Ladies and gentlemen, dear Vice-President,

dear colleagues

1. Introduction:

First of all, I would like to thank the Consiglio Nationale Forense for having co-arranged with the CCBE this very important conference on the Common European Sales Law (CESL) in order to debate specific issues of the CESL Regulation-Proposal[1] from the view point of legal practitioners. I am particularly honoured to address this distinguished audience in my capacity as President of the CCBE in 2012 at the opening of a conference which deals with one of the most visionary, most interesting and in various aspects most challenging European law initiatives - challenging prospects for every lawyer in Europe and challenging equally for the lawyers' clients, which are both consumers and businesses.

For those, who are not yet familiar with the work of the CCBE please allow me a short introductory remark: the CCBE, Council of Bars and Law Societies of Europe, is the representative European organisation of around 1 million European lawyers through its member bars and law societies from 31 full member countries and 11 further associate and observer countries. During its now more than 50 years of existence the CCBE has worked hard to contribute towards a compact "corpus legalis" for European lawyers, to contribute to European draft legislation and European law developments, to intervene before European courts including the ELHR and to continuously promotes the area for freedom, justice and the rule of law for the ben-

[1] COM 2011 (635) final.

efit of European citizens – the lawyers' clients. This substantive work of the CCBE is being prepared in currently (17) committees and (11) working groups.

The developments towards a potential European contract law have been closely followed within the CCBE under the guidance of a specifically established "European Contract Law Working Group" which has been established at the very beginning since the Commission's ambitions in this direction became visible.

I am rather proud to inform you that the first – in principle positive and welcoming CCBE resolution on European Contract law was passed already in Nov 2006. The CCBE resolved that it was in full support of the initiative to create a common frame of Reference in order to improve quality and coherence of the existing acquis and future legal instruments in the area of contract law. The CCBE European Contract Law working group has meanwhile been upgraded within the CCBE to a European Private Law Committee with broader remede.

I know that many conferences have taken place since the CESL Proposal first was promulgated by the EU-Commission on October 11, 2011. These conferences, however, were mainly involving academics and politicians, both as speakers and attendees, but as it seems, hardly any lawyers as practioners. That was one of the main reasons why the CCBE[2] decided to go on and co-organise this today's conference.

The "success" of any new European Law, but in particular one being an optional instrument, must in my view, first of all, be achieved among and through the legal practitioners. Ie the new optional instrument and its consequences must be understood and accepted by the legal profession, who will "translate" and recommend it to their clients.

[2] Council of European Bars and Law Societies, Brussels.

Lawyers are the first port of call for citizens in need of legal advice or representation. Only if practicing lawyers after due consideration of all circumstances can and will recommend the CESL in their day-to-day-work as an option of sales law being superior or at least comparable to the otherwise applicable national law, CESL will come to substantial real life and will be voluntarily chosen by parties as a basis for their cross-border transactions[3], be it a b2c or a b2b-sales contract.

At present, some Member States seem to be rather hesitant and critical to accept the proposed CESL as an optional instrument for a Common European Sales Law[4]. One of the main reasons seems to be that there have been some doubts whether the legal basis of Art. 114 TEUF that has been chosen by the Commission, would be valid. Since I heard that equally the legal service of the Council has confirmed Art 114 so to say as rock solid basis that may no longer be a reason for legal uncertainly or confusion. Another reason for the opposition against this Proposal is that it is contested whether CESL would be not violating the principles of subsidiarity and proportionality (Art. 5 Sec. 3 and 4 TEUF). Further arguments go more into the substantive law details of provision itself and questions which arise and will practicably arise out of the fact that certain legal areas are excluded, ie missing, the proposal sufficiently certain and balanced in view of an over protection of consumers.

I do not want to go into details of what is rather complicated legal debate and I certainly do not want to preempt, today's discussions which will address exactly such points as whether the CESL in its current form can achieve what it sets out to do. But I would like to point out two issues which, I believe,

[3] Art. 4 Draft of the Order (DO).

[4] The österreichische Bundesrat, the deutsche Bundestag and the House of Commons have submitted Notices to the Commission holding that the Proposal violates the principle of subsidiarity pursuant to Art. 5 Sec. 3 TEUF and the principle of proportionality pursuant to Art. 5 Sec. 4 TEUF.

are important. First, the CCBE, whilst some members may have expressed their different (national) views in detail the CCBE made it very clear that it will continue its substantive work on the Draft of CESL by contributing its legal expertise to the debate.

Second, I would like to remind you that the CCBE has not joined the ranks of those that have refuted the Proposal of CESL right away as an inappropriate instrument. Quite to the contrary, amongst others the Italian, the Spanish and the German delegation held that the legal position taken by the Commission with reference to Art. 114 TEUF was sound and appropriate.

2. What is the CCBE's Work Done so far and is it reflected in the CESL?

2.1 The Underlying Idea of the CESL

As to the underlying idea of the CESL I am optimimistic. Why? But first let me clarify again: I can and will certainly not prejudice the currently ongoing substantive work and deliberations within the CCBE/Private law Committee in charge. But a view on the many Resolutions that have already been adopted by the CCBE since 2006 in consideration of the principle idea of a possible European Contract and European Sales Law – all were supported by the vast majority of the delegations – speak a very distinct language.

The basic idea underlying behind all these CCBE Resolutions is simple: Lawyers play and have to play a pro-active role in shaping any future legal act, be it a European Directive or a Regulation. This goal, however, can only be achieved by accepting that any such new optional CESL instrument will be and

must be somewhat different than the respective national laws. Thus, a general impulsive "no" to new challenges and new developments has been rejected both by the members of the CCBE Committee in charge and by the national delegations. Truly speaking, not yet by all of them, but by the overwhelming majority.

The pro-active stance taken by the members of the CCBE Committee could only be taken due to a considerable knowledge of lawyers in the field of comparative law. On that basis it was possible to find a common ground how to accept to shape general guidelines of European Contract Law, being a viable and accepted law for future generations.

As stated before this pro-active approach implies that the CCBE was and is of the opinion that lawyers have something to add and to contribute to the overall political debate. Lawyers know best what are the legal needs and demands of their clients, i.e. the ordinary citizen, as they day by day ask their lawyers to defend and represent their interests in the search for practicable, understandable, just and equitable solutions of conflicts that have arisen.

> Finally, the CCBE believes that the approximation of the divergent private laws of the Member States should not necessarily be achieved by virtue of more and more new Directives and Regulations, as those will cut more and more – and very deeply – into the flesh of the national laws, thus creating inconsistencies and sometimes, as we have already withnessed, even systemic conflicts. Thus, to the view of the CCBE an optional instrument on an – and this is very important! – opt-in basis, could be more appropriate to overcome the complex issues of even more required harmonization of national laws and outbalance practical issues of potentially several applicable national laws for one transaction.

The Large Scale Approach

The next Resolution taken by the CCBE in January 2008 represents the work on four major problems areas, namely: on freedom of contract, on Standard Terms of Contract, on the Notion of Consumer and Professional[5], and on Remedies and Damages. This Resolution was not supported by the UK delegation, but by all others.

I cannot repeat here in detail what has been said in this Resolution. But I would, at least, try to outline some main aspects in order to demonstrate how they indeed fit into the scheme of the Proposal of CESL which you will debate today.

The CCBE held that the "principle of freedom of contract" must be considered to be a "fundamental principle of contract applying to contracts with both European citizens and enterprises".[6] I may remind you that this principle is now enshrined in Art. 1 of CESL.

With regard to Standard Terms of Contract the CCBE stressed that the "grey list" of Art. 3 of the Directive 93/13/EWG on Unfair Terms should be fully respected by all Member States in order to "achieve a higher level of consumer protection". There is hardly any doubt that this proposal has basically been taken care of in Art. 83 – 85 of CESL, containing a general provision and a "black" and a "grey list" of standard contract terms to be either "always unfair" (Art. 84 CESL) or to be presumed to be unfair pursuant to Art. 85 CESL. However, the CCBE did not vote for a "black" list, but held that the

[5] The CCBE hardly ever used the now common term „trader"
[6] Vide p. 3, Resolution, dated January 31,2008

Member States could to do in order "to achieve a higher level of consumer protection, if so needed"[7].

Moreover, I would like to underline that the CCBE maintained the position that due competence to "apply any terms of the "grey list" should no longer be vested solely into the national courts[8], but rather to the ECJ.[9] This is exactly the consequence of the Proposal of CESL.

It seems to be very important that the CCBE in the same Resolution has also addressed the issue whether Standard Terms of Contract should be controlled by the courts in b2b-transactions. The CCBE so agreed and maintained the position that "gross deviations from legal principles and good commercial practice" should be the bench-mark for the unfairness test.[10] Thus, it was held that Art. 3 Sec. 3 of the Late Payment Directive No. 2000/35/EC should be taken as the legal basis, as this provision seemed to be "appropriate to protect the "weaker" party, e.g. a non-consumer".[11]

If one now reads Art. 86 of CESL one will find a striking similarity. But the proposal of the CCBE goes one important step further. The bench-mark is not only "good faith and fair dealing" in order to determine whether a clause "grossly deviates" therefrom. The stand taken by the CCBE requires a finding whether the respective Standard Contract Term contains a "gross deviation from the legal principle", i.e. the respective provision of the applicable law.

I do not argue that this approach is better equipped than Art. 86 of CESL to adjudicate whether a specific Standard Term of

[7] Vide p. 4 ibid.
[8] EuGH 1.4.2004 – C-237/02 – Freiburger Kommunalbauten.
[9] Vide p. 4 ibid.
[10] Vide p. 4 ibid.
[11] Ibid.

Contract is unfair. But it must be stressed that the "legal principle" is a much more solid basis to adjudicate whether the deviation of the Standard Term is "gross" and thus unfair in comparison to the rather general test whether the rather unspecified principles of "good faith and fair dealing" have been violated.

I also admit that the definition of "good faith and fair dealing", as contained in Art. 2 lit. b) of the DO is rather rigid as it spells out that "good faith and fair dealing" must relate to a standard of conduct that respects the interests of the other party. This again is subject to ongoing discussions.

Finally, I would like to draw your attention to the last proposal of the CCBE that has been made in the Resolution of January 2008. The majority of the delegations held that it is inappropriate to spell out many, namely pre-contractual information duties to be observed by the professional towards the consumer, without at the same time addressing the remedy available to the consumer in case the professional has breached its information duty.[12] The CCBE favoured a higher degree of consumer protection and a damage remedy in this respect, not leaving the remedy to the national laws. This by now is exactly the position taken by Art. 29 of CESL.

Then: the Resolution Concerning the Common Frame of Reference

Soon after the DCFR had been published in October 2009 the CCBE passed another Resolution.[13] There are two elements in this Resolution that are worth mentioning: First, the CCBE proposed a Sales Law for b2c and b2b-transactions – not restricted to cross-border contracts – on the basis of the Sales

[12] Vide p. 5 ibid.
[13] Resolution, dated January 23, 2010.

Directive No. 99/44/EC, thus enlarging its scope to b2b-transactions also.

Second, and even more important the CCBE resolved that the remedies to the buyer should encompass the remedy for damages on the basis of the proposals of the DCFR.[14] Astonishingly, you will find almost the same wording in the Articles 159 sequ. of CESL. The claim for damages is not based on the negligence principle, but foreseeability shall be the decisive test. However, the measure of damages available to the damaged party, as suggested by the CCBE, does not go so far as to also cover damages for pain and suffering, as spelled out in the definition of loss in Art. 2 lit. c) of the DO.

3. The Way Forward – Can CESL achieve what it sets out to do? Given the work of the CCBE so far,

It seems very likely that the CCBE and its newly named "Committee of European Private Law" will not deviate from the essence of the Resolutions that have been passed with hardly any objection in the past. But there be Caveats I personally think that sufficient time to consult in depth with stakeholders must be given and ideas what to improve should be fairly taken up in the legislative process. Conferences like this one are important to faster such exchange of views.

But, of course, I cannot and will not prejudge either the evaluation of the experts in the Committee nor the political decision which has then to be taken by the Standing Committee of the CCBE in the future in relation to the Proposal of CESL.

I also could cuvisage that the Committee might refrain from going into the details of the Draft. For an organisation that represents more than one million lawyers in 31 full Countries

[14] Sec. II – 3: 701 sequ.

such work on specific details could be an adventure, that will lead to nowhere.

It should may be said how the CCBE works. To accept simple majority votes, provided that just more than fifty % have been met, never has been the way the CCBE has presented its views to the Commission or to the Parliament. Strong majorities are needed in order to make the voice of the lawyers to be heard in public. This is the general philosophy.

Thus, I believe that the Committee in charge and the CCBE will review the Resolutions taken so far in light of the respective principles now laid down in the Proposal of CESL.

I am almost certain that also in the future a pro-active stance that will be taken. There is hardly any reasonable doubt in my mind that the CCBE will come out in favour of the substance of the Proposal of CESL, as the Resolutions passed already are consonant with many provisions of CESL, I am looking forward very much to fruitful and interesting debates today. Thank you for your attention.

I am, the CCBE is convinced that CESL should have a vital future. But this hope is based on the promise that the CCBE will closely watch and contribute the future law-making process of CESL.