

3. The 28th regime – an alternative allowing less lawmaking at Community level
Own-initiative opinion – EESC 758/2010 - May 2010
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DG JUST - Mrs REDING

Main points of the EESC Opinion	Commission Position
<p>The EESC recognises the great potential of an optional instrument as a way for removing internal market barriers stemming from the fragmentation of national laws of the Member States. It elaborates on the advantages of such an instrument and recognises potential problems associated with the implementation of such an instrument.</p> <p>In this context, the EESC considers a need for in-depth discussion at different levels – academic, stakeholders and EU institutions – with a view to contributing to the completion of the Single Market.</p> <p>In particular, the EESC asks the Commission to pursue the study of this subject at both the theoretical and practical levels, in order to define the conditions for its feasibility and usefulness.</p>	<p>The Commission welcomes the EESC's opinion on the optional instrument and shares EESC's assessment of its potential added value. The idea for optional instruments has been embraced by independent studies, such as the Monti Report, the Gonzales Report and by political authorities, such as the European Parliament. It is also foreseen as a measure in the Commission's Europe 2020 Strategy. In Commission's view an optional instrument could be particularly relevant for the European contract law. It would be a "neutral" additional and voluntary regime that would co-exist in parallel to the national contract laws. It would not interfere with national law and could be chosen by business only when it better serves their interests, for example in cross-border contracts.</p> <p>The Commission agrees with the EESC on the need for an in-depth discussion on the usefulness and appropriateness of an optional instrument on a case-by-case basis. In this context, the Commission refers to the ongoing consultation on the future of European contract law for consumers and businesses following the publication of the Green paper on policy options for progress towards a European Contract Law for consumers and businesses (COM 348(2010)). The Green Paper sets out various policy options for the way forward including an optional instrument for European contract law.</p>
<p>In EESC's opinion an optional instrument would allow parties to a contract to enter into transactions throughout the European Union on the basis of one contract law regime. Barriers to the Internal Market such as legal risks and costs created by the differences in national legal systems either for consumers or businesses would be overcome.</p> <p>Furthermore, it would offer advantages when compared with unification or harmonisation</p>	<p>In Commission's view the co-existence of 27 contract law regimes in the EU makes cross-border transactions more complex and costly. This situation is particularly disadvantageous for SMEs. European companies miss out on the economies of scale and efficiency gains which the Internal Market offers. Weaker business competition leads to a restricted product choice, higher prices and lower quality for European consumers.</p> <p>The Commission considers the potential of an optional instrument as complementary to the</p>

<p>of national law.</p>	<p>harmonisation of national contract law in removing the negative effects of legal fragmentation. In particular, in the area of consumer contract law, the Commission continues to support the Proposal for a Consumer Rights Directive,. However, the Commission is considering a complementary optional instrument among other solutions for areas, where full harmonisation is not possible (e.g. general contract law).</p>
<p>The EESC suggests that an optional instrument would be particularly helpful in areas where private international law (Rome I) forbids or restricts the free choice of law by the parties, as is the case with transport (Article 5 Rome I), consumer (Article 6 Rome I), insurance (Article 7 Rome I) and employment (Article 8 Rome I) contracts..</p> <p>In particular, the EESC considers the case for an optional instrument applicable to financial services (banking and insurance law) and consumer sales (in particular internet sales).</p>	<p>The Commission recognises strong arguments in favour of limiting in a first stage an optional instrument to specific areas of contract law, in particularly those, which are the most common and relevant from the internal market perspective – e.g. the contract for sale of goods.</p> <p>Contracts in the financial services area would require special consideration as those are of a very specific and technical nature, particularly when concluded between professionals, and need a prudent approach as the legal environment in these areas changes rapidly.</p>
<p>In the opinion of the EESC the choice of the optional instrument should be granted even in "purely domestic cases". As a result, entrepreneurs could base all their transactions – domestic as well as international – on one set of contractual rules.</p>	<p>The Commission will decide on the need for an optional instrument, its precise scope and structure following the analysis of responses to the Green Paper and an economic assessment of the different options.</p>
<p>The EESC underlines the need for ensuring that the optional instrument offers high protection to the weaker parties, especially consumers.</p> <p>Furthermore, in the EESC's opinion, the instrument should not be used to bypass mandatory provisions of national law. Instead, the incentive to choose it would be created by the possibility to use contract terms throughout the Community without any adaptations to national law but based on a higher level of protection than the average legislation of Members States.</p>	<p>The Commission recognises that any instrument in European contract law must provide an appropriately high level of protection to weaker parties including consumers.</p> <p>By its very nature, an optional instrument could only constitute a sensible solution to the problems stemming from regulatory divergences if it is chosen by the contracting parties in the first place. In particular, consumers should be reassured when entering into a contract on this basis that their rights will not be compromised. Therefore, the optional instrument would need to offer a high level of consumer protection.</p>

<p>The Draft Common Frame of Reference submitted recently to the European Commission provides the European legislator with a model which it could use when enacting an optional instrument.</p>	<p>The Commission agrees that the Draft Common Frame of Reference constitutes an impressive academic work, which could be the starting point for elaborating an optional instrument. However, any potential instrument in European contract law would need to take into consideration other research work conducted in this area as well as the Union acquis.</p>
<p>The EESC recommends that in their ex ante Impact Assessments either the Commission or the EP consider the "option" of adopting a 28th Regime for each new legislative initiative; starting with the on-going revision of the "Package Travel" Directive. This kind of assessment should carefully scrutinise the potential impact that optional legislation could have on current mandatory rules in place in national laws.</p>	<p>Impact assessment is a process that prepares evidence for political decision-makers on the advantages and disadvantages of possible policy options by assessing their potential impacts. Policy options must be closely linked both to the causes of the problem and to the objectives and they must respect the principles of subsidiarity and proportionality. Whether the suggested "option" of adopting a 28th Regime is a relevant, feasible and effective solution can only be assessed on case-by-case basis.</p> <p>The revision of the Package Travel Directive replies to the recent changes in the package travel market. It aims at increasing the number of consumers protected and closing the existing grey zones where the level of protection has to be determined on case by case basics. The adequate level of consumer protection and the level market playing field for businesses can only be achieved by compulsory measures. An optional instrument would neither close the existing legal grey zones nor would it contribute to levelling the market playing field. There is also a risk that it could be used by traders to bypass some more stringent national rules to the detriment of consumers.</p>