent, less time-consuming processes and transactions. However, the difference between these systems varies greatly in European law and no effort has yet been made to reform and standardise these registration systems.</td>
</tr>
<tr>
<td>Netherlands</td>
<td>As far as rights to movable and immovable property and claims are concerned, they are in favour of an OI. For transfer of ownership and other areas, the need is, however, less urgent.</td>
</tr>
<tr>
<td>Austria</td>
<td>It would be appropriate to introduce European laws on title deeds, both for immovable and movable property. With regard to immovable property, this has already been explained. In the case of movable property, the <em>lex situs</em> rule in private international law creates a whole range of complex problems, with rights associated with the title being completely lost when the asset enters a foreign territory. Where general property law is concerned, it could be difficult to have two concurrent systems, one national and the other European. The publication of property rights should, in any case, be guaranteed.</td>
</tr>
<tr>
<td>Poland</td>
<td>The use of an OI in property law is very uncertain and debatable in Poland. There is no real support for this project at present.</td>
</tr>
<tr>
<td>Portugal</td>
<td>No information available.</td>
</tr>
<tr>
<td>Slovakia</td>
<td>At the moment, the question of the relevance of an optional instrument in the field of property law calls for a rather sceptical response. The main issue is knowing whether the EU has, with regard to the principles of subsidiarity and proportionality, the jurisdiction to adopt this kind of optional instrument.</td>
</tr>
</tbody>
</table>
| Sweden       | The Ministry’s response:  
They refer to the response to question 28. |
| United Kingdom | The Ministry’s response:    
There is no information available on this subject. |
<table>
<thead>
<tr>
<th>Academic response:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Given the significant differences relating to property law across Europe, the usefulness and feasibility of such an instrument would be highly debatable.</td>
</tr>
</tbody>
</table>
CONCLUSION: THE MAIN LESSONS LEARNED FROM THE STUDY

What are the main lessons that have been learned from this study and from all of the questionnaires, the results of which have just been analysed?

First of all, it is clear that some optional instruments have been very successful (e.g. the Community trademark).

The technique therefore has a place in Europe (A).

But some optional instruments have failed or are taking time to develop (e.g. the European company in numerous European countries).

What, therefore, are the qualities and flaws of the optional instruments that explain why some optional instruments are adopted and others abandoned by operators? The answer to this question is essential for identifying the rules and guidelines to optimise the chances of success of optional instruments (B).

1. THE LEGITIMACY OF USING OPTIONAL INSTRUMENTS IN EUROPE

The successful use of optional instruments in some areas and/or in some countries, as shown by the survey, confirms the impressions we may have had before this survey (1.1.). It legitimises the use of this technique. But three questions emerge:

- In this instance, has the optional instrument replaced the national standard (1.2.)?
- Are optional instruments used in the absence of other harmonisation techniques (1.3)?
- Would optional instruments be useful in other areas (1.4)?

1.1. Confirmation of the success of the optional instrument in some areas

The responses to the questionnaires confirm that operators actually use some optional instruments.

Some have already been a great success, generally optional instruments within intellectual property law. Many reports call for the unitary patent and state that existing optional instruments in intellectual property law (Community trademark, Community designs, European patent procedure) are already very useful, or even essential to companies involved in cross-border trade in Europe. The success of these optional instruments is substantial and clear. In addition, everyone is aware of this thanks to official statistics published by the OHIM (for the Community trademark and Community designs) and the EPO (for the European patent procedure).

These optional instruments are used to go beyond the territoriality of the rights granted by national legislation. This is also the objective of the European marketing authorisation, which establishes a centralised procedure for obtaining marketing authorisation for all Member States, optional procedure for new active substances, an optional instrument not
Implementation of optional instruments within European civil law

covered by this study\textsuperscript{295}.

The success of these European intellectual property rights is all the more remarkable as international rights already exist (international trademark, international registration of designs), i.e. there is already an effective worldwide optional instrument, which is in competition with the European optional instrument.

Other optional instruments are promising, even if they have not yet been used on a large scale. First of all, the figures cited need to be put into context, particularly when the percentage of use of the optional instrument is not calculated in relation to only those cross-border cases for which it is intended.

This is particularly true of procedural optional instruments. Most of the figures obtained compare the EEO or the European payment order with the number of internal enforcement or payment order procedures. Of course, some of these instruments, such as the EEO, could be used in internal relations, but such relations do not use them in practice. This means that it is more interesting to know whether, in cross-border relations, the EEO is chosen more often than the internal procedure followed by an exequatur. The absence of official statistics means it is hard to tell. But the Swedish figures were striking, showing that out of 595 000 enforcement cases, only 40 relate to cross-border relations and 30 if these use the EEO, i.e. three quarters of cross-border cases. One might wonder why out of the 595 000 enforcement cases in Sweden, only 40 relate to cross-border relations: are there so few cross-border relations or are they so well secured that fewer enforcements are needed?

Some optional instruments have been successful in some countries and not in others. The European company is, in this respect, remarkable. In some countries (Greece, Bulgaria, Spain, Portugal, Poland) it is hardly used if at all, in others (Sweden, France, Cyprus, Luxembourg, the Netherlands, Slovakia) it is making progress, but it has been very successful in the Czech Republic and in Germany, although the number of dormant SEs should not be downplayed. The same can be said of the EEIG.

Why is the same optional instrument used in some countries and not in others? First and foremost, insofar as the optional instrument first of all gives an option between national law and European law, the added value of the optional instrument depends on the ability of national law to govern the situation effectively. Therefore, it is normal for an optional instrument to be more useful in one country than another, and for the optional instrument to present intrinsic flaws or not.

A conclusion can be drawn on this point that there are optional instruments that we could not do without today. This is the case for optional instruments in intellectual property law. They have no doubt facilitated business activity in Europe. There are probably some that we will not be able to do without tomorrow. This is probably the case with civil procedure optional instruments, which are considered to be promising, and optional instruments within law of economic interest groups, but only in some countries.

1.2. **Has the optional instrument replaced the national standard?**

To get a better understanding of the optional instrument, we need to understand whether it is a transitional technique to eventually enable soft harmonisation, or whether it is required in its own right. In other words, is it the goal itself or a step towards eventual maximum harmonisation?

All of the reports have shown that the optional instrument technique is a goal in itself, a specific technique, and not a step towards eventual maximum harmonisation.

In accordance with the very principle of the optional instrument method, national legislators have added these instruments, sometimes known as 'additional' instruments, to their national laws. In intellectual property law, for example, they have in no way replaced national rights.

The advantage of optional instruments is that they are a European option, which supplements national laws, without modifying them. They reconcile European spirit and national sovereignty.

1.3. **Are optional instruments only used in the absence of maximum harmonisation standards?**

If the optional instrument has been a success, the question still remains as to whether operators only used it because there was nothing else. Perhaps they would have preferred maximum harmonisation?

Although it is not always easy to answer such a question, it can be noted that some optional instruments have been successful even when national laws were harmonised. This is the case, for example, with the Community trademark.

Trademark law has been harmonised by several Directives. A first Council Directive approximating the laws of the Member States relating to trademarks was adopted on 21 December 1988. The Directive approximating national legislation relating to trademarks was introduced into national laws. This Directive was modified by Council Decision 92/10. Finally, on 22 October 2008, the Community legislator adopted Directive 2008/95 approximating the laws of the Member States, constituting the codified version of this legislation, and repealing Directive 89/104.

And yet, this harmonisation did not prevent the success of the Community trademark, which is a sign that the optional instrument is chosen for itself and not due to the absence of other European initiatives.

Some people still maintain that the Community trademark is not truly an optional instrument, because if you want a supranational right, your only choice is to use the Community trademark. It is not a choice between a supranational right governed by the optional instrument and a supranational right governed by national laws, but between a set of national trademarks governed by national law and a supranational right governed by national laws. 

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300 See the opinion of Y. BALENSI, presented in the French report.
European law. This line of argument can, however, be countered by the fact that faced with an optional instrument, the operator still has a choice between two options that are not identical. It will choose the one that gives him the most benefit.

1.4. Would optional instruments be useful in other areas?

If optional instruments can be applied in areas where there is also maximum harmonisation, it may be even more useful in areas where maximum harmonisation is unthinkable.

In this respect, it is particularly remarkable that several reports (Greek, Belgian and Slovak) envisaged an optional instrument in extra-family property law, precisely where it would be so difficult to create maximum harmonisation that nobody even considers it. And yet, the divorces of European nationals from several Member States give rise to inextricable difficulties, which could in some cases be better regulated by an optional instrument.

In a less refined way, this is already the case for proprietary relations, with the French-German Agreement on the optional matrimonial system, and the European Certificate of Succession called for by European notaries.

Outside of family law, there is another area in which maximum harmonisation has caused great difficulties. This is consumer law. This is why an optional instrument in sales law would be particularly suited to cross-border relations, not only between professionals but also between businesses and consumers.

Where widespread maximum harmonisation has failed, the optional instrument is a solution that combines effectiveness and freedom, freedom of the State to retain its national law and freedom for the operator to choose its law. Of the optional instruments most often called for by the rapporteurs, the unitary patent leads the way, followed by the European private company, a European bill of exchange or cheque, and even a European enforcement order.

This means that many rapporteurs have faith in the effectiveness of optional instruments to continue improving cross-border trade.

The optional instrument has a legitimate role in Europe and is therefore worth proposing, but the chances of its success still need optimising.

1.5. Optimising the chances of success of optional instruments

The reasons for the success or failure of optional instruments were covered in Chapter 13.

The following distinction is made:

- on the one hand, reasons that are based on a comparison of two terms of the option, which can be qualified as causes endogenous to the optional instrument: this involves the scope of the optional instrument, the legal certainty provided, or not, by the instrument, the complexity of the instrument, its cost and the speed and efficiency of the procedures.

- on the other hand, reasons that are not based on a comparison of the two options, which are therefore causes exogenous to the optional instrument: this mainly involves the adaptation, or not, of the optional instrument to the situation
in hand, the successful or poor implementation of the optional instrument by national laws and the lack of awareness of the optional instrument. The neutrality of the optional instrument is sometime, but only rarely, put forward, and the European image of the optional instrument less still.

Of the reasons for success highlighted by the different rapporteurs, we can identify the rules to follow when creating future optional instruments to maximise their chances of success.

The four rules for creating a successful optional instrument are common sense rules: added value, communication, autonomy, legal certainty.

## 2. ADDED VALUE

Optional instruments must be created in areas where they will bring added value, where they will be more useful for operators than existing instruments.

It goes without saying that when an optional instrument is chosen, the operator compares the benefits of using the optional instrument with the applicable system when there is no choice of instrument.

This is why optional instruments in intellectual property law are so successful as their added value is undeniable.

This is also why an optional instrument for sales contracts could be successful, as it would enable a trader to have a common system for trading with consumers in the 27 Member States. There would most certainly be great added value in this. Between professionals, it would give them a neutral system rather than the seller's system or the buyer's system.

But this added value means nothing if people do not know about it.

## 3. COMMUNICATION

Optional instruments involve a great deal of communication. It is noted that the most eminent legal practitioners discovered the expression 'optional instrument' with the debate surrounding European contract law. This means that existing optional instruments have gone unnoticed as such. A great deal of communication, even 'advertising', is needed, as ignorance is one of the main causes of failure for some optional instruments.

Besides traditional communication techniques from the legal world (symposiums, training of judges, lawyers and notaries, inclusion in the curriculum for professional examinations), other techniques should be developed.

To start with, for example, practical online guides for educational purposes could be considered.

We have found that communication about optional instruments is difficult. Either too much information is given and it becomes incomprehensible or too little information is given and the information becomes unusable.

Perhaps a three-stage process is required?
The first stage relates to succinct information on the comparative advantages of the two options (this information must therefore be as specific as possible to the country, as the national option is different depending on the country).

If the operator is interested, a link is available to simplified information on implementation of the optional instrument.

If the operator is still interested, a final link is available to a third level with comprehensive information and the texts in question.

For example, with regard to sales, the information will be different depending on whether the person who wants to buy a product is a consumer or a professional.

Article 9 of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law lays down specific information requirements for contracts between traders and consumers. The consumer must, in particular, receive the information notice in Annex II.  

If the suggestion of three communication levels is applied, the consumer will be able to view a table with a simple comparison (without going into too much detail) of the law in his country of residence and the optional instrument on subjects as important as the trader's duty to provide information, the consumer's right of withdrawal, abuse of weakness, interpretation in favour of or against the consumer, protection against unfair terms, etc.

If the consumer is interested, he will click on the link for an explanation of how the instrument works.

At this stage, another link will take him to the texts themselves in his own language. A European hotline could be created to explain this optional instrument to consumers.

Information, even if it is very clear, is not always enough and we would need to do a lot of work on communication and training in optional instruments. This would need to come from the EU, as this is the only way for each optional instrument to be known in each Member State. Express provision is also made by the Proposal for a Regulation on a Common European Sales Law.

The compilation of European statistics would also contribute to putting optional instruments into practice. The statistics on optional instruments in intellectual property law are evidence of their success. Published statistics showing that optional instruments are moving forward would act as a stimulus.

Awareness of the optional instrument is not enough either. The optional instrument must also be as autonomous as possible.

4. AUTONOMY AND COMPLETENESS

The insufficient autonomy of some optional instruments is a common criticism. If an optional instrument has to refer to the national law, it is a sign of failure. It results in uncertainty and complexity. It is the greatest criticism made by many operators of the SE.

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Furthermore, there is a risk that national laws will try to minimise the scope of the optional instrument by transposing it 'poorly'.

The optional instrument must therefore be as autonomous as possible, if possible without referring to national laws. It must be complete.

5. **LEGAL CERTAINTY**

The risk of legal uncertainty scares operators off. Any yet, any new optional instrument brings with it interpretation difficulties like any new text, which is a drawback that is all the more difficult to overcome as the competing national law has been around for longer and does not pose any interpretation problems.

Complexity should therefore be tracked down and eliminated if it is unnecessary.

The objective of legal certainty could be better achieved if disputes relating to optional instruments fell within the jurisdiction of specialist judges. This would avoid interpretations being dispersed between thousands of European judges. This is already the case for disputes in intellectual property law in France, but it could be extended to include other optional instruments.

In addition, the means of quickly finding the interpretations of the key concepts of the new texts and circulating them need to be found.

An accelerated preliminary ruling procedure could be considered for optional instruments, so that texts are interpreted as quickly as possible, if necessary, or alternatively a referral for opinion procedure. This was tried out in France during a major reform of collective proceedings, a matter that is still fairly complex. The Court of Cassation was asked its opinion (not binding but often followed) on the main difficulties of applying the new law. In approximately six months, the main issues had received a preliminary interpretation.

A special optional instruments intranet could also be set up with the decisions of all EU judges on optional instruments being sent between Supreme Courts. The problem of translation would, however, still remain. In addition, as everyone has seen, in law and elsewhere, too much information kills the information. It would be desirable for all national decisions on an optional instrument to be recorded in a free access European database.

These rules or guidelines can already be found in part in the Proposal for a Regulation on a Common European Sales Law, which is the archetype of the optional instrument (see the developments in the introduction).

Article 14 of this proposal requires Member States to notify final judgments of their courts which give an interpretation of the provisions of the Common European Sales Law or any other provision of the Regulation. The Commission also stipulates that it will set up 'a database for the exchange of information concerning final judgments referring to the Common European Sales Law or any other provision of the Regulation, as well as relevant judgements of the Court of Justice of the European Union'.

In addition, Article 15 contains a text entitled 'review clause', which provides for a review of the application of the Common European Sales Law and any other provision of the Regulation five years after its date of application. Amongst other things 'the need to extend the scope in relation to business-to-business contracts, market and technological developments in respect of digital content and future developments of the Union acquis'
should therefore be taken into account. This review will involve the submission, by the Commission, of a report, 'if necessary accompanied by proposals to amend the Regulation, to the European Parliament, the Council and the European Economic and Social Committee'.

These provisions of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, as well as the provisions of others already mentioned in the introduction to this study, will be able to serve as a model for any future European optional instruments.
ANNEX I\textsuperscript{302}

Study IP/C/JURI/FWC/2009-064/LOT1

Questionnaire

Study on the implementation of optional instruments in Europe

Introduction

A. The different methods: between harmonisation and the optional instrument

European decision-making bodies have a choice between several methods for legislating.

- Minimum harmonisation has been adopted since the early days of Community consumer law.

Minimum harmonisation texts, by only establishing a minimum beyond which each of the Member States is authorised to go, enable them to impose a higher level of protection than that provided for by European legislation. In this way, protecting States feel authorised to maintain a high level of protection if they so wish and respected in their traditions. However, by leaving differences between the legislations of the Member States, this method can deter European businesses and consumers: the former would be reluctant to set themselves up and/or offer their goods and services in other Member States, the latter would not have sufficient 'confidence' to sign contracts in Member States other than their own (e.g. European Commission, working document SEC/2008/2545 final). These distortions would therefore hinder the development of European trade.

- Maximum harmonisation of the legislations of the different Member States, in that it lays down a uniform substance of European law, tends more towards unification of Member State legislations. It was introduced into Community consumer law, with the 'New Approach' advocated by the European Commission since 2005 and implemented for the first time by the Directive of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (Directive 2005/29/EC amending Directive 2002/65/EC concerning the distance marketing of consumer financial services).

It is, however, denounced for its major disadvantages, in particular identified during oppositions and discussions on the Proposal for a Directive of 8 October 2008. The elimination of the Member States' freedom particularly that of establishing a higher consumer protection level, was one of the criticisms of this method.

- The optional instrument\textsuperscript{(1)} method differs from that of harmonisation, by way of Directives.

The European Commission’s Green Paper on policy options for progress towards a European Contract Law for consumers and businesses (Com (2010) 348/3) summarises the seven possible options for creating a European contract law. In option 4, the European Commission suggests an option whereby 'a Regulation could set up an optional instrument, which would be conceived as a '2nd System' in each Member State, thus providing parties

\textsuperscript{302} Only Annex 1 (Questionnaire sent to rapporteurs) is included; the other annexes area available upon request from Policy Department C: Citizens’ rights and constitutional affairs, European Parliament.

\textsuperscript{(1)} The concept is not strictly European. At world level, the 1980 United Nations Convention on Contracts for the International Sale of Goods (Article 6), the Unidroit conventions on electronic factoring (Article 3) and on international financial leasing (Article 5), which follow a model with a non-application option.
with an option between two systems of domestic contract law’.

An optional instrument is an instrument offered to operators, who can choose to adopt it or not. In this way, they can either remain subject to the national law normally applicable, or submit to the European optional system.

The purpose of this preliminary study is to look into how existing optional instruments are implemented in the different European Union States. It must also reveal if these instruments are often chosen in practice.

B. General instructions

Reports must be written in English or French.

The responses to the questionnaire must be clear and precise and quantifiable data must be provided wherever possible.

It is important that information sources are clearly identified.

Questionnaire coordinators are invited to gather information from lawyers, courts and other sources.

Please submit the report electronically to the following address by 5 March: optin@transeuropexperts.eu

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C. Relevant European texts

I. Civil procedure


II. Intellectual property law

- ‘Community' trademark: Council Regulation (EC) No 40/94 on the Community
trademark of 20 December 1993 (consolidated version)\(^{(2)}\)


- European patent (Munich convention of 5 October 1973, revised 13 October 2007): optional European patent system, rather than application being filed with each national patent office.

III. Association and company law


IV. Family property law

- Matrimonial property system: Agreement of 4 February 2010 between France and Germany creating a common optional matrimonial system; other States could adopt this system at a later date by joining this agreement.

D. The projects


- The Community patent: Council Resolution of 3 December 2009 (COD/2000/0177) on the adoption of conclusions relating to the main characteristics of the Jurisdiction of the European patent and the EU patent (known as 'Patent jurisdiction').

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\(^{(2)}\) http://ec.europa.eu/internal_market/indprop/tm/index_fr.htm

\(^{(3)}\) http://europa.eu/legislation_summaries/internal_market/businesses/intellectual_property/l26033_fr.htm#AMENDINGACT
Questions

A. Are the instruments listed above under points I to IV optional instruments in your law?

1.1.1.1. Are the optional instruments (OIs) listed above under section 1-C considered by legal practitioners in your country to be OIs?

1.1.1.2. Has your national legislator replaced the OI with its own legislation, or has it added the OI to its legislation?

B. Are these optional instruments chosen by the operators?

1.1.1.3. Are operators choosing the European Enforcement Order?

Have statistics, official or otherwise, been published regarding the use of this instrument in your country? If so, what are they?

If no statistics have been published, in your opinion what is the approximate percentage of use of this European Enforcement Order, relative to the national enforcement order, combined with an exequatur procedure? On what analysis, research and/or documents is your opinion based?

1.1.1.4. Are operators choosing to use the European Small Claims Procedure?

Have statistics, official or otherwise, been published regarding the use of this instrument in your country? If so, what are they?

In the absence of statistics, in your opinion, what is the approximate percentage of use of this procedure relative to the national procedure? On what analysis, research and/or documents is your opinion based?

1.1.1.5. Are operators choosing the European Payment Order?

Have statistics, official or otherwise, been published regarding the use of this instrument in your country? If so, what are they?

In the absence of statistics, what, in your opinion, is the approximate percentage of use of this European payment order in comparison with the existing order for payment under national law? On what analysis, research and/or documents is your opinion based?

1.1.1.6. Are operators choosing Community trademarks?

Have statistics, official or otherwise, been published regarding the use of this instrument in your country? If so, what are they? In the absence of statistics, what, in your opinion, is the approximate percentage of use of the Community trademark in comparison with the situation in which many national trademarks are registered in several EU Member States? On what analysis, research and/or documents is your opinion based?

Do you think that the Community trademark is used by operators who had not in the past registered trademarks in European countries other than the country where they are based?
1.1.1.7. Are operators choosing Community designs? Have statistics, official or otherwise, been published regarding the use of this instrument in your country? If so, what are they?

In the absence of statistics, what, in your opinion, is the approximate percentage of use of Community designs in comparison with the situation in which designs are registered several times in several EU Member States? On what analysis, research and/or documents is your opinion based?

Do you think that Community designs are used by operators who had not in the past registered designs in European countries other than the country where they are based?

1.1.1.8. Are operators choosing the European patent? Have statistics, official or otherwise, been published regarding the use of this instrument in your country? If so, what are they?

In the absence of statistics, in your opinion, what is the approximate percentage of use of the European patent relative to a national patent being filed in several Member States? On what analysis, research and/or documents is your opinion based?

Do you think that the European patent is used by operators who had not in the past filed patents in European countries other than the country where they are based?

1.1.1.9. Are operators choosing to use the European Society?

Have statistics, official or otherwise, been published regarding the use of this instrument in your country? If so, what are they?

In the absence of statistics, in your opinion, what is the approximate percentage of use of this association, relative to national associations of the same kind? On what analysis, research and/or documents is your opinion based?

1.1.1.10. Are operators choosing to use the European Economic Interest Grouping?

Have statistics, official or otherwise, been published regarding the use of this instrument in your country? If so, what are they?

In the absence of statistics, in your opinion, what is the approximate percentage of use of this association, relative to national associations of the same kind? On what analysis, research and/or documents is your opinion based?

1.1.1.11. Are operators choosing to use the European Cooperative Society?

Have statistics, official or otherwise, been published regarding the use of this instrument in your country? If so, what are they?

In the absence of statistics, in your opinion, what is the approximate percentage of use of this association, relative to national associations of the same kind?
1.1.1.12. Are couples choosing to use the Franco-German optional matrimonial system?

If this first question does not concern you, is there a discussion about whether to join the Franco-German agreement on the optional matrimonial property system in your State?

1.1.1.13. In your opinion, for what reasons are professionals (or couples for the OI referred to in question II-Q10) choosing or not choosing these OIs?

C. How are optional instruments applied by judges, solicitors, legal practitioners and other key European Union bodies?

I. Information for professionals

1.1.1.14. Are legal professionals familiar with the OIs? Have symposiums been held in your country on one or more of these OIs?

Are magistrates trained in the OIs?

Is information on the OIs provided to legal professionals by their professional bodies (professional orders, supreme councils, etc.)?

Are other methods used to promote awareness of these OIs in your country?

II. Judges

1.1.1.15. Is there any litigation relating to the OIs?

1.1.1.16. Have there been many referrals to the ECJ for a preliminary interpretation ruling* relating to the optional instruments by judges in your country?

1.1.1.17. To your knowledge, have there been any national judicial interpretations that would distort the OI?

Have there been any interpretations of the OI that would have then been challenged by the ECJ?

1.1.1.18. Do judges in your country have a means of knowing about interpretations made by judges from other Member States regarding the same issue?

Are lawyers able to find out about and invoke these differing interpretations in their own conclusions?

1.1.1.19. Which methods of interpretation do national judges generally use to interpret optional instruments?

Do these methods differ between trial judges, appeal judges and Supreme Court judges?

III. Legal practitioners and optional instruments

1.1.1.20. Are solicitors familiar with these OIs?

Have they applied these optional instruments? If yes, how do they go about it?
1.1.1.21. Are lawyers familiar with these OIs? Do they use them? If so, how do they go about it?

1.1.1.22. Do commercial legal practitioners know about these OIs? Do they use them? If so, how do they go about it?

IV. Other relevant EU bodies

1.1.1.23. Are consumer associations or consumer-citizen organisations familiar with these OIs, particularly those relating to procedure? Do they recommend using them? Do they mention them on their websites?

D. Do optional instruments improve the situation?

1.1.1.24. For each OI referred to above, do you believe that the OI has improved the situation in cross-border relations for consumers and businesses? Please explain your response, particularly with regard to costs, simplicity, the neutrality of the OI, the legal certainty provided by the OI, and any other factor which you consider relevant.

1.1.1.25. Do you think that the OIs mentioned above facilitate the creation of the great single market, or do you think that this objective would be better served by a maximum or minimum harmonisation method?

1.1.1.26. Do you think that procedural OIs have facilitated settlement of cross-border disputes?

1.1.1.27. Have operators reported flaws with the OIs mentioned above? If yes, have these flaws completely put them off the OI or not?

E. Could optional instruments be adopted in areas other than those mentioned above?

1.1.1.28. Generally speaking, what would the added value be of optional instruments in other areas of civil law?

1.1.1.29. What would be the added value of an OI with regard to the rules of private international law?

1.1.1.30. What do you think about the opportunity of an OI in family law, either in family property law (in particular the optional matrimonial system for cross-border couples) or in the non-property aspects of family law (in particular for better management of the situation after the divorce of cross-border couples, or issues surrounding custody of the children of separated couples whether they were married or not)?

1.1.1.31. What do you think of the opportunity for an optional instrument in surety law? Specifically, would the Euro-mortgage be likely to improve cross-border credit?
1.1.1.32. What do you think of the opportunity for an optional instrument in property law?
Policy Department Citizens’ Rights and Constitutional Affairs

Role
Policy departments are research units that provide specialised advice to committees, inter-parliamentary delegations and other parliamentary bodies.

Policy Areas
- Constitutional Affairs
- Justice, Freedom and Security
- Gender Equality
- Legal and Parliamentary Affairs
- Petitions

Documents