

# EUROPEAN ECONOMIC AREA

## STANDING COMMITTEE OF THE EFTA STATES

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### SUBCOMMITTEE IV ON FLANKING AND HORIZONTAL POLICIES

#### EEA EFTA Comment on the result of the feasibility study carried out by the Expert Group on European Contract Law

#### 1. PREFACE

1. The EEA EFTA States, Iceland, Liechtenstein and Norway, have studied with interest the feasibility study regarding a possible future instrument in European Contract Law, presented by the Commission's Expert Group on European Contract Law on 3 May 2011. Some of the EEA EFTA States have previously commented on the Commission's Green Paper on policy options for progress towards a European Contract Law for consumers and businesses (COM(2010) 348), which is closely linked to the work done by the Commission's Expert Group on European Contract Law. The EEA EFTA States welcome the publication of the study carried out by the Commission's Expert Group, and would like to take this opportunity to comment on some aspects of the proposal.

#### 2. SPECIFIC ISSUES

##### 2.1. Type of Instrument

2. First, the EEA EFTA States would like to point out that it is difficult to comment on the substance matter of the text without knowing what type of legal instrument is foreseen. It is obvious that any given rule will have a different effect on the Contract Law of the Member States should it be presented in a regulation establishing a European Contract Law rather than in a non-binding publication.
3. Moreover, the EEA EFTA States recognise that there might be good reasons for establishing a "toolbox" for the European legislator. One may, however, be concerned that such a "toolbox" would hinder the natural evolution of Contract Law as products and markets develop. For the time being it is not possible to conclude on this point.

4. The EEA EFTA States are sceptical of a Commission Recommendation on European Contract Law. This could, however, be an option in the long term, provided that such an instrument has sufficient legitimacy.
5. The EEA EFTA States are very sceptical towards a Regulation setting up an optional instrument of European Contract Law. It might be difficult to agree on an instrument that will give the necessary high level of consumer protection. If this instrument is to prevail over national mandatory rules, which might in itself be a problem, one may fear that in reality it will not be voluntary for the customer to choose the European rules, since using the rules may be presented by the trader as a condition of the transaction. An optional instrument could also undermine the principles of Regulation 593/2008/EC (Rome I), which state that the consumer cannot be deprived of the protection afforded by mandatory national law. In case such an instrument should be used to a great extent, it might also lead to the weakening of national law. The Commission's Green Paper on policy options towards a European Contract Law (COM (2010) 348 Final), was for instance subject to a national consultation in Norway, and there was very little support for the policy option of an optional instrument.
6. The EEA EFTA States would also advise against introducing a directive or regulation establishing a European Contract Law. There is a risk that such an initiative could interfere too much with the national laws of the Member States, thereby raising the sensitive issues of proportionality and subsidiarity. For the same reason, the EEA EFTA States cannot embrace a proposal for a regulation establishing a European Civil Code.

## **2.2. United Nations Convention on Contracts for the International Sale of Goods (CISG)**

7. As a general comment, those EEA EFTA States which are signatories of the Convention believe that the substance matter of any proposal regarding an instrument in European Contract Law should to a large extent be in line with the United Nations Convention on Contracts for the International Sale of Goods (CISG). Since the majority of Member States are already signatories to the CISG, it would be reasonable that this should be the basis of a European instrument aimed at enhancing cross-border trade. Such an instrument must, however, take due care of the need for sufficient consumer protection.

## **2.3. Rules on Unfair Contract Terms**

8. If the instrument should contain rules on an unfairness test of contracts terms, these rules should be drafted differently than foreseen in the present text. In this regard the EEA EFTA States would like to point out that Article 36 of the Nordic Acts on the Conclusion of Agreements (cf. the respective laws of Denmark, Finland, Iceland, Norway and Sweden) has proven to be a flexible and durable concept in dealing with unfair contract terms. The article reads:

*“An agreement may be wholly or partially set aside or amended if it would be unreasonable or conflict with generally accepted business practice to invoke it. The same applies to unilaterally binding dispositions.*

*When making a decision, account will be taken not only of the contents of the agreement, the positions of the parties and the circumstances prevailing at the time of conclusion of the agreement, but also of subsequent events and circumstances in general.*

*The rules in the first and second paragraph apply correspondingly if it would be unreasonable to uphold the usage of trade or other custom of contract law.”*

9. The EEA EFTA States suggest that the EU may draw inspiration from Article 36 of the Nordic Acts on the Conclusion of Agreements if it should regulate what constitutes an unfair contract term in any possible European instrument.
10. Article 36 of the Nordic Acts on the Conclusion of Agreements also deals with any need to alter the terms or the effect of a contract in exceptional circumstances. Thus, as such, it can cover both Articles 81 and 92 of the proposal by the Commission’s Expert Group.

#### **2.4. Late Payment**

11. The EEA EFTA States believe that any rules on interest for late payment in business-to-business contracts should be in line with, and not diverge from, Directive 2011/7/EU on combating late payment in commercial transactions. Furthermore, there may be good reasons for stating that a trader shall also be granted interest for late payment in business-to-consumer contracts. Any possible European instrument should only state at this point, however, that the trader shall be entitled to interest for late payment according to the applicable national law.

#### **2.5. Digital Products**

12. Finally, the EEA EFTA States would like to draw the Commission’s attention to their Comments of 12 March 2009 to its Proposal for a Directive on Consumer Rights, in which the EEA EFTA States invited the EU to consider more extensive and coherent Community action in the field of digital products. The EEA EFTA States stated that the rapid development of new digital products, such as music downloads, seemed to require action at Community level. In relation to the current feasibility study, the EEA EFTA States believe that a European Contract Law instrument could contain rules covering digital content. The EEA EFTA States also encourage the Commission to consider the need for action at EU level outside the scope of a European Contract Law instrument.
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