

E U R O P E A N E C O N O M I C A R E A
S T A N D I N G C O M M I T T E E
O F T H E E F T A S T A T E S

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Annex
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EEA EFTA COMMENTS

**on the Communication from the Commission to the Council and the European
Parliament on European Contract Law – COM(2001) 398**

15 October 2001

I INTRODUCTION

1. These EEA EFTA Comments are based on input from the public administrations in the EEA EFTA States. The limited time given for response under the terms of the Communication has not allowed for a broad public inquiry extending to private parties and representative organisations. In light of the aforesaid, the present comments will not address the issue of experience with cross-border trade and the practical need for farther-reaching EC action in the area of contract law which were raised by the Commission, except in relation to certain consumer protection rules (see Annex). Hence, this response is limited to comments on the four proposals for an EC action set forth by the Commission.

II OPTION I: NO EC ACTION

2. The EEA EFTA States welcome legal initiatives at EC level in order to enhance the development of the Internal Market. However, experience shows that problems occurring in business to business relations often prove to be solved adequately by the market itself. The principle of *pacta sunt servanda* and the principle of contractual freedom should therefore be granted more space in such relations than within the context of business to consumer relations.

**III OPTION II: PROMOTE THE DEVELOPMENT OF COMMON
CONTRACT LAW PRINCIPLES LEADING TO MORE
CONVERGENCE OF NATIONAL LAWS**

3. An EC initiative in this area may well prove to be successful in speeding up the process of harmonisation already initiated by academics and legal practitioners, such as UNIDROIT Principles of International Commercial Contracts (1994) and Lando-Beal Principles of European Contract Law Part I: Performance, Non-performance and Remedies (1995). The establishment of contact groups and discussion forums by the EU, and ultimately the issuing of common principles by the EU, will give a kind of

semi-legality to such a text, enhancing the willingness of contractual parties to make use of the common principles and states to pay due awareness to them when issuing new statutes in the area of contract law. This approach is also in line with what is known to be the feature of contractual law, namely a development of legal principles in close connection with market needs and cultural changes as a whole. The EEA EFTA States believe the benefit of such an initiative to be well founded, better working and more effective legislation in the long run.

IV OPTION III: IMPROVE THE QUALITY OF LEGISLATION ALREADY IN PLACE

4. The EEA EFTA States welcome improvements of existing legislation. However, in general minimum harmonisation Directives are preferred, as they allow those countries that have a high level of, i.e., consumer protection to retain that level.

5. Directives have been adopted on specific contracts (like package tours and timeshare) or specific marketing techniques (distance selling). These are areas characterised by a high volume of cross-border trade, and thereof a number of consumer concerns and problems. Therefore existing Directives should be retained, but updated and adjusted when necessary. In addition, harmonised Community legislation should be considered for items like pyramid selling and passengers' rights in air travel (see Annex).

6. As pointed out in the Communication, provisions of national contract laws may directly or indirectly obstruct the good functioning of the Internal Market. New technologies such as increased use of the Internet as a commercial channel for transactions from business to businesses, as well as businesses to consumers have and increasingly will in the near future, make it easier for economic operators to conclude transactions over long distances on the Internal Market. The EEA EFTA States agree that when the parties to an agreement choose to apply all mandatory rules of one State to the contract, the existing difference between different mandatory rules may have a negative impact upon cross-border transactions. For consumers as well as businesses it is important that all and increased transactions costs that may result from such discrepancies will be avoided to the extent possible.

7. The continued growth of e-commerce, the increase in travel and the introduction of the EURO will invariably lead to an increase in cross border disputes. Ensuring enforcement of existing legislation and access to justice for consumers should therefore, in the view of the EEA EFTA States, be another priority. The establishment of the European Extra-Judicial Network for resolving consumer disputes (EEJ-Net) will constitute a valuable contribution to access to justice for consumers. If consumers' rights are to have practical value, mechanisms must exist to ensure their effective exercise. The EEA EFTA States believe a functioning EEJ-Net will have a major positive impact by providing consumers with more meaningful access to justice in cross border cases and by building consumer confidence. This will be particularly important for the development of e-commerce by giving consumers greater trust in electronic retailers associated with out-of-court dispute resolution schemes. Furthermore, the EEA

EFTA States believe that the existence of EEJ-Net will ensure that claims based on Community consumer law are dealt with more seriously. The preventive effect should not be underestimated, even if only a few percent of possible claims are pursued through the Clearing Houses. Correspondingly, once consumers experience that assistance is available, this will contribute to confidence and stimulate increased cross border activities. A functioning EEJ-Net will also, through the exchange of information and report systems, give valuable documentation on the need for improving existing legislation or strengthening enforcement on a national level. Making the EEJ-Net function should therefore be a high priority.

8. One item should be specifically mentioned because it calls for special attention with regard to enforcement, namely timeshare. In spite of the Directive on timeshare and its transformation into national law, consumer problems connected to entering into timeshare contracts, in particular in Spain, still represent a major concern. This is reflected in numerous reports. A solution to this problem is imperative, not only for the individual consumer who buys or considers buying timeshare, but also for enhancing confidence in EU legislation in general, and reducing reluctance towards entering into agreements in another EEA State. The negative experiences with timeshare contracts are painfully present in consumer awareness, which is unfortunate for consumers' attitude towards cross-border shopping in general as well as for the trust in Community legislation as a tool for ensuring consumer rights.

9. The EEA EFTA States consider therefore that it would be important that further studies and preparations would be undertaken in order to "improve the quality of legislation already in place" as mentioned in paragraph 46 of the Communication.

10. In this respect, it could be further explored in which way the current national contract laws conflict and which minimum changes could be agreed upon at European level in order to achieve the objectives of a fully effective Internal Market and possibly also by some review of the current and existing *lex specialis* provisions of the *acquis* taking due account of the higher protection levels that legislation of some Member States provides for.

V OPTION IV: ADAPT NEW COMPREHENSIVE LEGISLATION ON EC LEVEL

11. Principles of contract law are deeply rooted in national legal systems and founded on national traditions. Therefore one must foresee heavy difficulties in reaching an agreement on binding comprehensive legislation and, irrespective of such difficulties, an agreement will have to comprise a number of compromises, leading to a result which may prove unfit to many, if not all, the EEA States. Against this background, the EEA EFTA States are sceptical to the development of a new set of binding comprehensive principles of contract law on a European level.

12. The development of a set of non-binding model principles is most welcome. However, the EEA EFTA States would like to see that the procedures outlined under

option II are followed. For such principles to have a real harmonising effect, the importance of launching a broad debate must be underlined.

VI CONCLUSION

13. To achieve adequate consumer protection and while the same time ensuring equal competitive conditions, the EEA EFTA States find that a combination of option II and option III will be the most effective tool. This approach will hopefully provide an adequate solution in the short run as well as facilitate a more rapid gravitation towards the harmonisation of European contract law within a reasonable time frame.

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Specific comments with respect to consumer protection in community law

Enforcement and access to justice is important. Making existing legislation function should be given priority in the elaboration of new legislation. Within the capacity to revise existing legislation and introduce new legislation in the consumer area, the following areas, which have all been highlighted in reports presented by the Commission, the following are the ones we consider the most important:

1. Directive 85/577/EEC (Doorstep selling) should be updated to the higher and more developed standards of the distance-selling Directive. We also fully support suggestions in the March 2000 Hearing to remove the exemption for rental contracts, so as to include timeshare contracts which do not fall within the scope of the Directive on timesharing. Extending the scope as to include contracts concluded on other locations outside of ordinary sales outlets should be considered.
2. Directive 90/314/EEC on package travel and holiday tours should be revised. Important issues to be addressed are extension of the definition of "package", extension of the guarantee scheme to include lack of performance and non-performance and establishing a harmonised guarantee fund or insurance at European level, strengthen the restrictions on advance payment and consider in particular the protection of consumer interests in this area related to e-commerce.
3. Directive 94/47/EC (timesharing) should be revised in order to extend the definition of timeshare, so as to include point clubs and other adaptations developed to evade the Directive. It should be amended to provide effective guarantees in the case of lack of performance or non-performance, and to secure financially the consumer who uses the right of withdrawal, by strengthening the restrictions on advance payment or other measures.
4. Finalising the proposed Directive on distance selling of financial services should be given priority. Given the difficulties in reaching an agreement, the possibility of including regulation of some aspects of some services where agreement can be reached in the general Directive on distance selling as a temporary solution should be considered.
5. Directive 90/314/EEC on package tours and holiday travel has a provision in Article 3.1 that states that particulars contained in the brochure are binding on the organiser or retailer. Other Directives have provisions that limit the seller's right to introduce contract terms and conditions that are to the detriment of the consumer compared to those presented in marketing when a contract is to be concluded. Civil contractual effects of advertising in the consumer area should be addressed at a more general level, and at least considered regulated in existing Directives.

6. In the Directives that contain a right of withdrawal (doorstep selling, timeshare and distance selling), the period of the right of withdrawal differs, not only between the Directives, but also in national legislation. In our opinion, the minimum period should be harmonised, and should be 14 calendar days.
7. The report on problems in relation to multilevel marketing/pyramid selling, considering regulation on certain aspects, like misleading advertising and marketing, sales methods, information to potential distributors and distributors' agreements, should be followed up.
8. Air travel is a field where an increasing number of complaints indicate that the level of consumer protection is not sufficient. As air travel contracts are typical cross-border transactions, the need for measures to strengthen consumer protection should be addressed at a European level.

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