Choice, Certainty and Diversity: Why More is Mean Less

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In its latest Green Paper on policy options for progress towards a European Contract law for consumers and businesses, the European Commission identifies numerous imperatives to strengthen the internal market: facilitate contracts between European businesses and consumers both inside and outside the EU; reduce the diversity of existing national legal rules and thereby increase legal certainty as well as enable European citizens to take advantage of the single market.¹

The premise is that the single market is not being fully optimised. Various obstacles, such as legal uncertainty arising out of the diversity of national private law rules, the need for translation arising from multilingualism, exclusion from the market, and costs engendered by cross-border transactions, particularly within the EU, stand in the way. It is thus assumed that diversity of national contract law rules (‘legal diversity’) comes at a cost and constitutes an obstacle which hinders the smooth functioning of the single market.² This paper considers

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that the Commission has erroneously identified the problems on the single market caused by legal diversity.

The Commission proposes, *inter alia*, to create an optional instrument containing a uniform set of rules available in all EU official languages.\(^3\) This paper critically evaluates the optional instrument, a strong candidate for the legal framework to be chosen for the Common Frame of Reference (‘CFR’), as a solution to the perceived problems identified by the Commission. The optional instrument does not correspond to these problems and therefore cannot provide a satisfactory solution.

Three substantive questions will be addressed. First, are we really being given a choice, or is this merely a semblance? Secondly, will the exercise of choice provide the right answer to the problem, and if so, how? Thirdly, does more choice lead to more certainty?\(^4\)

If legal diversity is perceived to be one of the major causes of the single market functioning unsatisfactorily, then why should or how could more rules, in the form of an optional instrument, ameliorate the situation? In fact, whereas in the past the emphasis was on improving the coherence and quality of European contract law, today it seems to be a question of ‘more’: more contracts, more choice, more rules. However, ‘more choice’ is a quantitative not a qualitative measure. The suggestion that more choice will solve the perceived problems seems misguided. Does the Commission have the competence to orient the single

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\(^3\) Green Paper, n 1 above, option 4, 9-10.

market in the direction that more choice will take us?\textsuperscript{5} How can legal diversity diminish, and legal certainty increase, through more choice? This impossible conundrum merely highlights the European Commission’s working method and presumptions, both of which will be investigated in this paper.

Certainty is both an epistemological and psychological concept.\textsuperscript{6} The Commission is, of course, vague about its conception of legal certainty: the idea of certainty is often coupled with the expression ‘user-friendly,’\textsuperscript{7} though the linkage between the two is never elucidated. It is perhaps supposed that the existence of a legal instrument, as opposed to none, will satisfy these two criteria. It is understood that legal certainty is linked to the predictability, security and accessibility of legal rules.

This paper critically examines the proposal for an optional instrument through a framework of methodological critiques. In part one, the end-goal of option 4 of the Green Paper needs to be identified and critically assessed: why do we need an optional instrument giving parties more choice? In part two, the optional instrument as a solution to create less diversity and more certainty will be evaluated. In part three, an enquiry will be made as to whether the optional instrument is an illustration of better law-making.

I Why do we need an optional instrument giving parties more choice?


\textsuperscript{7} See Green Paper, n 1 above, 4 ‘An instrument of European Contract Law, if sufficiently user-friendly and legally certain.’ This terminology is repeated in the following paragraph.
The Commission proposes an optional instrument, giving contracting parties more choice, as a solution to optimise the market. The market rationale clearly grounds the Commission’s competence, but will it stand the test? Three issues will be briefly addressed: market optimisation, the costs of legal diversity and the idea that more choice will be a means to this end.

1. Market optimisation

The Commission considers it is necessary to strengthen and thus optimise the single market. What sort of optimisation does the Commission have in mind and what sort of market order? For example, a competitive market exists in the USA with considerable legal diversity, arising out of state law. Granted, this might not be the perfect model for the ‘social and economic market’ of the EU.\(^8\) Indeed the European single market is destined to be a competitive and integrated market, where social considerations play a part, as well as those of economic efficiency. Moreover, maximising utility is not a paramount end-goal relating exclusively to material welfare. Optimising the market also involves considering how to enhance non-material welfare,\(^9\) yet this important consideration has been ignored.

Furthermore, why does optimising the market require legal diversity to be eliminated? This assumption, that the former logically entails the latter, merely grounds the Commission’s competence. Once again, the Commission has used the

\(^8\) See Collins, n 2 above, chapter 4, especially 96f.

consultation process as a subterfuge: we are presently being asked many legal-technical questions regarding the legal form of the instrument, its scope of application and its material scope. Certain methodological critiques follow. How can the legal rules be drawn up when their raison d’être has not been made explicit? While certain selected questions about the means are being asked, the expert committee is already drafting a set of rules for an optional instrument. The time frame is too short and insufficient room has been given to thought and discussion. Questions as to how cannot provide answers to the true end-purpose of an optional instrument. Various underlying crucial questions of a socio-economic nature are not being asked, nor investigated. For many of us this realisation produces an acute sense of déjà vu.

2. The costs of legal diversity


12 See the Synthesis of the Fourth Meeting of the Expert Group, 1-2 September 2010, cfr report_10_09_01_02en.pdf, available at: http://ec.europa.eu/justice/policies/consumer/policies_consumer_intro_en.htm. ‘The Chair reaffirmed the mandate of the group to work exclusively on the assumption of an optional instrument, while emphasising that no political decision concerning the options of the Green Paper, including whether to propose such an instrument has been taken.’


14 See Rutgers and Sefton-Green, n 9 above. The subsequent proposal for a Consumer Rights Directive has likewise given rise to abundant criticism. See, for example, C. Twigg-Flesner and D. Metcalfe, ‘The proposed Consumer Rights Directive - less haste, more thought?’ (2009) 6 (3) ERCL 368-391.
The idea of an optional instrument is tied into the assumption that reducing legal diversity will reduce costs and thus optimise the internal market. More consumers will be able to have access to higher quality goods and SMEs will not be excluded from making cross-border contracts. From a pragmatic point of view, it is difficult to solve a problem without analysing and empirically verifying the cause of the difficulties, but this does not appear to have been done. Indeed the Commission appears to prefer to work back to front. An impact assessment report will be put into place after the consultation process has come to an end, but not beforehand.\textsuperscript{15} The purpose of the impact assessment will be to assess, inter alia, the costs of legal diversity, both quantitatively and qualitatively. However, this looks rather like bolting the stable door after the horse has gone.

The question of whether legal diversity engenders unnecessary and avoidable costs is controversial.\textsuperscript{16} The assumption is that ‘legal diversity causes transaction costs and lowers economic trade and welfare, in particular creating legal uncertainty.’\textsuperscript{17} First, it is important to ascertain exactly what costs we are talking about and how these costs are distributed, which inevitably involves a cost-benefit analysis. Anthony Ogus has pointed out, for example, that the costs of legal diversity benefit providers of legal services,\textsuperscript{18} though I am not suggesting

\textsuperscript{15} Green Paper, n 1 above, 2.

\textsuperscript{16} See, for example, P. Legrand, ‘Antivonbar’ (2006) 1 Journal of Comparative Law, 13-40, who calls this a ‘cheap fiction.’


that the legal profession should be given priority. An enquiry that concentrates on how to lower costs may be simplistic and even miss the point.

Helmut Wagner has drawn up the following list of potential costs: i) collecting information ii) legal disputes iii) setting incentives for pushing through legal claims and iv) other e.g. consumers’ rights of redress and complaints, including in cross-border contracts, travel, time (opportunity costs), postage, bank charges/ and costs linked to transferring payment from the euro zone to the non euro zone (or vice versa), annoyance (negative utility), etc. I would also add translation costs. This list shows that there are more than transaction costs to be put into the equation. Secondly, this assumption needs to be tested: are the costs of legal uncertainty actually measurable?

Costs are inevitably engendered and legal uncertainty is always present. Wagner has shown that even full harmonization cannot eliminate such costs; it is thus difficult to understand how an optional instrument will be able to succeed.

The cost of reducing the costs should also be considered. The results of the use of another optional mechanism in contract law, namely the United Nations Convention of International Sale of Goods 1981 (‘CISG’), has been used as a point for comparison. A distinction can be made between the initial costs of making the CISG and its actual cost-effectiveness once implemented. It is sometimes

19 Wagner, n 17 above, 31-32.

20 ibid, 35.

21 ibid, 37-42.
suggested, for instance, that the costs of the CISG were minimal. However, it is not clear how, or whether, such costs are measurable. As the CISG applies on an opt-out basis, it is arguable that it applies in a great number of international contracts of sale, without the contracting parties’ awareness. However, a survey carried out in 2008 has led to an inference that the CISG’s usage rate is quite low. In the face of insufficient statistical evidence, the comparison is of relative value, since the results are inconclusive. When examining the costs of reducing legal diversity on the European scene, it is of course clear that the DCFR process has already been a costly operation for the EU and will continue to be so, since, inter alia, the EU will bear the costs of translating the optional instrument. In sum, the link between reducing legal diversity and the costs relating thereto is a complex issue and is not incontrovertibly proven.

3. More choice, less diversity?

In the Green Paper the Commission laments that ‘Businesses do not have the option of a common European contract law which could be applied and interpreted uniformly in all Member States.’ It would appear then that


24 ibid, 305 who asks whether ‘succumbing to that temptation might be a manifestation of the sunk costs effect.’

25 Green Paper, n 1 above, 7: ‘As a general observation, a Union instrument would be made available in all official languages.’

26 See Collins, n 2 above, 72-75.

27 Green Paper, n 1 above, 5-6.
businesses are deprived of a potential choice: what they need, it is implied, is more choice. The Commission also regrets that many businesses, particularly SMEs, do not engage in cross-border transactions,\textsuperscript{28} as if their refusal to sell to consumers throughout the EU was somehow the fault of legal diversity, since it is too costly. The controversial nature and immeasurability of the costs of legal diversity have been discussed above. Moreover, many of the market failures, attributed to legal diversity, are driven by a rather different economic reality. If consumer demand for cross-border trade is insufficient, legal diversity may be one of multiple factors, not the sole cause, as the Commission would wish us to believe. For instance, pure lack of spending power may be another, or linguistic diversity,\textsuperscript{29} a fact that a change in legal rules will not cure.

First, it is necessary to identify empirically the various causes of market failures. The Green Paper lists ‘regulatory, linguistic and other obstacles’ or again states that ‘divergences between national contract laws feature amongst these barriers’\textsuperscript{30}, yet it focuses almost exclusively on the latter. The prerequisite process of identifying which barriers, their relative costs and their relative capacity to hinder the market has not been carried out. For instance, amongst the other obstacles mentioned in the Green Paper, delivery problems with postal services and problems with payments are mentioned.\textsuperscript{31} It is not difficult to imagine that in B2B or B2C transactions, businesses and/or consumers will not be inclined to contract cross-border when payments involve exchanges to and

\textsuperscript{28} ibid.


\textsuperscript{30} Green Paper, n 1 above, 4.

\textsuperscript{31} ibid, n 16.
from the euro zone or postal charges within the EU that exceed domestic postal rates. Have studies been carried out to assess whether these considerations are tantamount to legal diversity and constitute a reason for actors’ reluctance to enter into cross-border contracts? This does not appear to be the case and indeed these considerations have been relegated to a footnote. Secondly, it is not at all clear why any of these obstacles, particularly that of legal diversity, will be cured by the magic wand of ‘more choice.’ It takes but little logic to understand that an optional instrument if truly optional, will create not less legal diversity, but more. Perhaps this is why some prefer to refer to a 2nd regime, to conceal the reality of a 28th regime.32 How an optional instrument could thus solve the perceived problem of legal diversity is anyone’s guess. Moreover, even if this were the case, the underlying question of whether legal diversity is the paramount obstacle to the smooth functioning of the internal market has not even been considered.

II The impossible conundrum of less diversity and more certainty

The Green Paper has identified the problem as one of too much diversity and too little certainty. However, we have seen that the optional instrument will give contracting parties more choice of legal rules, not less. A paradox thus appears: it is difficult to understand how giving contracting parties more choice will lead us both to more certainty, and less diversity. This conundrum can be examined from a number of angles.

1. Who exercises the choice and for whose benefit?

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32 See Opinion of the European Economic Social Committee on the 28th Regime - an alternative on allowing less law-making at community level’ (own-initiative opinion) INT/499.
Is there a connection between giving actors on the market more choice and optimising the market? The Commission has a tendency to assume that this issue is one-dimensional and that consumers’ and businesses’ choices will necessarily converge in order to optimise the market. But this is surely an oversimplification: the identical correlation between different stakeholders’ interests is far from being obvious or necessary. The Green Paper insists on the fact that the optional instrument should contain a ‘high level of consumer protection.’\(^3\) However, the consultation process does not provide any means to assess appropriate levels of consumer protection. It can be safely assumed that European consumer protection cannot be reduced according to the principle of *acquis communitaire*. However, levels of European consumer protection are mostly kept to a minimum level of harmonization,\(^4\) at least for the time being,\(^5\) and what is high for some may be low for others. Moreover, there is an elliptical reference to the fact that ‘the optional instrument would have to affect the application of mandatory provisions, including those on consumer protection.’\(^6\) Yet it is not clear if the optional instrument will have a positive or negative affect

\(^3\) Green Paper, n 1 above, 7.


\(^6\) Green Paper, n 1 above, 9-10.
on such mandatory provisions. Nor indeed, is any room given to discussions about how to achieve a high level of consumer protection. These are, once again, questions that have not been raised in the present consultation process.

Instead the Commission merely asks us to consider whether the instrument should apply to B2B and/or B2C contracts. It is difficult to see how a sensible answer can be given in the abstract. For instance, the question of whether the optional instrument is preferable for consumers will depend on the content of the rule, the level of consumer protection contained therein, and whether the level offered is higher or lower than their national law. Is it assumed, for instance, that the optional instrument will be for the benefit of businesses and consumers in the sense that it is preferable to national law for both of them? This looks both improbable and impracticable.

If the level of consumer protection is higher than that provided for under an applicable national law in which a business is used to trading with consumers, the optional instrument would not appear to be attractive to the business. The risks of social dumping posed by the optional instrument have already been

37 If the optional instrument is to have added value in relation to the CISG, a contrario, one is tempted to interpret this as meaning the optional instrument could restrict the application of mandatory rules. Or is the reference to mandatory rules that do not relate to consumer protection? This ambiguity needs to be clarified.

38 A repetition of the previous consultation process concerning the review of the consumer acquis, see n 9 above.

39 Green Paper, n 1 above, 11.

emphasised and require further discussion.\textsuperscript{41} It becomes apparent that it is more pertinent and indeed pressing to instigate a debate about desirable levels of consumer protection, as well as an in-depth enquiry about how the optional instrument is to be articulated with the provisions of Rome I Regulation, an issue once again reduced to a footnote.\textsuperscript{42} This should also be a matter for the consultation process. But over and above the methodological critiques addressed at the way in which the consultation process is being carried out, the optional instrument runs the risk of engaging a race to the bottom: its objectives are implausible, or unrealistic.

A related question is to consider who will exercise the choice of whether the optional instrument should apply to a given contract: will consumers decide in a B2C contract, for instance? Will an opt-in or opt-out mechanism be provided? This crucial question does not seem have been raised at all in the Green Paper. There is extensive literature in behavioural economics about the bias towards opt-out or default rules which thus prevail through inertia.\textsuperscript{43} If this is the case and if an opt-out mechanism is provided, then a positive choice will rarely be made in practice. The question of whether we are really being given more choice raises its head once again.

2. The capacity of actors on the market to choose

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\textsuperscript{42} Green Paper, n 1 above, 10, n 27.

\textsuperscript{43} See R.H. Thaler and C.R. Sunstein, \textit{Nudge: Improving Decisions about Health, Wealth and Happiness} (Yale University Press, 2008); Low, n 23 above.
More choice only makes sense if market actors have the capacity to use it. Market actors’ capacity to choose to opt-in or out of the optional instrument is predicated on the basis that they are both free and sufficiently informed to do so. This requires them to be in a position to act as rational agents, a highly controversial model.\textsuperscript{44} In relation to cross-border contracts, the articulation between Regulation Rome I and the optional instrument requires an in-depth enquiry, which lies outside the scope of this paper. Other implications of the optional instrument applying first to B2C contracts, then to B2B contracts will be considered.

a) Consumers’ choices: costly and uninformed

Are consumers really in a position to act as rational agents in the market place?\textsuperscript{45} Consumers have multiple and complex interests that are not reducible to improving the functioning of the single market, understood from a narrow perspective. According to choice theory, a rational choice can only be made if the conclusive factor of preference is present.\textsuperscript{46} Unfortunately, the question of how to ensure that the optional instrument is more attractive than domestic law does not seem to be a point for public consultation, as already mentioned. But even leaving this issue aside, the goal of making the optional instrument more attractive to all actors in all Member States seems utopian, and its effectiveness is thus insufficiently guaranteed. Two observations follow.

\textsuperscript{44} See Low, n 23 above, 289-290.

\textsuperscript{45} The idea that consumers are rational agents is linked to the discourse about how to boost their confidence. See T. Wilhelmsson, “The Average European Consumer: a Legal Fiction?” in Wilhelmsson et al, n 9 above, 241-268; Schwarz, n 4 above.

First, consumers’ choices for choosing EU, rather than national, law need to be ascertained. However, this may not always be possible, nor can it be affirmed with certainty that they will always choose EU law. Consumers’ choices will depend on numerous variables; such as whether the contract is domestic or cross-border, what kind of contract is involved, what language the contract is written in, the presence of accessory and related criteria, e.g. after-sales services, transport costs, bank charges, etc.

Secondly, consumers need to be informed about the consequences of the choice they are being given, between EU and national law. How will this be achieved? It is inconceivable that a standard form contract will entail an external evaluation of the pros and cons of the choice. The reality is that standard form contracts will allow the stronger party to impose or waive the optional instrument’s application. What room is there for consumers’ autonomy in this process? Is it suggested that consumers should take recourse to legal advice in order to carry out simple consumer transactions? Obviously consumers have neither time nor money for such legal niceties. If the presence of an optional instrument requires them to take legal advice or obtain information about the legal consequences of their choice, this will be a strong disincentive to contracting in the single market. Or when engaged in electronic commerce are consumers expected to read all the rules in the optional instrument before pressing on the blue button to choose EU law? This suggestion is similarly implausible. Is the Commission thus suggesting that it is desirable that consumers should make more transactions on the single market without being fully aware of the consequences? If an optional

instrument were applicable to B2C contracts, the likelihood of consumers freely exercising an informed choice looks rather remote. It seems more likely that consumers’ choices will be arbitrary and ill-informed. It is difficult to comprehend why such choices will be in their interests.

b) Businesses’ choices: informed at a cost

Businesses come in all sizes. Big businesses will be able make informed choices by using lawyers to advise them of the consequences of the applicable law, even if at a cost. Some businesses may regularly use negotiated contracts, which means that the transaction costs myth will simply not be applicable. Two inferences follow. First, transaction costs will not necessarily decrease, at least not initially. If transaction costs will not be reduced, the market rationale is flawed. Yet the perception that transaction costs are a stumbling block for the single market to function properly is central the Commission’s policy. Secondly, the introduction of an optional instrument may exacerbate SMEs’ exclusion from the market, since their need to access legal resources will be reinforced. The question as to the scope of the optional instrument, relying on the classic division between B2B and B2C contracts may not, therefore, be appropriate. SMEs may not be able to afford to obtain legal advice about the consequences of adopting the optional instrument. As Gary Low has pointed out, the size of actors matters and whether they are contracting on a ‘take it or leave it basis.’48 When considering the position of SMEs in the internal market, a distinction may need to be made between their status in B2B contracts and B2C contracts. In the former, both parties could be SMEs, or only one of them. This criterion affects their relative

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48 Low, n 23 above, 288-289.
bargaining position. In the latter, the SME business will have a comparative advantage over the consumer, but may be less well placed than a competitive big business contracting with consumers. If the Commission wishes to reinforce the comparative position of SMEs on the single market in order to facilitate their access to conclude cross-border contracts, further consideration should be given as to how to give them the capacity and means to achieve this goal.49

3. Does the choice of the optional instrument really matter?

Aside the central question of whether more choice will lead to less legal diversity and more certainty, the no less critical question of whether this viewpoint is not warped to fit lawyers’ spectacles remains. Lawyers start from the assumption that contracting parties actually care about legal rules, or even that the choice of legal rules really matters to them. There are numerous arguments to refute this thesis, none of which appear to be considered in the Green Paper.

First, whether the choice of legal rules is important or not may depend on the status of contracting parties, consumers or businesses. It has already been noted that contracting parties’ concerns may diverge on this issue. For instance, do consumers actually care about contract rules, let alone which ones? Representatives from consumer associations confirm that choice of legal rules and indeed their content is not always consumers’ main preoccupation.50

49 It is noticeable that concern for the level of protection offered for SMEs in the possible instrument has been raised in the Seventh Meeting of the expert group, see cfr_report_11_111_18_19_en.pdf.

Consumers may be concerned in the abstract about their rights, but in the particular, they are more concerned about redress being quick, easy and cheap.\textsuperscript{51} Secondly, consumers’ access, knowledge and concern about legal rules are a fiction in many contracts. A sure way of making European contract law attractive to consumers would be to provide identical rules about the quantum of damages throughout the EU, in the event of businesses’ breach of contract in relation to B2C cross-border contracts of sale. In instantaneous contracts of sale in shops, consumers think about the object of the sale, but not contract rules. Indeed, it has been suggested that instantaneous sales contracts are not, on one level, contracts at all.\textsuperscript{52} According to Omri Ben-Shamar’s analysis, it may even be preferable to get rid of contract rules for consumers altogether, as other means of consumer redress will be far more effective.\textsuperscript{53} When contracts are made electronically, one-click contracts allow consumers to contract as fast as if they were waiting at the cash desk. How often do consumers actually read the general conditions of sale when contracting electronically? The Commission emphasises that consumer electronic domestic sales have increased but not electronic cross-border sales,\textsuperscript{54} but the latter’s lack of success may have nothing to do with legal diversity. Consumer confidence may be composed of many practical and non-legal elements of which familiarity with the business, its reputation, trust, as well as language, are crucial.

\textsuperscript{51} \textit{ibid}.


\textsuperscript{54} Green Paper, n 1 above, 5.
Thirdly, behavioural economics studies have shown that consumers are not concerned by legal diversity.\textsuperscript{55} The argument has two strands: first that most actors do not think about the differences in contract laws’ rules; secondly, that most actors prefer the status quo, which would mean that an optional instrument would not implement the kind of changes the Commission envisages. As Gary Low has put it: ‘Without catering to these predictable biases, it is likely that a default or optional harmonised rule will be as a bride left at the altar, blind to her groom’s past indifference up to the day of the wedding.’\textsuperscript{56}

4. Choice and certainty

In B2C contracts, three possibilities relating to the choice of the optional instrument and its capacity to increase certainty exist. First, it is plausible that consumers will choose national law, as opposed to EU law, not because one is better than the other, but because the former is known; the latter unfamiliar. Secondly, many reasons exist why consumers would choose either EU law or national law, in other words, no one reason prevails. This means that for each given contract, there is a 50/50 chance EU law will be chosen, so the outcome is uncertain. These two possibilities indicate that the optional instrument will not achieve much; in a sense it will exacerbate the status quo, as legal diversity, with the addition of a 28\textsuperscript{th} regime, and legal uncertainty, will increase respectively. This lack of certainty will not provide a guide for consumers’ behaviour and thus the optional instrument will not help to strengthen the market, as the Commission wants us to believe. Last but not least, if a strong preference is

\textsuperscript{55} See, for example, Low, n 23 above.

\textsuperscript{56} ibid, 303
inbuilt into the equation, in that the optional instrument is manifestly preferable to national law, then logically there is no choice to be made: it is a sham.\textsuperscript{57}

As far as B2B contracts, are concerned, we have seen that the optional instrument will add an additional choice, whether in domestic or cross-border contracts. If European contract law, contained in the optional instrument is an option amongst a wider spectrum of choice, will it be certain, or how will it be certain, that the former will prevail? Sometimes, it is argued that contract law is facilitative law and the demand for such law is predominantly homogenous.\textsuperscript{58} It follows that businesses will want to choose the optional instrument to enable the law to converge because inter alia, ‘a consensually approved outcome can be reached at a minimum cost.’\textsuperscript{59} However, this viewpoint seems somewhat simplistic since transaction costs are neither the exclusive, nor decisive factor for businesses’ choices. For example, businesses, as opposed to consumers, can choose whether or not to waive certain mandatory national rules.\textsuperscript{60} This consideration may be extremely significant, and tantamount to the need to reduce transaction costs, as it will affect businesses’ liability. The inevitable convergence thesis thus remains unproven. Businesses may choose a certain law

\textsuperscript{57} If preferable can be read as providing a higher level of protection for consumers, then it could be argued that the ends justifies the means but the fact that this may be a means to bring in hard law through the back door, by means of a soft law legal instrument may nonetheless be considered objectionable. Moreover, it is highly unlikely that preferable could be reduced to such a simple formula; otherwise, if Member States all agreed, the problem would have been solved a long time ago.

\textsuperscript{58} Ogus, n 18 above

\textsuperscript{59} ibid.

for a multiplicity of factors and variables that do not apply systematically to each and every type of contractual situation.

In short, either the optional instrument will engender more uncertainty and no less diversity or a very certain outcome, which precludes choice being truly exercised. Under the first hypothesis, freedom of contract is pushed to its utmost limits: but to what end? Under the second, freedom of contract has discarded, though in a rather surprising fashion. What then is the Commission really trying to achieve?

III Better law-making?

This paper has focused on critically assessing the optional instrument against the Green Paper’s imperatives. This also raises the question of the Commission’s competence to legislate in European contract law. The beauty of the optional instrument is that it satisfies the principles of subsidiarity and proportionality more than any of the Green Paper’s options. This makes the optional instrument look like a winning horse. The EESC has already noticed the commodity of the optional instrument as a means of law-making with the help of civil society61. The optional instrument has also been hailed as a means of less-lawmaking. It is difficult to see why this is so, considering the time, effort and costs involved in the DCFR and now CFR process, unless the implication is that it involves less law-making by the European legislator. But this suggestion may worry those of us who are concerned by questions of regulatory legitimacy.62 The public consultation process and the setting up of an expert committee are part and

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61 See Opinion, n 32 above, 3-4.

parcel of a smoke-screen to detract our attention from the reality. As already mentioned, an expert committee for the future CFR is already engaged in selecting and redrafting relevant parts of the DCFR for the CFR. Indeed many members of the academic DCFR project are also involved as members of the expert committee. The political implications of this process should not be ignored.63

Moreover, the EESC indicates that the optional instrument will be user-friendly since it is law-making by civil society. Does this mean better law-making? This paper has shown that such an instrument will not be in the least user-friendly for small-sized actors and especially consumers. Easy to use, perhaps, but not necessarily friendly to, or in the interests of, all its users. The only reason that the optional instrument could be perceived as user-friendly and more certain is because the legal rules are contained in a tangible instrument. However the mere existence of a European instrument, which may be attractive for political reasons, does not permit us to validate its content in the abstract.

The question of whether the optional instrument is a means of better law-making requires a comparison with the other options. The previous proposals for full harmonization via Directives look seriously compromised.64 Will the optional instrument solve the same or a different problem? Is the proposal for an optional


instrument a disguised way of bringing hard law in through the back door?\textsuperscript{65} All these questions funnel down to a worrying alternative. Either the optional instrument will harmonize European contract law without appearing to do so, or, the optional instrument will not harmonize European contract law and thus not reduce legal diversity.

In the first case, harmonization will be achieved by preterition: the non-binding nature of the optional instrument will cover up the fact of harmonization. If this is the case, we should not be diverted by wool being pulled over our eyes. This means that the idea of ‘more choice’ amounts in reality to no real choice. The trade-off would be more certainty and less diversity. The content of the instrument, the levels of protection and the articulation with mandatory rules must be carefully considered. In the second case, the optional instrument will not reduce legal diversity; indeed it will achieve the opposite. More choice means less certainty and more diversity. Why is this better law-making?

In conclusion, the numerous, but selective, how questions contained in the Green Paper do not suffice to address the underlying questions of its end-goal. This paper has examined how the optional instrument is infeasible as well as being undesirable: it is unlikely to achieve its objectives, which in themselves are highly questionable. An optional instrument legitimises returning to a freedom of contract/party autonomy model, which fails to reflect reality for a very large number of standard form contracts, whether concluded at the cash desk or on the internet. This is true for both consumers and SMEs. In addition, the methodology

\textsuperscript{65} B. Lurger, ‘The Common Frame of Reference/Optional Code and the Various Understandings of Social Justice in Europe’ in Wilhelmsson et al, n 9 above, 177-199; 185, who refers to a ‘wolf in sheep's clothing.’
adopted by the Commission raises many more questions, more than those that can be answered.

The proposal for an optional instrument boils down to the following choice: Less (no) choice, more certainty and less diversity or more choice, less certainty and more diversity. Neither of these solutions appears to be better law-making, nor a preferable option.