European Economic and Social Committee

INT/499
The 28th regime – less lawmaking

Brussels, 27 May 2010

OPINION

of the
European Economic and Social Committee
on
The 28th regime – an alternative allowing less lawmaking at Community level
(own-initiative opinion)

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On 16 July 2009, the European Economic and Social Committee, acting under Rule 29 (2) of its Rules of Procedure, decided to draw up an own-initiative opinion on

The 28th regime – an alternative allowing less lawmaking at Community level.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 30 March 2010.

At its 463rd plenary session, held on 26 and 27 May 2010 (meeting of 27 May), the European Economic and Social Committee adopted the following opinion by 124 votes to 8 with 20 abstentions.

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1. Observations and recommendations

1.1 In recent times, on many occasions and during numerous events, several voices from civil society have raised the question as to whether an optional regime could be adopted as an alternative to the traditional way of harmonising legislation in specific areas, thereby fully regulating certain kinds of legal relationships, namely civil contracts.

1.2 Also, references to the possible use of a so called 28th regime began to appear in various Commission and EP documents, mainly relating to important subjects where the desired full harmonisation was expected to be neither easy nor achievable.

1.3 The EESC has expressed its support in several opinions for an in-depth study of this mechanism and its possible application in specific domains.

1.4 Apart from the undertaking initiated with the EESC own-initiative opinion on "European Insurance Contract"[1] and carried out by the Project Group "Restatement of European Insurance Contract Law" with the recent publication of the "Principles of the European Insurance Contract Law (PEICL)" in the framework of the "Common Frame of Reference" exercise, only on a few occasions has a similar approach been followed by the European legislator in the area of company law, intellectual property law and international law.

1.5 However, no in-depth discussion on the nature, object, legal framework, areas of application, advantages and difficulties of such an instrument and its possible contribution to the completion of the Single Market has occurred until now.

1 OJ C 157, 28.6.2005, p. 1.

1.6 For this specific purpose, and in line with its opinion on the Proactive Law Approach[2], the EESC has decided to take forward this own-initiative opinion accompanied by a public hearing where representatives from stakeholders, academics, public officials from different Member States and the Commission have had the opportunity to express their views.

1.7 Taking into consideration most of the written material and opinions expressed in the last few years and in particular those voiced during the hearing, the EESC recognises that some fundamental parameters should be considered when defining and designing an optional regime which offers advantages in terms of "Better Lawmaking" and of a simplified, understandable and user-friendly regulatory environment.

1.8 The optional regime should therefore:

a) be conceived as a "2nd Regime" in each Member State, thus providing parties with an option between two regimes of domestic contract law;
b) be defined at EU level and enacted by EU regulations;
c) facilitate interaction between parties in the drafting process;
d) contain provisions of mandatory law ensuring a high level of protection for the weaker party, at least similar to those granted by the EU or national mandatory rules, applicable whenever necessary;
e) limit the option of the parties to a choice of the entire instrument thus avoiding the possibility of "cherry-picking".

1.9 The EESC has proposed some new paths for future discussion on the possible legal basis for the implementation of this lawmaking mechanism, having in mind that the choice of the legal basis may depend on the field of application.

1.10 The EESC has elaborated on the many advantages of the use of this instrument, e.g.:

a) It would allow parties to a contract to enter into transactions throughout the European Union on the basis of a single regime of contract law. Barriers to the Single Market, such as legal risks and costs created by the differences in national legal systems would automatically be overcome;
b) It would leave the decision on its application to the market and would therefore only be chosen where interested parties considered it to be an advantage;
c) The individual legal culture of each Member State would be left untouched, making it more acceptable in the political arena;
d) Well-designed and implemented by EU regulations, it would allow parties to use it even in purely domestic situations;
e) Courts could not treat it as a chosen "foreign" law. Therefore, principles such as "*iura novit curia*" would apply and access to national Supreme Courts as well as the ECJ would

2 OJ C 175, 28.7.2009, p. 26.

be unrestricted, which is often not the case when foreign law or general principles are applied; equally, institutions offering out-of-court complaint and redress mechanisms could not refuse to hear a case using the argument that it would be submitted to foreign law.

1.11 The EESC is well aware of some difficulties in its implementation:

a) the inter-relation between the optional instrument and European private international law, not least as far as rules expressing national public policy (*ordre public* – Article 21, Rome I Regulation 593/2008) are concerned;
b) even an optional sectoral instrument requires a set of general principles of private law;
c) an optional instrument covering only private law issues cannot cover problems of tax law;
d) consumers must be adequately informed about the nature, advantages and disadvantages of an optional instrument;
e) this "28th regime" should not apply to labour law or employment contract law in force in the Member States.

1.12 The EESC is thus convinced that this discussion should be pursued in greater depth at different levels – academic, stakeholders (professionals, consumers, etc.), research institutes and EU institutions, mainly in the framework of the "Better Regulation" exercise – with a view to contributing to the completion of the Single Market.

1.13 The EESC thus 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.

1.14 The EESC also 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; the same evaluation should apply to proposals already in preparation, 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. It must assess the risk of it being used to bypass national mandatory rules to the detriment of weaker parties.

2. Introduction - purpose of the opinion

2.1 Better law making and, whenever possible, less regulation, is one of the aims of the Single Market. All the initiatives under the "Better Regulation" exercise developed by the Commission and the European Parliament and fully supported by the EESC in several opinions were aimed at finding the best ways to make the legislative environment more user-friendly and understandable to business, workers and consumers.

2.2 A relatively new idea on a better and more consistent way of regulating important matters at EU level occurred for the first time in an EESC opinion on "The European Insurance

Contract"[3]. This opinion proposed that legislation on European insurance contract should be based on an optional system which provided an alternative to harmonising different national laws.

2.3 In the framework of the CFR (Common Frame of Reference) the Project Group "Restatement of European Insurance Contract Law" developed and presented to the Commission the only structured proposal for a model of an optional instrument in the EU so far.

2.4 In recent years, lawyers, academics and some civil society stakeholders have suggested during numerous events that this method could be a useful alternative to the traditional method of harmonisation in specific areas such as the pension system or financial services.

2.5 The Commission has gradually begun referring to the possibility of using the "28th regime" method in various areas and the EESC has expressed support for this in a number of opinions[4].

2.6 However the concept, nature and the framework of its application have yet to be properly defined; it is particularly important to show that it is not only feasible but that it also offers advantages in terms of "Better Lawmaking" and of a simplified, understandable and user-friendly regulatory environment. That is the aim of this own-initiative opinion.

3. The concept of the "28th Regime"

3.1 Nature and characteristics

3.1.1 The terms "28th Regime" and "Optional Instrument", which are often used synonymously, try to give a graphic image of a European Contract or Private Law which would not override national law but would provide for an alternative by leaving its application to the discretion of the parties to the contract.

3.1.2 Although commonly used in several papers from EU institutions and in most of the articles published on the subject, the expression "28th Regime" may, however, be somewhat misleading because it may be considered to be a regime of "foreign" law as opposed to the 27 "national" contract laws of the Member States, which may be considered as "domestic" laws.

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3 OJ C 157 of 28.6.2005, p.1.

4 OJ C 157, 28.6.2005, p.1, rapp. Pegado Liz.; OJ C 318, 23.12.2006, p. 200, rapp. Von Fürstenwerth; OJ C 65, 17.3.2006, p. 134, rapp. Ravoet. OJ C 309, 16.12.2006, p. 26, rapp. Iozia.; OJ C 65, 17.3.2006, p.13, rapp. Burani.. OJ C 27; 3.2.2009, p.18, rapp. Grasso.; OJ C 151. 17.6.2008, p.1, rapp. Iozia. OJ C 175, 28.7.2009, p. 26, rapp. Pegado Liz.

3.1.3 Therefore, it appears to be more appropriate to talk about a "2nd Regime"[5] of private law in all Member States. This term makes clear that a European Optional Instrument would penetrate the domestic laws of the Member States like any other source of European Law. In short: A "2nd Regime" would provide parties with an option between two regimes of domestic contract law, one enacted by the national legislator, the other by the European legislator.

3.1.4 This kind of a "2nd Regime" could be used by parties for doing business throughout the European Union. Therefore, parties to a contract would not have to deal with 27 national legal regimes in the Member States but could base their transactions on a common European private law regime. This would be helpful because neither of the parties to a contract would have to accept the application of a law it considered as foreign law.

3.1.5 A "2nd Regime" 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. The optional instrument could even apply to internationally mandatory rules (Article 9 Rome I) provided that it takes sufficient care of the general interest protected by such rules[6]. However, this 2nd regime should not apply to labour law or employment contracts in force in the Member States of the European Union

3.1.6 Therefore, a "2nd Regime" would allow business in the whole Community to be based on one and the same regime of contract law even in areas where private international law provides for the mandatory application of the rules protecting the weaker party.

3.1.7 An optional instrument of this kind has been mentioned in Recital 14 of Rome I which reads: "*Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, …, such instrument may provide that the parties may choose to apply those rules.*"

3.1.8 Since an optional instrument would be a 2nd Regime of contract law within each Member State's law, 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 the 2nd Regime which would help to further reduce legal transaction costs.

3.1.9 Another characteristic of a "2nd Regime" would be the fact that the courts could not treat the optional instrument as a chosen "foreign" law. Therefore, principles such as "*iura novit curia*" would apply and access to national Supreme Courts would be unrestricted, which is often not the case when foreign law or general principles are applied. Equally, institutions offering out-

5 As to the perception of an Optional Instrument as a "2nd Regime" see *Heiss*, Introduction, in: *Basedow/Birds/Clarke/Cousy/Heiss* (eds.), Principles of European Insurance Contract Law (2009) I 45.

6 The French National Assembly has recently adopted an information report on consumer rights (rapporteur was Ms M. Karamanli) suggesting to test a 28th European legal regime within the framework of the Rome I regulation.

of-court complaint and redress mechanisms could not refuse to hear a case by using the argument that it would be submitted to foreign law. For instance, the German Insurance Ombudsman may refuse to deal with a complaint according to its Code of Procedure if the complaint is to be determined decisively according to foreign law[7]. A European optional instrument, however, would be a "2nd Regime" of contract law in each Member State and, therefore, could not be considered as "foreign" law by the German Insurance Ombudsman.

3.1.10 Last but not least, an optional instrument enacted by the European legislator would be subject to procedures for a preliminary ruling by the ECJ, which would safeguard a uniform application of the optional instrument by national courts within the EU[8].

3.2 **Optional Contract Law and Protection of the Weaker Party**

3.2.1 A "2nd Regime" as described above would offer a choice which would be unrestricted by mandatory rules of national law provided that it takes sufficient care of the general interest protected by such rules. This creates a demand to ensure that the protection of the weaker party, especially consumers, would not be softened[9], and that it would not be used to bypass mandatory provisions of national law.

3.2.2 This can be safeguarded by three means:

a) First of all, the "2nd Regime" would have to provide for mandatory rules itself and to apply a high level of protection for the weaker party[10];
b) Secondly, any exclusion of particular provisions of the "2nd Regime" by agreement must be prevented in order to forbid a "mix" of national law and the "2nd Regime" by choosing the most relaxed standards from each source of law;
c) Consumer should be informed about the optional instruments through general consumer information provided by consumer organisations as well as a pre-contractual duty of the entrepreneur to inform the consumer that the contract offered is subject to the optional instrument.

3.2.3 As a consequence, the eligibility of the "2nd Regime" would not create an incentive for the stronger party to propose a less protective law to its contractual partner. Instead, the incentive to choose the "2nd Regime" would be created by the possibility to use contract terms

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7 See Heiss, Introduction, in: Basedow/Birds/Clarke/Cousy/Heiss (eds.), Principles of European Insurance Contract Law (2009) I 47.

8 Ibid.

9 According to Prof. M Hesselink of the University of Amsterdam, in terms of social justice, *"(...) a 28th regime can be chosen by clicking on a blue button (...). If the draft CFR were to become an optional instrument in B2C contracts, this would not lead to social dumping. (...) A choice of law for the DCFR, if allowed by the European legislator, could create the win-win situation in B2C contracts"*.

10 See Heiss/Downes, Non-Optional Elements in an Optional European Contract Law: Reflections from a Private International Law Perspective, ERPL 13 (2005) 693 (699).

throughout the Community without any adaptations to national law but based on the "2nd Regime", which would itself provide for a higher level of protection of the weaker party than the average legislation of Members States.

3.2.4 An optional instrument introducing a high level of consumer protection will offer an advantage to the consumer insofar as products put on the European market on the basis of the optional instrument can more easily be compared. Thus, the optional instrument may actually enhance transparency.

3.3 **Legal basis and form of an optional instrument**

3.3.1 The competence of the EU as regards the adoption of this instrument remains a key issue when discussing its nature and characteristics. Some authors consider that Article 81 TFEU (ex Article 61 subparagraph c) and Article 65 TEC) could form the legal basis because what matters in their opinion is the level of conflict of laws and not substantive law. Thus the EU only needs a reliable basis to allow parties to choose the instrument as an applicable law and therefore only needs to focus on the compatibility of the national rules of private international law. An instrument based on Article 81 TFEU could, however, cover only "civil matters having cross-border implications" and would not bind the United Kingdom, Ireland and Denmark.

3.3.2 Others think that Article 352 TFEU (ex Article 308 TEC) is the most appropriate legal basis to grant the EC authority to enact this kind of optional instrument for achieving one of the objectives set out in the Treaties on the grounds that they had allegedly not "provided the necessary powers"[11].

3.3.3 However, we should not exclude the possibility of using article 114 TFEU (ex article 95 TEC) as this is about "approximating laws" which "directly affect the establishment or functioning of the Common Market" and are aimed at the "achievement of the objectives set out in Article 26" (ex Article 14 TEC). Moreover, whenever the European legislator even has the power to approximate national contract laws based on Article 114 TFEU, it should have the possibility to enact an optional instrument which, after all, intrudes less on the national regimes, thereby making it the preferred choice according to the principle of subsidiarity.

3.3.4 New Article 118 TFEU provides for a special legal basis. It is, however, limited in scope to intellectual property rights.

3.3.5 In order to ensure maximum uniformity, such an instrument should be contained in a Regulation (Article 288 para. 2 TFEU). As such it would form part of the substantive law of each Member State and would therefore find application only if the law of a Member State

11 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.

was applicable to the contract in question according to the conflict rules of Rome I. It would have to provide for comprehensive regulation and not just set minimum standards.

3.3.6 In any case the compatibility of each new optional instrument with the subsidiary principle should be seriously assessed.

3.4 **Contents**

3.4.1 A future Optional Instrument should consist of a General Part regulating its optional application and a Specific Part providing substantive regulations for the areas of law which it would cover.

3.4.2 An Optional Instrument could be structured as follows:

Chapter One: General Provisions

Chapter One, which would consist of 4 or 5 articles only[12], would determine the scope of application of the optional instrument and set out the parties' options. It would also specify those rules which are mandatory (especially rules protecting the weaker party). Finally, it should prohibit any recourse to national law and instead provide for filling the gaps by having recourse to general principles common to the laws of the Member States[13].

Chapter Two: Specific Provisions

Chapter Two would provide the substantive rules of areas of law which are within the scope of application of the optional instrument.

3.5 **Advantages and difficulties**

3.5.1 An optional instrument would, first of all, 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[14].

3.5.2 An Optional Instrument would, furthermore, offer advantages when compared with unification or harmonisation of national law.

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12 Based on the model of the Principles of European Insurance Contract Law (PEICL) and subject to further discussions.

13 To avoid any confusion, it is advisable to establish what these general principles are or to have recourse to general rules applicable to all types of contracts contained in the "Principles, definitions and model rules of European Private Law – Draft Common Frame of Reference (DCFR, Book I-III, outline edition 2009), if and when recognised or enacted by a legal EU instrument.

14 See, for instance, *Basedow*, Ein optionales Europäisches Vertragsgesetz: Opt-in, opt-out, wozu überhaupt?, ZEuP 2004, 1.

3.5.2.1 Firstly, an Optional Instrument leaves the decision on its application to the market. It makes sure that it will only be applied where parties to a contract consider it an advantage. It is to be expected that Optional Instruments will be used by international players in the market whereas local players will save transposition costs, especially the redrafting of their contract terms in order to adapt them to a new European Regime.

3.5.2.2 Secondly, the individual legal culture of each Member State would be left untouched. This would make an Optional Instrument more acceptable in the political arena. The same argument applies to the national lawyers in each Member State who will probably argue against replacing traditional rules of law with a European contract law. However, they would have no reason to oppose an Optional Instrument which would leave national law untouched.

3.5.3 Moreover, 2nd Regimes already exist at present (see 3.6.3). This clearly indicates that national constitutional laws do not present any concerns as regards Optional Instruments.

3.5.4 The creation of an Optional Instrument in contract law or other areas of private law may, however, create technical problems. Clearly it is not easy to create the choice and regulate the relationship of two sets of contract law existing one next to the other. However, as the outline of a possible future Optional Instrument has shown, the technical problems may be overcome.

3.6 **Similar instruments**

3.6.1 Optional Instruments already exist, at both global and European level.

3.6.2 At a global level, examples include the UN Convention on Contract for the International Sale of Goods (1980)[15] the UNDROIT Conventions on International Factoring[16] and on International Financial Leasing[17]. These conventions follow an opt-out model[18].

15 The text is available at www.uncitral.org.

16 Ibid.

17 Ibid.

18 See art 6 CISG; art 3 Convention on International Factoring; art 5 Convention on International Financial Leasing.

3.6.3 Several optional instruments exist at European level:

- Regulations establishing European companies such as the Regulations on the *societas europaea*[19], on the European Economic Interest Grouping[20] or the European Cooperative Society[21];
- Regulations establishing European intellectual property rights, such as the Community Trade Mark[22] and the Community Patent[23];
- Regulations offering European civil procedures, such as the Regulations on European orders for payment[24] and on European Small Claims Procedures[25].

Further optional instruments are proposed, among them a European Certificate of Succession[26]. These Regulations or Proposals add European instruments to those offered by national law.

4. The 28th regime and Better Regulation

4.1 The completion of the Single Market

4.1.1 An optional instrument would strongly support the functioning of the Single Market, and represents the most perfect form of voluntary harmonisation in line with the principle of subsidiarity.

4.1.2 Moreover, an optional instrument will facilitate the freedom of movement of consumers and will strengthen cross-border mobility and competition between businesses.

4.1.3 The entry into force of the Treaty of Lisbon does not change the situation with regard to the creation of an Optional Regime.

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19 Council Regulation (EC) N° 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ L 294 of 10.11.2001, p. 1.

20 Council Regulation (EEC) N° 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG), OJ L 199 of 31.7.1985, p. 1.

21 Council Regulation (EC) N° 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), OJ L 207 of 18.8.2003, p. 1.

22 Council Regulation (EC) N° 207/2009 of February 2009 on the Community Trade Mark, OJ L 78 of 24.3.2009, p. 1.

23 The Regulation was adopted on 4th December 2009 but is not yet published in the OJ.

24 See Recital 10 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, p. 1 as amended.

25 See Recital 8 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 31.7.2007, p. 1.

26 See Chapter VI of Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, COM(2009) 154 final.

4.2 **European contract law**

4.2.1 The network on "Common Principles of European Contract Law" (CoPECL-Network) has recently finished its Draft Common Frame of Reference[27] and submitted it to the European Commission. Clearly, those rules provide the European legislator with a model which it could use when enacting an optional instrument as advocated by Commissioner Reding[28]. What is still needed is a rule on the optional application of the CFR/Common Principles in line with the already existing proposal of Article 1:102 PEICL[29].

4.3 **Future areas of application**

4.3.1 There is a stronger need for an optional instrument in areas of contract law dominated by mandatory rules of national law which form a legal barrier to the functioning of the Single Market[30]. This has been pointed out already by the Commission as regards financial services including insurance[31]. Therefore, financial services (banking and insurance law) may be a major area for the future application of an optional instrument while taking due consideration of consumer protection legislation under all circumstances (whereby the proposal relating to insurance law must comply with the Common Frame of Reference).

4.3.2 A "28th Regime" could also be envisaged for consumer sales (in particular internet sales). However, as far as consumer sales are concerned the relationship of an optional instrument to the Proposal for a Directive of the European Parliament and of the Council on Consumer Rights[32] must be considered carefully.

4.3.3 Optional instruments may also be adopted for areas of private law other than contract law: Security rights in movable property or non-tangible goods are obvious candidates for submission to a "28th Regime"; the Commission's proposal for a European Certificate of Succession[33] shows the possible application of optional instruments in the law of succession; the law of matrimonial property may be yet another subject for an optional instrument in the future.

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27 See von Bar/Clive/Schulte-Nölke et al. (eds.), Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR) Outline Edition (2009); the DCFR Insurance is contained in Basedow/Birds/Clarke/Cousy/Heiss (eds.), Principles of European Insurance Contract Law (2009).

28 In the Hearing with Viviane REDING, Commissioner-designate for Justice, Fundamental Rights and Citizenship, European Parliament, 7.1.2010.

29 Art 1:102 Principles of European Insurance Contract Law (PEICL), dealing with their optional application, reads in its relevant parts: "The PEICL shall apply when the parties, notwithstanding any limitations of choice of law under private international law, have agreed that their contract shall be governed by them." (BASEDOW, The Optional Application of the Principles of European Insurance Contract Law, in Fuchs (ed.), European Contract Law, - ERA Forum Special Issue 2008 vol 9, 111).

30 See Heiss/Downes, Non-Optional Elements in an Optional European Contract Law, ERPL (2005) 693, 697 et seq.

31 See, for instance, Communication from the Commission to the European Parliament and the Council, "A more coherent European contract law – An action plan" of 12 February 2003, COM(2003) 68 final, no 47, 48.

32 COM(2008) 614 final.

33 See COM(2009) 154 final which is dealt with supra no. 3.6.3.

4.3.4 The need for an optional instrument becomes less pressing in the area of general contract law. The DCFR, which covers general contract law, is in fact not drafted as an optional instrument. However, the editors of the DCFR highlight in their Introduction that it might be used as "the basis for one or more optional instruments"[34]. This proposal could also be implemented in a restrictive manner by introducing the General Provisions of the DCFR into an optional instrument which applies only in specific areas of contract law. This would help to avoid regulatory gaps which would necessarily appear if only provisions specific to particular types of contracts were enacted.

5. Findings of the public hearing held by the Single Market Observatory on 6 January 2010

5.1 A number of variations on the theme of the 28th regime already exist or are proposed in European company law, intellectual procedural law and the law of succession. All go beyond national limitations, intrude less on national laws and open up new opportunities for market actors in cross-border trade. The 28th regime must however abide by strict consumer protection rules while at the same time being more rigorous than harmonisation. Pensions are a key issue of the 28th regime with some 18 million European pensioners living in another Member State. Ultimately, the 28th regime should focus on good information and trust-building (e.g. contracts) and lead to simpler services and products (especially financial services). In the retail financial services area, priority must be given to better consumer protection legislation: the crisis has shown the need for regulating all financial services offered to consumers and offering simplified financial services to all consumers who so wish. The political consensus to be achieved to allow for such an option as the 28th regime and its legal basis nevertheless remain on the agenda. The Commission's Impact Assessments should systematically sound out the possibility of an "optional approach", i.e. of adopting a 28th regime, while it could only be a response to specific problems and not a generic alternative to contract law.

Brussels, 27 May 2010.

The President
of the
European Economic and Social Committee

Mario Sepi

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34 *von Bar/Beale/Clive/Schulte-Nölke* in von Bar/Clive/Schulte-Nölke et al. (eds.), Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR) Outline Edition (2009) Intr. 79.