

# 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 Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (COM (2011) 635)**

#### **1. EXECUTIVE SUMMARY**

The EEA EFTA States, Iceland, Liechtenstein, and Norway have studied with interest the Commission's proposal for a Regulation on a European Sales Law, COM (2011) 635, and appreciate the opportunity to comment on the draft Regulation. The main views of the EEA EFTA States are the following:

- The EEA EFTA States are sceptical as to whether the proposed Regulation is likely to enhance cross-border trade to the benefit of both consumers and businesses and has been put forward on the appropriate legal basis.
- Any possible European instrument on sales law would need a high level of consumer protection so that the general level of consumer protection in the Member States is not weakened. Only if this requirement is fulfilled could one envisage that consumers would opt to use a European Sales Law.
- The proposed Regulation still requires some clarifications regarding unfair contract terms and the co-existence between national contract law and the European Sales Law.
- The broad scope of the proposal requires a thorough assessment of its EEA-relevance, which the EEA EFTA states will conduct when and if, the proposal is adopted by the EU-legislator. The present comment is therefore without prejudice to any future assessment of the EEA-relevance of the proposal.

#### **2. PREFACE**

1. The EEA EFTA States have continuously followed the Union's work on contract law in an active manner during the past decade. Last year the EEA EFTA States took the opportunity to comment on key issues raised in 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 also 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). As the proposed Regulation raises several different questions, the EEA EFTA States will focus below firstly on the added value for consumers and businesses represented by the proposed Regulation, secondly on the policy options chosen in the proposed Regulation, and lastly some key issues in the Annexes of the proposal. The EEA EFTA States reserve the right to provide national comments on issues regarding the proposal which are not covered by this EEA EFTA Comment. Furthermore, this Comment is without prejudice to the question of EEA-relevance of the proposal.

### **3. THE ADDED VALUE FOR CONSUMERS AND BUSINESSES**

2. The main objective of the proposed Regulation is to enhance cross-border trade to the benefit of consumers and businesses. By providing a contract law instrument that may be used on a voluntary basis by the parties, the proposal aims to overcome the possible detriment to trade caused by legal uncertainty among consumers and businesses stemming from differences in contract law between Member States. The EEA EFTA States believe that enhanced cross-border trade could bring much needed benefits for consumers and businesses, and thus strengthen the potential for economic growth in the European Economic Area.
3. However, for such a proposal to be successful, the EEA EFTA States consider it to be essential that the European legislator provides unquestionable evidence that differences in national contract law constitute an obstacle to cross-border trade, which in turn may be remedied by the proposal. In the national consultations of some of the EEA EFTA States, organisations representing consumers and businesses alike, have raised questions with regard to, or stated their disagreement with, the findings of the Commission relating to whether differences in contract law is a key obstacle to cross-border trade. In fact, key obstacles to cross-border trade are rather to be found in facts such as language barriers, the consumer's mistrust about a far-distant provider, concerns about payment and data security, or uncertainty about future maintenance services. In view of this, also the legal basis for the proposal can be questioned.
4. Based on the statements from organisations representing consumers and businesses, the EEA EFTA States are sceptical as to whether the proposed Regulation might achieve its objectives and has been put forward on the appropriate legal basis. Notably, based on the statements in national consultations, there is a risk that a possible future instrument in line with the proposal would in fact not be used in cross-border trade to any significant extent.

### **4. THE CHOSEN POLICY OPTIONS IN THE REGULATION**

5. Preferences regarding the policy options in the Regulation vary among stakeholders. While some, notably consumer organisations, question whether the proposed instrument would in fact be optional on the part of the consumer, business

organisations seem uncomfortable with the optional character of the instrument as they favour a full harmonisation of contract law. The EEA EFTA States believe it to be essential that the level of consumer protection offered by the proposal is upheld or enhanced if the instrument is to be recommended for use by consumers in cross-border trade.

6. Furthermore, the EEA EFTA States consider that any future instrument should not be limited to certain forms or channels of trade, e.g. limited to online or e-trade.
7. The EEA EFTA States support the right of Member States to decide whether, and to what extent, a possible optional European instrument should be made applicable to national contracts.
8. To ensure a smooth co-existence between a common European instrument and national contract law, it is of vital importance that the text of the proposed Regulation in an unambiguous manner regulates the relationship between the European Sales Law, national contract law, and the international private law regulations of the Member States. In this respect, the EEA EFTA States suggest that items 27 and 28 of the preamble should be incorporated into the text of the Regulation itself.
9. The EEA EFTA States welcome the proposed protection of small and medium sized enterprises (SMEs), envisaged in the proposed Regulation.
10. The EEA EFTA States support the idea of the seller's obligation to provide a Standard Information Notice in contracts with consumers as proposed in Article 9 of the Regulation. However, the EEA EFTA States recommend that the seller should be obliged to provide the Standard Information Notice in the language used in the consumer's country of residence as well as in the language of the contract. Furthermore, the EEA EFTA States suggest that upon receiving payment from the consumer, the seller shall be obliged to provide the consumer with a receipt for the payment, and that the receipt should include a statement that the contract is governed by the European Sales Law. Since there is reason to believe that consumers often will keep the receipt for any future claims arising under the contract, but not necessarily the contract itself, it could be useful for the consumer to have the receipt as evidence and reminder of the fact that the contract is governed by the European Sales Law.
11. The EEA EFTA States would also propose that in the case where a contract governed by the European Sales Law is done in several languages, and for this reason discrepancy between the language versions arises, the consumer is entitled to invoke the contract in the language of his or her choice. Thus, the seller, being the professional party to the contract, bears the risk of any language discrepancies.
12. The EEA EFTA States consider that the European Sales Law could be used for mixed contracts not covered by Article 5 of the Regulation, if the part of the contract that falls outside Article 5 is minor and the principles of the European Sales Law are deemed adequate to also govern that part of the contract.

## 5. ISSUES RELATING TO ANNEX I OF THE PROPOSAL

13. The EEA EFTA States note that the proposal seems to provide a high level of consumer protection. Although some regulations in Annex I may provide a different level of protection compared to consumer protection law in the Member States, the EEA EFTA States believe that a sufficient high level of consumer protection is essential so that the overall level of consumer protection in the Member States is not weakened. This is vital to ensure consumer confidence in any future instrument.
14. A main concern regarding the material scope of the proposed Regulation relates to the regulation of unfair contract terms. The EEA EFTA States strongly encourage the European legislator to clarify in any future contract law instrument that it shall have no impact on public authorities' ability to supervise unfair terms in contracts according to national standards. One such example may be the competence of the Consumer Ombudsman and Consumer Agencies in some of the EEA EFTA States to ban businesses from using contract terms which are found to be unfair in contracts with consumers. Such market regulations from a public authority will have no direct influence on contracts which are concluded between a consumer and a business. It should thus be easy to clarify in the Regulation that it does not have any prejudice to such enforcement by a public authority.
15. Consumer organisations have suggested that, in case of a conflict, the seller should bear the burden of proof if he or she disputes the buyers claim that the buyer is a consumer within the meaning of the proposed Regulation. The EEA EFTA States suppose that this would be a suitable rule that would enhance consumer confidence, and the likelihood that a consumer would choose to enter into a contract with a seller who offers to use the European Sales Law.
16. Although Article 77 of the Annex already provides a high level of consumer protection, it would be pertinent to suggest that the consumer should be protected against a swift cancellation by the seller, e.g. by stating that the seller should give the consumer at least two months' notice before cancelling a contract of indeterminate duration.
17. The EEA EFTA States encourage an addition to Article 120. If the seller's performance has not decreased in value, or only a minor decrease in value may be stated, a consumer should in any case be entitled to a reasonable decrease in the price based on the significance of the non-conforming performance to the consumer. This would compensate the consumer if, e.g., a piece of furniture is delivered in another colour than what was agreed in the contract. This may not amount to a reduced economic value of the goods, but could never the less represent a personal diminished value for the consumer.
18. The EEA EFTA States support the proposed time limit of 30 days for remedying lack of conformity by repair or replacement as foreseen by Article 111. The time limit offers positive added value for consumers.
19. To further enhance the confidence of consumers in a possible future European Sales Law, the interest of the consumers could be given more weight when interpreting the

contract. This may be achieved by including a reference to the principle of consumer protection in the General Principles in part I of Annex I.

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