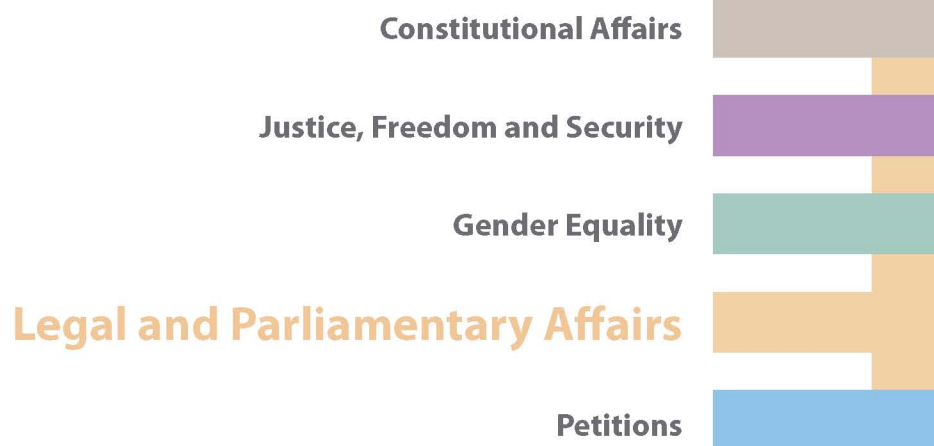


**DIRECTORATE-GENERAL FOR INTERNAL POLICIES**

**POLICY DEPARTMENT**

**CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS**



**An optional instrument on EU  
contract law:  
could it increase legal certainty  
and foster cross-border trade?**

**NOTE**





**DIRECTORATE GENERAL FOR INTERNAL POLICIES**  
**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND**  
**CONSTITUTIONAL AFFAIRS**

**LEGAL AFFAIRS**

**An optional instrument on EU contract law:  
could it increase legal certainty and foster  
cross-border trade?**

**NOTE**

**Abstract**

It seems likely that an optional instrument on European contract law could have some positive impact on cross-border trade, although its size remains very difficult to estimate. Whether an optional instrument will increase legal certainty depends on the degree to which the European legislator will succeed in making some very clear and transparent choices concerning scope, gap filling, mandatory rules, the modalities of opting in and the legal basis of the instrument.

This document was requested by the European Parliament's Committee on Legal Affairs.

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## LIST OF ABBREVIATIONS

<b>B2B</b>	Business to business
<b>B2C</b>	Business to consumer
<b>C2C</b>	Consumer to consumer
<b>CISG</b>	Convention on International Sales of Goods
<b>CJEU</b>	Court of Justice of the European Union
<b>DCFR</b>	Draft Common Frame of Reference
<b>PECL</b>	Principles of European Contract Law
<b>SE</b>	<i>Societas Europea</i>

## EXECUTIVE SUMMARY

Claims that an optional instrument on European contract law could make a significant contribution to overcoming the current economic crisis seem overly optimistic. However, it seems likely that the introduction of an optional instrument would have some structural positive economic impact, especially on cross-border trade.

How much legal certainty an optional instrument would bring depends crucially on a number of decisive choices that the European legal legislator will have to make concerning the scope of the instrument, the role of mandatory rules, how to opt into the instrument, its legal basis, and the interpretation, gap filling and further development of the instrument.

Whether other aspects of the introduction of an optional instrument, such as its contribution to an ever closer Union, the high level of consumer (and maybe SME) protection that it is expected to contain, its problematic relationship to the CISG and the quality of its content, should be regarded as an added value or a weakness of a '28<sup>th</sup> regime' is very much a matter of appreciation.

## 1. INTRODUCTION

This is an ad hoc briefing paper prepared at the request of the European Parliament for an Interparliamentary meeting with participants from the national Parliaments, on 'An optional instrument for EU contract law', organised by the Legal Affairs Committee of the European Parliament, on 27 October 2010, in Brussels.

According to the specific terms of reference the present briefing paper should deal with the subject 'An optional instrument on EU contract law: can it increase legal certainty and foster cross-border trade?',<sup>1</sup> and should provide critical replies to the following questions: 'What are the added value and weaknesses of a "28th regime", including by comparison to other policy options? Can it consolidate the internal market, by increasing legal certainty for consumers and businesses, and in what circumstances?'.

In view of the title of the request and the specific questions contained in it, and in view of the fact that for the same meeting other briefing notes will be prepared on related and partially overlapping questions it seemed advisable for this paper to concentrate first and foremost on the potential of an optional instrument for fostering cross-border trade (Section 2) and for increasing legal certainty (Section 3), and subsequently to address some selected other advantages and disadvantages of a 28<sup>th</sup> regime (Section 4).

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<sup>1</sup> Request for five *ad hoc* briefing papers for a Workshop on an optional instrument for EU contract law (Framework contract IP/C/JURI/FWC/2009-064/LOT1).

## 2. CROSS-BORDER TRADE

Whether an optional instrument on EU contract law can foster cross-border trade and consolidate the Internal Market are questions concerning the likely economic effects of an Optional Instrument.

There are serious limitations to the possibilities of answering these questions here. First, these are essentially empirical questions. However, the short notice for this ad hoc briefing note did not allow for any new empirical research. Moreover, the questions relate to the future rather than to past or present states of affairs which makes the questions insofar also speculative.<sup>2</sup> Finally, much will depend on what the optional instrument will look like and how it will be institutionally embedded. However, accepting these limitations some relevant observations can still be made.

### 2.1. The economic crisis

It has been suggested by the European Commission that an Optional Instrument can make a significant contribution to Europe's recovery from the current economic crisis. See, for example, the Green Paper, on p. 3:<sup>3</sup>

'An instrument of European Contract Law could help the EU to meet its economic goals and recover from the economic crisis.'

See also 'Project Europe 2030', a report to the European Council from a rather diverse 'Reflection Group', chaired by Felipe González, where the central focus is on overcoming the economic crisis and which recommends, among other things, to '[p]rovide citizens with the option of resorting to a European legal status (the "28th regime") which would apply to contractual relations in certain areas of civil or commercial law alongside the current 27 national regimes.'<sup>4</sup>

These seem to be rather bold claims which can safely be dismissed as overly optimistic: it seems unlikely that an optional instrument could play a key role in Europe's recovery from the economic crisis that followed the virtual collapse of financial markets across the globe. However, some more modest claims may be justified.

### 2.2. Structural advantage

While the conjunctural impact of introduction of an optional instrument of European contract law thus seems rather doubtful the European Union may derive some more modest but structural economic advantage from an optional contract law instrument. In the words of a City based British solicitor, 'An extra choice within Europe should, in principle, threaten no one, and may offer some commercial advantages.' Indeed, the prima facie case for at least some positive economic impact of an optional instrument seems rather solid, especially after the failure, by now almost certain, of the European Commission's attempt to create a level playing for retail business in Europe through the full harmonisation of consumer contract law.<sup>5</sup>

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<sup>2</sup> In its Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses, Brussels, 1.7.2010 COM(2010)348 final, p. 2, the European Commission promises that any legislative proposal following the consultation will be accompanied by an appropriate impact assessment.

<sup>3</sup> Cf. also Communication from the Commission, "A Digital Agenda for Europe" - COM(2010) 245, 19.5.2010.

<sup>4</sup> *Project Europe 2030: Challenges and Opportunities; Report to the European Council by the Reflection Group on the Future of the EU 2030* (members: Felipe González (Chairman), Lykke Friis, Mario Monti, Nicole Notat, Vaira Vike-Freiberga, Rem Koolhaas, Rainer Münz, Wolfgang Schuster, Jorma Ollila, Richard Lambert, Kalypso Nicolaïdis, Lech Walesa), May 2010, p. 41.

<sup>5</sup> *Ibidem*, p. 5.

In his recent *New Strategy for the Single Market* Mario Monti wrote:<sup>6</sup>

'Harmonisation through regulations can be most appropriate when regulating new sectors from scratch and easier when the areas concerned allow for limited interaction between EU rules and national systems. In other instances, where upfront harmonisation is not the solution, it is worthwhile exploring the idea of a 28th regime, a EU framework alternative to but not replacing national rules -. The advantage of the 28th regime is to expand options for business and citizens operating in the single market: if the single market is their main horizon, they can opt for a standard and single legal framework valid across Member States; if they move in a predominantly national setting, they will remain under the national regime. An additional benefit of this model is that it provides a reference point and an incentive for the convergence of national regimes. So far, the 28th regime model received little attention except for the European Company Statute. It should be examined further for expatriate workers or in the area of commercial contracts where a reference framework for commercial contracts could remove obstacles to cross-border transactions.'

In his report Monti limits his recommendation to B2B contracts. However, in relation to B2C contracts it has been suggested that, the 'blue-button idea',<sup>7</sup> where consumers (e.g. on the Internet) would be given the choice between the law of the place of business of the seller and European contract law (by clicking on a button representing the European flag), it could create a win-win situation where businesses could save so much in terms of transaction costs that they could accept a somewhat higher level of consumer protection than they would otherwise be prepared to accept, and still be better off.<sup>8</sup> Therefore, it seems that if the right level of consumer protection is found an optional instrument could yield economic benefits also for B2C contracts.

On the other hand, the economic costs of introducing an optional instrument (in terms, especially, of adaptation by economic and legal operators to the new rules) seem to be rather modest, certainly much lower than the costs of e.g. full harmonisation of important parts of consumer law.

## 2.3. Empirical evidence

Empirical findings that are invoked as evidence to the contrary are usually very general. For example, a recent article cautioned that, 'should harmonization be introduced by way of an optional code, inertia-related effects may result in poor subscription in this new code, undermining its *raison d'être*',<sup>9</sup> but this warning is not based on any specific research into the psychology of business men and women that are trying to do business (notably through the Internet) in a large number of Member States and are confronted on a daily basis with the implications of different contract law systems. Also, the author of the article 'accept[s] that the fact of harmonization may have some positive effect on transfrontier trading, but question[s] whether the margin of increase is worth the cost' without at all going into what the costs of introducing an optional instrument might be. This is an important point because, as said, the costs of introducing an optional instrument are likely to be rather modest. (No one ever claimed that the introduction on the Vienna Sales Convention was too costly). Therefore, even a small number of businesses that see use in an optional

<sup>6</sup> A New Strategy for the Single Market at the Service of Europe's Economy and Society, Report to the President of the European Commission José Manuel Barroso by Mario Monti, 9 May 2010.

<sup>7</sup> Cf. Hans Schulte-Nölke, 'EC Law on the Formation of Contract - from the Common Frame of Reference to the "Blue Button"', 3 *ERCL* (2007), 332-349.

<sup>8</sup> See Hugh Beale, 'The Future of the Common Frame of Reference', 3 *ERCL* (2007), 257-276, 271. Brigitta Lurger, 'The Common Frame of Reference/Optional Code and the Various Understandings of Social Justice in Europe', in: T. Wilhelmsson, E. Paunio, A. Pohjolainen (eds.), *Private Law and the Many Cultures of Europe* (Alphen a/d Rijn: Kluwer Law International, 2007), 177-199, 184, is sceptical.

<sup>9</sup> Gary Low, 'The (Ir)Relevance of Harmonization and Legal Diversity to European Contract Law: A Perspective from Psychology' 18 *ERPL* (2010), p. 285-307.

instrument may suffice to outweigh the costs. In sum, very general findings from cognitive and social psychology as to erroneous estimations, loss aversion and inertia, can hardly be regarded as evidence of the way in which (potential) e-shop owners are likely to respond to the availability of an optional code of contract law.

The optional instrument on contract law would be somewhat similar to the European order for payment procedure<sup>10</sup> and especially the European company (*Societas Europea*) statute.<sup>11</sup> As to the latter, the final outcome of 30 years of negotiations was much less of a self-standing 28<sup>th</sup> regime and more of a hybrid of national and EU law than was initially envisaged. The comprehensiveness and self-standing nature (in the sense that references to national laws or international instruments should be reduced as much as possible) that the European Commission seems to envisage in relation to the optional instrument on contract law<sup>12</sup> may turn out in the end to be no less problematic in the case of general contract law than it was in the case of the European Company Statute. However, in spite of its compromise nature and of the scepticism concerning its economic usefulness that was expressed by critics at its introduction, five years after its coming into effect the SE has proved to be very popular in some Member States.<sup>13</sup> Well known examples of successful SEs are Allianz, BASF, Porsche, Fresenius and MAN from Germany, SCOR from France, Elcoteq from Luxembourg and Strabag from Austria. In other Member States, however, the SE has not taken off.<sup>14</sup> Earlier this year, the European Commission launched a consultation with a view to improving the SE's legislative framework.<sup>15</sup>

Interestingly, one important reason for some companies to become an SE has been what the former French Minister of European affairs and former Justice of the French constitutional court Noëlle Lenoir referred to as the desire, for marketing reasons, to confirm a European identity.<sup>16</sup> A recent study conducted by Ernst & Young determining the main drivers for choosing the SE corporate form, found as the second driver - after the mobility of the SE - the European image of the SE.<sup>17</sup> This is well illustrated by the example of CEO Michael Diekmann of Allianz Group who, in an interview, explained the rationale behind Allianz's transformation into a European company in the following way: 'The legal step reinforces the reality of our day to day operations: Allianz is a European company at heart.'<sup>18</sup> Similarly, one could imagine that some businesses that aim at selling to consumers Europe-wide might wish to present themselves as truly European, or as post-national in the sense that they do not wish to be associated merely with one Member State. This potential business motive is not taken into account by studies that seek to apply very general insights from cognitive and social psychology to the very specific case of an optional instrument on European contract law.

Still more specifically, a 2005 survey conducted by Clifford Chance among 175 businesses across eight countries in the European Union revealed that over four-fifths of businesses would welcome an optional EU contract law to help overcome obstacles to cross-border trade within the EU (the score among SMEs was even as high as 88%).<sup>19</sup> A conclusion from

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<sup>10</sup> Regulation no. 1896/2006 of 12 December 2006 creating a European order for payment procedure.

<sup>11</sup> Regulation No 2157/2001 of 8 October 2001 on the Statute for a European company (SE).

<sup>12</sup> See Green Paper, p. 7.

<sup>13</sup> The SE became available for use on 8 October 2004. On 10 September 2009 a total of 431 SEs were registered. See Press release, IP/10/338, Brussels, 23 March 2010.

<sup>14</sup> Ibidem.

<sup>15</sup> Consultation on the results of the study on the operation and the impacts of the Statute for a European Company (SE); Consultation document of the services of the Internal Market Directorate General, 23.3.2010.

<sup>16</sup> Noëlle Lenoir, 'The Societas Europea (SE) in Europe: A promising start and an option with good prospects', 4 *Utrecht Law Review* 2008, 13-21, on p. 15. See also Noëlle Lenoir, *La Societas Europaea ou SE – Pour une citoyenneté européenne de l'entreprise, Rapports officiels, Ministère de la Justice* (Paris : Documentation Française, 2007).

<sup>17</sup> Ernst & Young Société d'Avocats, *Study on the operation and the impacts of the Statute for a European Company (SE)* (2008/S 144-192482 Final report), 9 December 2009, p. 12.

<sup>18</sup> See [https://www.allianz.com/en/press/news\\_dossiers/allianz\\_se/news2.htm](https://www.allianz.com/en/press/news_dossiers/allianz_se/news2.htm).

<sup>19</sup> *The Clifford Chance Survey – Does business want an EU contract law?* (2005), p. 2 and p. 13 respectively.

the survey was that 'business in the EU is very interested in a neutral, EU contract law, and would be likely to use it.'<sup>20</sup>

Obviously, some more narrow business interests might be adversely affected by the introduction of an optional instrument. For example, law firms specialising exclusively in expertise concerning their own national contract law would risk to loose part of their market share. However, it is not clear that such a market effect should worry the European legislator. As one practitioner recently put it, 'The visceral opposition of lawyers to anything that might be perceived as indirectly threatening the law with which they are familiar and from which they earn their living must, therefore, be tempered by the needs of their clients. Contract law does not, alas, exist for the benefit of lawyers, but for those who use contract law daily for business purposes. Ultimately, it is the needs of the users of the legal system that must prevail. The users of contract law are happy to have a European contract law, but not for it to replace all national laws.'<sup>21</sup>

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<sup>20</sup> Ibidem, p. 5.

<sup>21</sup> *European contract law: coming out* (Clifford Chance Client briefing July 2010), p. 3.

### 3. LEGAL CERTAINTY

Whether an optional instrument on EU contract law could increase legal certainty is a question of a somewhat different nature. Strictly speaking, legal certainty – like security – is a psychological notion: how certain do the legal actors feel concerning the state of the law? However, usually the concept is used in a more specific sense: how foreseeable will the application of the law be? Or even more specifically: how certain is it what exactly my legal position is at a given moment, i.e. whether I would win or lose the case if it came to litigation?

Again, in relation to an optional instrument of European contract law very much will depend on the particular characteristics of the instrument that eventually will be adopted and on the institutional environment within which it will have to operate. Important factors that can contribute crucially to making the application of the instrument more certain include certainty concerning scope (Section 3.1), mandatory rules (Section 3.2), how to opt into the instrument (Section 3.3), its legal basis (Section 3.4), and interpretation, gap filling and further development (Section 3.5).

#### 3.1. Scope

With a view to legal certainty it will be crucial to formulate as clearly and precisely as possible what the scope of the instrument will be. This includes, in the first place, its personal scope: does the instrument apply to both B2B, B2C and C2C? Are the questions as to legal capacity and legal personality left to national law? If separate rules are introduced for the protection of SMEs, will the category of SMEs be clearly defined?

Secondly, there is the material scope. Does the instrument clearly define to what types of contracts it is applicable? If the optional instrument contains rules of general contract law and rules on one or more specific contracts (e.g. sales) can the parties then only opt into the instrument if their contract is of one of these specific types (in the example: a sales contract)? Or can they also opt into the general contract law rules in the instrument even if their contract is of a type not specifically regulated in the instrument (e.g. lease) or not even in national law such as, in most Member States, distribution (innominate contracts)? What happens in the case of mixed or hybrid contracts such as hire-purchase?

Finally, the territorial scope: will the optional instrument only apply to cross-border contracts or also to internal contracts? Will cross-border contracts be clearly defined? Will the regulation introducing the optional instrument be well co-ordinated with the Rome I regulation?<sup>22</sup> If the scope of the optional instrument is limited to cross-border contracts what will be the consequences of Member States spontaneously offering a choice for the instrument for purely internal contracts? In particular, can the interpretation of the instrument for such cases differ from the autonomous interpretation given by the CJEU and can (or must) national courts in such cases refer to the CJEU in order to obtain preliminary rulings?<sup>23</sup>

For legal certainty it is not important, in the first place, what the answers to these questions will be but rather *that* there will be an answer and that the answer will be as clear, transparent and unambiguous as possible.

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<sup>22</sup> Regulation (EC) no 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

<sup>23</sup> The Court has held that it has jurisdiction to give preliminary rulings on questions concerning Community provisions in situations where the facts of the cases being considered by the national courts are outside the scope of Community law but where those provisions have been rendered applicable either by domestic law or merely by virtue of terms in a contract. See Case C-28/95 *Leur Bloem* [1997] ECR I-4161 (on directives); C-130/95 *Giloy* [1997] ECR I-4291.

### 3.2. Mandatory rules

In relation to the Statute for a European Company (SE) a recent report found that one of the main drivers for not choosing the SE corporate form was uncertainty, in particular 'uncertainty resulting from the fact that behind the unified image of the SE, many different national legislations apply and uncertainty remains as to the legal effect of directly applicable law and the interface between the latter and applicable national law'.<sup>24</sup> Clearly, a similar problem could arise in relation to the optional instrument.

An optional instrument, whatever its exact legal form and modalities, will not operate in a vacuum. On the contrary, it will be embedded in a regulatory environment that changes from country to country and it will not be easy to make it become as self-standing an instrument as the Commission seems to envisage. For example, its application will crucially depend on the local rules of civil procedure including the fact/law distinction and the law of evidence. Moreover, there is the question of mandatory rules. In the Green Paper the Commission suggests that for the optional instrument to be successful the applicability of national mandatory rules should be limited. The Commission writes: 'To be operational from an internal market perspective, the optional instrument would have to affect the application of the mandatory provisions, including those on consumer protection. Indeed, this would constitute the added value compared with the existing optional regimes, such as the Vienna Convention, which cannot restrict the application of national mandatory rules.'<sup>25</sup> However, it will not be easy to make certain from the outset what national mandatory rules will remain applicable. This would be somewhat easier (and the outcome somewhat more predictable) if the optional instrument became applicable as a matter of private international law, i.e. via the Rome I regulation or via specific conflict of laws rules along the same lines in a regulation introducing the instrument. In that case, the application of national mandatory rules would be limited to 'overriding mandatory rules' (art. 9 Rome I). However, in relation to consumer protection, pursuant to art. 6, Para 2 Rome I, 'a choice of law may not have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable'. This means that without a specific amendment to Rome I (which however seems politically unviable) national rules providing further going protection to consumers may continue to surprise businesses selling abroad. Partly for this reason, the Commission seems to prefer the optional instrument becoming applicable as a matter of national law. That would solve the problem of potential legal uncertainty coming from art 6 Rome I (because then by definition there would be no further going consumer protection provided by national law), but conversely, new legal uncertainty would arise concerning other mandatory rules. Because it is not self-evident if the instrument becomes the applicable law as a matter of national law, that the operation of mandatory rules should be limited to internationally mandatory rules in the sense of art. 9 Rome I ('overriding mandatory rules').

This is not the place to discuss the substantive merits of one solution or the other e.g. in terms of the desirability of deregulation. What matters here is that for the success of an optional instrument it is crucial that there be as much clarity as possible as to what solutions are chosen concerning the effect of national mandatory rules and what exactly the implications of these choices are.

### 3.3. How to opt in?

A third potential source of legal uncertainty is lack of clarity as to how the parties can opt into the optional instrument. Does the choice have to be made expressly or is an implied choice sufficient? Can the choice be made in standard terms or does it have to be

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<sup>24</sup> Ernst & Young Société d'Avocats, *Study on the operation and the impacts of the Statute for a European Company (SE)* (2008/S 144-192482 Final report), 9 December 2009, p. 14.

<sup>25</sup> Green Paper, p. 8-9.

individually negotiated? Is the choice informal or does it have to be in writing? And for these questions, does it make a difference whether the contract is a B2C or a B2B contract?

If the optional instrument becomes applicable through a choice of law in the sense of the Rome I regulation any specific rules concerning the opt-in mechanism will have to be closely coordinated with Rome I. However, if the instrument becomes applicable as a matter of national law does that also mean that the modalities of the choice are left to the Member States, or if they are regulated by the regulation do the Member States remain free to introduce additional requirements (e.g. with a view to protecting consumers or minors)?

A final question in relation to opting-in that will have to be solved (but where?) is whether for B2B sales contracts opting into the optional instrument amounts to an implied opting out of the CISG if that would be the otherwise applicable law (which is the case in most Member States but not e.g. in the United Kingdom). Pursuant to art 6 CISG, the parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions. Does a choice for the optional instrument amount to a derogation in the sense of art. 6 CISG? And if the scope of the instrument turns out to be in some respects more limited than that of the CISG does the CISG remain applicable to that extent or does the otherwise applicable national law then regulate that remaining part?

### 3.4. Legal basis

Another source of possible legal uncertainty, temporary but nevertheless potentially devastating, is the legal basis for an optional instrument. The Green Paper does not address the issue at all but if the instrument that will be adopted is in fact *ultra vires*, or if there is uncertainty as to its legality, then until the issue is finally resolved this will remain an important source of legal uncertainty. In practical terms, two possible challenges can be awaited. First, challenges submitted to the CJEU via motions for preliminary rulings. Secondly, *ultra vires* challenges in certain national constitutional courts.

Although an optional 28<sup>th</sup> regime would be much more in line with the principles of proportionality and subsidiarity, somewhat ironically it is easier to find a legal basis for a non-optional European code (with the same scope) because an optional instrument would not lead to harmonisation.<sup>26</sup> Explicitly in this sense Diana Wallis MEP: 'It is about choice; not harmonisation.'<sup>27</sup> A way out could be to organise the choice for the optional instrument not as a choice of law (in the sense of private international law) but as an option made available in each Member State, as a result of a harmonisation measure. This latter option seems indeed to be envisaged by the European Commission in its Green Paper.

Choices in relation to the optional instrument that can make the legal basis more certain include the following. In relation to the personal scope, C2C contracts seem to be less directly affecting the Internal Market (but see eBay and similar). As to the material scope, the inclusion of general tort law (let alone negotiorum gestio) or certain specific contracts (e.g. donations) is likely to complicate matters.

### 3.5. Interpretation, gap filling and further development

It will have to be made absolutely clear that the optional instrument will have to be interpreted autonomously, also by national courts.

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<sup>26</sup> See The legal basis for an optional instrument on European contract law; Short study for the European Parliament on the different options for a future instrument on a Common Frame of Reference (CFR) in EU contract law, in particular the legal form and the legal basis for any future optional instrument, in accordance with Addendum to specific contract No IP/C/JURI/FWC-SC/2006-211/LOT3/C1/SC1 implementing Framework Service Contract No IP/C/JURI/FWC/2006-211/LOT3/C1 (Final Report – 31 October 2007). In the same sense *European contract law: coming out* (Clifford Chance Client briefing July 2010), p. 4.

<sup>27</sup> Diana Wallis MEP, 'Support for contract law', *European Voice*, 1 July 2010.

Especially in the beginning there will be many unsettled questions. The European Commission could contribute to increasing legal certainty by setting up a data base in several languages which includes all the cases from all the Member States that have been decided on the basis of the optional instrument. Further, the Commission could organise formation courses for Member State judges.

Another pressing question, of crucial importance for legal certainty, is whether the CJEU will realistically be able to deal with the workload of referrals for preliminary rulings in relation to the optional instrument. Maybe the time has come for a specialised civil chamber of first instance.

A related question is what should happen in the case of gaps, i.e. when a question arises on a subject which is within the material scope of the instrument but for which the instrument provides no answer. It is important for the contracting parties to know as much as possible what to expect in terms of gap filling and further development of the optional instrument by the courts. An important conclusion from the Clifford Chance survey was that predictability is regarded as an important factor in developing good contract law (albeit a less important one than fairness): 'Business wants to know where it stands legally.'<sup>28</sup>

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<sup>28</sup> *The Clifford Chance Survey – Does business want an EU contract law?* (2005), p. 5.

## 4. OTHER ADDED VALUE AND WEAKNESSES OF A “28<sup>TH</sup> REGIME”

In addition to its potential contribution to improving legal certainty and enhancing cross-border trade what other added value might a 28<sup>th</sup> (or rather 29<sup>th</sup>, if we count Scots law separately<sup>29</sup>) regime have? And, conversely, what might be other weaknesses? Here also the answer will very much depend on the specific characteristics of the optional instrument that would be adopted. Moreover, added value and weaknesses are essentially normative categories on which the stakeholders - who, in the case of European contract law, include all European citizens - will differ.

### 4.1. An ever closer Union

Pursuant to the Lisbon Treaty the Member States are ‘resolved to continue the process of creating an ever closer union among the peoples of Europe’.<sup>30</sup> Clearly, an optional instrument on European contract law would be a step in that direction. It could be regarded as a symbolic step towards a true Europe polity, building a European civil society and creating a common European identity,<sup>31</sup> and reinforcing European citizenship.

Moreover, an optional instrument could also be regarded as a further building block of a developing multi-level system of European private law. In this vein one could also think of further ways in which an optional instrument could be used. It could become a source of inspiration for the CJEU and for national courts when interpreting and further developing European and national private law, even in cases where the instrument is not the applicable law. Such optional-instrument-friendly interpretation would have a harmonising and integrating effect. Similarly, once law students will be trained not only in national contract law but also in the optional instrument this is likely, at least in international contexts, to enhance their propensity to be inspired by the European instrument, even beyond the specific cases of contracts where the parties have opted into it.

Whether this is an added value is, of course, a question on which Euro-enthusiasts and Euro-sceptics will differ. Because at the same time the introduction of an optional instrument might affect certain national interests. First, very concretely parties who opt into a European contract law instrument insofar opt out of the national law that would otherwise be applicable. This makes the original national law pro tanto less relevant. And in the long run massive opting out of national law may affect the prestige of a national system. However, to what extent this would be a real loss remains, of course, a matter of judgment. After all, such massive abandonment of a national contract law system would be based on a free choice made by citizens who apparently are dissatisfied with the state of their own law. They merely would be voting with their feet as it were. Therefore, on a different view one could also say that the presence of the alternative of an optional instrument would provide national legislators with incentives for keeping their law attractive.<sup>32</sup>

Secondly, any contribution to an ever closer Union is, of course, bad in the eyes of those who think that contract law simply should remain national, e.g. because the national civil code or the common law is an important part or expression of national identity. From such an essentially nationalist point of view an optional instrument, whatever its specific nature or content, would be bad simply because it represents more Europe.

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<sup>29</sup> See Lord Jonathan Mance, ‘The Common Frame of Reference’, 18 *ZEuP* (2010), 457-462.

<sup>30</sup> See Preamble and art. 1 TEU.

<sup>31</sup> See Hugh Collins, *The European Civil Code: the way forward*, (Cambridge, Cambridge University Press, 2008), 217. See also Bénédicte Fauvarque-Cosson, ‘Theoretical foundations of European private law: the need for codified guiding principles and model rules in contract law’ (forthcoming).

<sup>32</sup> On the risks of a race to the bottom and social dumping see the next section.

## 4.2. A high level of protection

According to the Commission's Green Paper, 'the optional instrument would need to offer a manifestly high level of consumer protection'.<sup>33</sup> Clearly, this issue is closely related to the Consumer Rights Directive which the current Belgian presidency of the EU is confident will be adopted within this year. Although the European Commission proposed full harmonisation for all the subjects dealt with in the proposal it now seems that only on a limited number of subjects (mainly relating to information duties and withdrawal rights) will there actually be full harmonisation (targeted full harmonisation) whereas the remainder (which includes such important subjects as unfair terms and sales) will continue to be regulated only on a minimum harmonisation basis. Obviously, on any fully harmonised subjects an optional instrument would contain the same level of protection (indeed, most likely, even identical rules). However, on the minimum harmonisation subjects the instrument is expected to provide a significantly higher level of consumer protection than the minimum required by the directive. This means that for citizens from Member States that stick to the minimum or do provide protection that does not go significantly beyond the minimum a choice for the optional instrument would increase their level of protection. Those consumers would certainly derive an added value from the optional instrument if the other party (i.e. the professional) accept a choice for the optional instrument.

However, there is also a more pessimistic scenario. It has been argued that an optional instrument may lead to a race to the bottom and social dumping. First of all, even if the optional instrument will contain consumer protection of a very high level it is unlikely that the 28<sup>th</sup> regime, compared to all other 27, will consistently provide the highest level protection on all subjects. Therefore, for some consumers a choice for an optional instrument will inevitably lead to some loss of protection on at least some subjects. The degree will differ from country to country. But clearly consumers from Member States generally having a high level of consumer protection not only are unlikely to have much to gain but, on balance, would almost certainly stand to lose some protection when opting into a self-standing optional instrument.

This brings us to the question who is going to make the actual choice. Consumer protection groups argue, quite rightly, that the whole *raison d'être* of consumer protection is the unequal bargaining position that consumers are in, and that in B2C contracts in all likelihood the choice for or against the optional instrument will effectively be made by the professional counter party. And for those professional sellers it will be only rational to opt into the optional instrument if they have something to gain from it. When may this be the case? First, the most important expected gain for traders from the availability of the optional instruments is that it will become possible to save important costs by having to deal with only one legal system which allows for having pan-European standard terms and legal advice from external lawyers (or from their own legal department) specialising in only one legal system. This will be especially important for traders doing business in many different Member States. For them, this gain could be so significant that even if the optional instrument contains a higher level of consumer protection than the laws of some of the Member States that they are doing business in, they would still gain more from the reduction of costs associated with one single regime than they would gain from not opting into the instrument in a not so consumer-friendly Member State. This is expected to be especially the case for on line businesses (e-shops), especially start-ups.

Another reason may be consumer confidence. To the extent that offering to sell abroad (maybe from a country far away) under the optional instrument will be regarded as some sort of quality label for honesty and reliability, this may be favourable for the trader even if the level of protection in the instrument is higher than that in the law that would otherwise be applicable.

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<sup>33</sup> Green Paper, p. 7. See also Article 12 of the Treaty on the Functioning of the European Union.

However, outside these two cases the typical reason for a trader to opt into the instrument will be that the level of protection in the optional instrument will be *lower*. And some fear that it will be mainly in these cases that the instrument will actually be opted into. And because this seems to them to be the most realistic scenario, they (quite consistently) fear that the European legislator, which for political reasons wishes for the optional instrument to be a success, will resort to a rather low level of consumer protection, in order to make the instrument attractive in the eyes of the parties that, one way or another, will determine the choice for or against the optional instrument, i.e. the traders. Some fear that the European legislator will even go so far in this strategy that the outcome can be regarded as social dumping.<sup>34</sup> Of specific significance in this connection is, of course, the question to what extent the optional instrument will be 'self-standing'. If national rules of consumer protection and other national rules that have a role in protecting weaker parties become inapplicable and at the same time are not replaced by similar rules *within* the instrument, then insofar an EU regulation introducing an optional instrument would amount to deregulation, not in the narrow sense of abolishing mandatory rules but in the socially equally relevant sense of a legal relationship being subjected to fewer mandatory rules than it would be if it was still governed entirely by national contract law.

On several occasions the Commission has made clear that the optional instrument should be especially useful for SMEs. To the extent that the instrument will contain protective rules for SMEs, either through specific categorical SME protection or through extending certain types of consumer protection to SMEs (or by turning specific B2C rules into general contract law rules) this would certainly be regarded by certain SMEs as an added value of the optional instrument. Moreover, another potential benefit could be the new entries into the Internal Market of businesses that only dare to embark upon cross-border trade when there are appropriate safety nets. Others would, however, contest such rules e.g. on the ground that all businesses should be able to stand on their own feet.

### 4.3. International aspirations

The scope of an optional instrument is likely to include international commercial contracts for the sale of moveable goods (in other words, cross-border B2B sales of goods). We saw that the concurrence of the CISG opt-out regime and the opt-in regime of an optional instrument may lead to legal uncertainty. To the extent that it will be possible to resolve the issue in favour of the optional instrument this will be a gain for European integration. However, at the same time this would be a loss for global integration. Insofar, the European Union could be accused, with some reason, of turning its back on the international community and of isolationism. According to the preamble to the Vienna Sales Convention, the states that are parties to that convention have agreed to it, 'considering that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States' and 'being of the opinion that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade'. Arguably, the aspirations expressed in these considerations would be undermined by a European *Alleingang*. The importance of this argument would become more relative to the extent the scope of the optional instrument would be much broader and sales would be merely one among many other subjects dealt with by the instrument. In the latter case, the optional instrument arguably could be regarded as the next step in a process that started with CISG (or rather with the Hague conventions) and led to the UNIDROIT principles, the PECL, the DCFR and now the optional instrument, which could serve as a model for further international approximation of private laws, beyond sales. The European Commission, in its Green Paper suggests such a potential model role.<sup>35</sup>

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<sup>34</sup> J. Rutgers, 'An Optional Instrument and Social Dumping', *European Review of Contract Law* (2006): 199–212.

<sup>35</sup> See Green Paper, p. 4.

#### 4.4. Quality

It goes without saying that an optional instrument of high quality would certainly be an added value whereas low quality would obviously be a weakness. Moreover, doubts as to the quality of the optional instrument could, of course, seriously affect its reception and success. Two types of concern have been expressed in this regard.

First, the 'academic quality' of the Draft Common Frame of Reference has been criticised by a group of German scholars.<sup>36</sup> (In contrast, Lord Mance regards the DCFR as 'a wonderful piece of work'.<sup>37</sup>) Earlier this year the European Commission set up an 'Expert Group on a Common Frame of Reference in the area of European contract law' which is meant 'to assist the Commission in the preparation of a proposal for a Common Frame of Reference in the area of European contract law'.<sup>38</sup> However, also this decision has met with criticism from a (partly overlapping) group of German scholars who published a letter to the editor in the *Frankfurter Allgemeine Zeitung* in which they contested the composition of the expert group.<sup>39</sup>

Secondly, there is a worry that even if the expert draft is going to be good enough once it will go through the hands of the European legislator and become the object of political bargaining and compromise the outcome will become less attractive. The experience with the SE reinforces this concern.<sup>40</sup> On the other hand, however, lack of democratic legitimacy is likely to be regarded by many as a fatal weakness of any optional instrument.

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<sup>36</sup> Horst Eidenmüller, Florian Faust, Hans Christoph Grigoleit, Nils Jansen, Gerhard Wagner and Reinhard Zimmermann, 'The Common Frame of Reference for European Private Law—Policy Choices and Codification Problems', *Oxford Journal of Legal Studies*, 28 (2008), 659–708, on p. 660.

<sup>37</sup> Lord Jonathan Mance, 'The Common Frame of Reference', 18 *ZEuP* (2010), 457–462.

<sup>38</sup> Art 2 (Task), Commission decision of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the area of European contract law (2010/233/EU), *OJ* 27.4.2010, L105/109

<sup>39</sup> Jürgen Basedow, Horst Eidenmüller, Christoph Grigoleit, Stefan Grundmann, Nils Jansen, Eva-Maria Kieninger, Heinz-Peter Mansel, Wulf-Henning Roth, Gerhard Wagner, Reinhard Zimmermann, 'Ein europäisches Vertragsrecht kommt - aber zu welchem Preis?' *Frankfurter Allgemeine Zeitung*, 7 July 2010.

<sup>40</sup> On the process, see Noëlle Lenoir, 'The Societas Europea (SE) in Europe: A promising start and an option with good prospects', 4 *Utrecht Law Review* 2008, 13–21.

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