



**CNUE position on the draft reports presented by the rapporteurs from the Committees on Legal Affairs (JURI) and Internal Market and Consumer Protection (IMCO) on the Commission's proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law**

The European notaries have followed very constructively the road towards a European contract law. They were involved in the work by the Expert Group set up to assist with an impact assessment on the subject.<sup>1</sup> Moreover, the CNUE's Contract Law working group took a position on the Commission's proposal as soon as the *Viviane Reding* Vice-Presidency's text was published.<sup>2</sup> Furthermore, the CNUE participated in the drafting of a position of the European Law Institute<sup>3</sup> which studied the Commission's proposal in detail, making technical recommendations in order to improve it.

The CNUE takes advantage of the opportunity it is given by the recent draft reports of MEPs *Klaus-Heiner Lehne* and *Luigi Berlinguer* (JURI) and MEPs *Evelyne Gebhardt* and *Hans-Peter Mayer* (IMCO) to express its opinion, although the following observations are restricted to a few major issues of the Common European Sales Law:

1. The limitation of the Common European Sales Law to distance contracts is commendable and should remain unchanged.
2. The CNUE welcomes the specification of the material scope in the main body of the Regulation.
3. The draft reports still do not contain a reservation regarding the form in order to protecting the special formal rules laid down by the Member States.
4. The draft report by the JURI committee proposes a new system to cover mixed purpose contracts and linked contracts. The CNUE is in favour of the Commission's approach of excluding mixed purpose contracts from the scope of the Common European Sales Law in the interests of legal certainty and clarity.
5. The CNUE welcomes the proposal to exclude from the right of withdrawal contracts issued in authentic form by a notary, whilst recognising that it will always be necessary also to include an exception concerning information duties following the example of the directive on consumer rights.

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<sup>1</sup> See the meeting summaries at the following address: [http://ec.europa.eu/justice/contract/expert-group/index\\_en.htm](http://ec.europa.eu/justice/contract/expert-group/index_en.htm).

<sup>2</sup> The CNUE's position of 9 December 2011 is available at the following address: [http://www.notaries-of-europe.eu/files/position-papers/2011/European\\_Contract\\_Law-CNUE-final-9-12-11-EN.pdf](http://www.notaries-of-europe.eu/files/position-papers/2011/European_Contract_Law-CNUE-final-9-12-11-EN.pdf).

<sup>3</sup> The ELI's position is available at the following address: [http://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Publications/S-2-2012\\_Statement\\_on\\_the\\_Proposal\\_for\\_a\\_Regulation\\_on\\_a\\_Common\\_European\\_Sales\\_Law.pdf](http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/S-2-2012_Statement_on_the_Proposal_for_a_Regulation_on_a_Common_European_Sales_Law.pdf).



6. The CNUE proposes amendments in order to establish an instrument adapted to distance contracts that offer the particular opportunity to establish a modern contract law that satisfies the requirements of e-commerce.
7. The CNUE considers that developing standard terms and conditions is not without risk. They give the impression that they have been authorised by a public authority and thus exempted of any control of their content.
8. The CNUE proposes to add contract terms that are considered unfair by case law to the list of contract terms which are always unfair.
9. The CNUE recalls that European sales law only applies in the presence of a choice validated by both parties. Consequently, the optional instruments cannot apply only to pre-contractual obligations as, at this stage, the parties will not yet have opted for the optional instrument.

In detail:

## **I. Limitation to distance contracts**

The CNUE is in favour of the proposal by the rapporteurs from the JURI Committee, which consists of limiting the material scope to distance contacts, and in particular online contracts (amendment 55).

The CNUE is convinced that limiting the scope to e-commerce provides the opportunity to create a modern contract law in this rapidly growing field. A made-to-measure instrument for e-commerce could lay the groundwork for legislation at international level.

Nevertheless, it would be appropriate to keep this limitation to the scope consistent in order to exclude any legal uncertainty in practice with respect to the application of the Common European Sales Law (CESL). In this context, the proposal to apply the CESL in cases where the contract itself is not concluded by means of distance communication, but where all the steps taken with a view to concluding the contract have been carried out exclusively by means of distance communication, concerns us (amendment 56). In any case, it will be impossible to prove with full certainty that all the steps leading up to concluding a contract have actually been based exclusively on distance communication techniques.

### **Amendment**

#### **Proposal for a regulation**

#### **Article 5 – paragraph 1 a (new)**

*Text proposed by  
the Commission*

*Lehne/Berlinguer  
(amendment 56)*

*CNUE-proposal*

***1a. The Common European  
Sales Law may also be used for  
contracts referred to in points  
(a), (b) and (c) of paragraph 1  
where the parties conducted***

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(a), (b) and (c) of paragraph 1  
where the parties conducted**~~*



*negotiations or took other preparatory steps with a view to the conclusion of the contract, using for all those steps exclusively means of distance communication, but where the contract itself was not concluded by means of distance communication.*

*~~negotiations or took other preparatory steps with a view to the conclusion of the contract, using for all those steps exclusively means of distance communication, but where the contract itself was not concluded by means of distance communication.~~*

## II. Exclusion of property law

The CNUE welcomes the JURI Committee rapporteurs' wish to establish the material scope in the main body of the regulation (amendments 69 and 70). In particular, it is correct in this context to exclude all matters subject to substantive law from the scope. In parallel to this detail, it would, however, be appropriate also to adjust the definition of a sales contract.

The rapporteurs propose that the admissibility of a contract subject to property law and relating to the retention of title (cf. amendment 135) is included in the scope. The CNUE welcomes the fact that the rapporteurs wish, in accordance with Art. 4 of Directive 2000/35/EC on combating late payment in commercial transactions, to limit the effects of this article on the compatibility of the retention of title with contract law. In this perspective, any regulation that goes beyond admissibility in contract law should not be subject to CESL. This is why the CNUE considers that the review clause proposed is not objectively justifiable. The same is true for the inclusion of a specific deadline to check the limitation of the scope to distance contracts.

### Amendment Proposal for a regulation

#### Article 2 lit. k

*Text proposed by the Commission*

*CNUE-proposal*

(k) 'sales contract' means any contract under which the trader ('the seller') transfers or undertakes to transfer the ownership of the goods to another person ('the buyer'), and the buyer pays or undertakes to pay the price thereof; it includes a contract for the supply of goods to be manufactured or produced and excludes contracts for sale on execution or otherwise involving the exercise of public authority;

(k) 'sales contract' means any contract under which the trader ('the seller') ~~transfers or~~ undertakes to transfer the ownership of the goods to another person ('the buyer'), and the buyer ~~pays or~~ undertakes to pay the price thereof; it includes a contract for the supply of goods to be manufactured or produced and excludes contracts for sale on execution or otherwise involving the exercise of public authority;

### Amendment Proposal for a regulation Recital 35



*Text proposed by the  
Commission*

(35) It is also appropriate to review the functioning of the Common European Sales Law or any other provision of this Regulation after five years of operation. The review should take into account, amongst other things, the need to ***extend further the scope in relation to business-to-business contracts***, market and technological developments in respect of digital content and future developments of the Union acquis.

*Lehne/Berlinguer  
(amendment 21)*

(35) It is also appropriate to review the functioning of the Common European Sales Law or any other provision of this Regulation after five years of operation. The review should take into account, amongst other things, the need to ***include further rules relating to the matter of retention of title clauses***, market and technological developments in respect of digital content and future developments of the Union acquis.  
***Particular consideration should further be given to whether the limitation to distance contracts, and in particular online contracts, remains appropriate or whether a wider scope, including on-premises contracts, may be feasible.***

*CNUE-proposal*

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***Particular consideration should further be given to whether the limitation to distance contracts, and in particular online contracts, remains appropriate or whether a wider scope, including on-premises contracts, may be feasible.***

### III. Reservation concerning the form of contracts

The rapporteurs from the JURI Committee propose to provide that the CESL is recognised, in the light of conflict of law rules, as a ‘second regime’ (amendments 2 and 6). The result of this recognition in national law is that the provision of the Rome I Regulation that provides particular protection for consumers and legal commerce through special rules runs idle. This applies in particular to Art. 11 of the Rome I Regulation which allows the Member States to defend their reservations as regards the form concerning certain transactions and for consumer protection reasons. It is true that recognising freedom as regards the form of the contract at national level does not affect Art. 11 of the Rome I Regulation, but it has as a consequence that the law applicable to form that has to be determined according to Art. 11 of the Rome I Regulation will always admit formal freedom (Art. 6 CESL) when the law of a Member State should apply.

The CNUE therefore repeats its call for a reservation on the form of contracts in order to avoid rendering useless the rules of form stated by the Member States in the interests of consumer protection and the protection of legal commerce and, indeed, in order to safeguard the integrity of public registers.



## Amendment

### Proposal for a regulation

#### Annex I - Article 6

*Text proposed by the Commission*

Unless otherwise stated in the Common European Sales Law, a contract, statement or any other act which is governed by it need not be made in or evidenced by a particular form.

*CNUE-proposal*

*Unless otherwise stated in the Common European Sales Law or in the respective national law outside the Common European Sales Law which is applicable pursuant to Regulations (EC) No 593/2008 and (EC) No 864/2007 or any other relevant conflict of law rule, a contract, statement or any other act which is governed by it need not be made in or evidenced by a particular form.*

## IV. Mixed purpose contracts and linked contracts

Following thorough examination of the proposals submitted by the rapporteurs from the JURI Committee, the CNUE is in favour of the Commission's approach of excluding mixed purpose contracts from the scope of the Common European Sales Law in the interests of legal certainty and clarity. Indeed, the inclusion of such contracts raises complex questions regarding their definition in addition to underlying problems resulting from outstanding issues linked to the combined application of the national rules and the provisions of the European sales law. Thus, certain Member States – for consumer protection reasons, for example – have specific mechanisms for the evaluation, cancellation and enforcement of such contracts that could be compromised or lose their meaning if another contract law system were to apply. Likewise, a European regime could not govern in a uniform way the issue of knowing under which conditions it is possible to imagine a legal relationship between different contracts without running the risk of the system failing at the level of the national law.

## V. Right of withdrawal and information duties relating to sales contracts authenticated in the presence of a notary

### 1. Rights of withdrawal

The CNUE welcomes the IMCO Committee rapporteur's wish, pursuant to Art. 3(3)(i) of the directive on consumer rights, to exclude from the right of withdrawal contracts concluded according to the law of the Member States by a public officer-holder who has a statutory obligation to be independent and impartial and who must ensure, by providing comprehensive legal information, that the consumer only concludes the contract on the basis of careful legal consideration and with

knowledge of its legal scope (amendment 137 by MEP Mayer). The European Law Institute had provided for a similar exclusion (proposal of Art. 40(2)(i))<sup>4</sup>.

Exclusion in the context of the directive on consumer rights is based on the consideration that information duties and rights of withdrawal dealt with abstractly and generally in the directive cannot reach their purpose and run idle when the consumer is advised completely and impartially and satisfying his/her needs perfectly. Accordingly, in order to maintain the rules set down by the directive regarding consumer rights, the CESL should reflect this acquis of European law in consumer protection matters.

## 2. Information duties

For contracts authenticated in the presence of a notary, the Member States provide exhaustive and specific information duties (adapted case by case), the respect of which is compulsory during the authentication procedure. These provisions by the Member States and the European acquis established by the consumer rights directive should not be replaced by general information duties provided for in the CESL. The requirements set down by the consumer rights directive should therefore be respected and a sufficiently broad exclusion for contracts authenticated in the presence of a notary should be provided for in the regulation.

### **Amendment Proposal for a regulation**

#### **Annex I - Article 40 – paragraph 2 lit. g a (new)**

<i>Text proposed by the Commission</i>	<i>CNUE-proposal</i>
	<i>(g a) a contract which is, in accordance with the laws of Member States, established by a public office-holder who has a statutory obligation to be independent and impartial and who must ensure, by providing comprehensive legal information, that the consumer only concludes the contract on the basis of careful legal consideration and with knowledge of its legal scope;</i>

### **Amendment Proposal for a regulation**

#### **Annex I - Article 13 – paragraph 5 lit. c a (new)**

*Text proposed by the Commission*

*CNUE-proposal*

*(ca) is, in accordance with the laws of Member States, established by a public office-holder who has a statutory obligation to be independent and impartial and*

<sup>4</sup> [http://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Publications/S-2-2012\\_Statement\\_on\\_the\\_Proposal\\_for\\_a\\_Regulation\\_on\\_a\\_Common\\_European\\_Sales\\_Law.pdf](http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/S-2-2012_Statement_on_the_Proposal_for_a_Regulation_on_a_Common_European_Sales_Law.pdf).



*who must ensure, by providing comprehensive legal information, that the consumer only concludes the contract on the basis of careful legal consideration and with knowledge of its legal scope;*

## VI. Aptitude for online trade

The CESL was presented with the aim of massively encouraging cross-border online trade<sup>5</sup> and should therefore also provide the tools necessary for it to work. An instrument adapted to distance contracts provides the particular opportunity of establishing a modern contract law which satisfies the requirements of online trade.

### 1. Protecting consumers from non-performance and lack of conformity of services following payment of the purchase price

It is probably not the divergence between contract laws but the lack of confidence in traders that is the main cause of the deficits observed on the road to enhancing online trade – particularly with SMEs. The consumer fears, and not wrongly, that once the purchase price has been paid, he/she has no other solution in the event of non-performance or lack of conformity of services by the seller.

Certainly, Art. 126 of the Commission's proposal provides that the purchase price is only payable at the point of delivery of the goods. In practice, however, the price is payable immediately, which is entirely justifiable from the seller's point of view. This is why, for online trade, traders offer insurance when concluding the contract, which covers the risk of non-performance or lack of conformity of the service. The CESL could seize the opportunity of the advantages of concluding contracts securely and introduce a legal framework for these services. The CNUE refers in this context to the corresponding proposal by the European Law Institute.<sup>6</sup>

In its digital strategy, the Commission quoted the 'trust marks' as a means of building confidence in e-trading.<sup>7</sup> The trust marks are supposed to strengthen consumer confidence in certified traders.<sup>8</sup> Consequently, the CESL should also provide a legal basis for these trust marks. This is why the CNUE proposes that regulations to this end be drawn up. As regards the leading traders known on the internet, the trust marks can provide an opportunity for small and medium-sized enterprises (SMEs) to close the gap in consumer confidence.

### 2. Online offer and acceptance

It is appropriate to reconsider the traditional concept of offer and acceptance on which the Commission's proposal is based and which has been drawn up for the traditional case of concluding a contract. According to this concept, concluding contracts on the internet depends mainly on the acceptance of the offer by the trader given that the offer of services would normally be qualified as non-binding *invitatio ad offerendum* (Art. 31 III of the Commission's proposal) on the website.

<sup>5</sup> Speech by the Vice-President of the Commission, Viviane Reding, at the Conference on European Contract Law in Warsaw on 10 November 2011 at the following address:

<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/742&format=HTML&aged=0&language=EN&guiLanguage=en>.

<sup>6</sup> Cf. ELI's draft position with a view to a new Art. 26.

<sup>7</sup> COM (2010) 245 final, p. 13.

<sup>8</sup> Cf. study by Jan Trzaskowski of the Copenhagen Business School, [http://www.legalriskmanagement.com/PUBLICATIONS/2006\\_TRUST.pdf](http://www.legalriskmanagement.com/PUBLICATIONS/2006_TRUST.pdf).

A lot of time can pass between the consumer's offer and the trader's acceptance as the trader does not have to notify immediately that the consumer's offer has been accepted<sup>9</sup>. The trader can implicitly declare acceptance (Art. 35 II of the Commission's proposal), the law granting the trader 'reasonable time' to accomplish an act in the context of concluding the contract (Art. 36 III of the Commission's proposal). This traditional concept of the conclusion of a contract comes up against limits in online trade, which is above all characterised by its speed. As there is a growing and quickly available supply, the consumer wants to obtain confirmation of the contract's conclusion as quickly as possible in order, where applicable, to obtain the goods from another trader. For this reason, the CNUE proposes regulation adapted to the conclusion of online contracts.

### **Amendment Proposal for a regulation**

#### **Annex I - Article 19 a (new)**

<i>Text proposed by the Commission</i>	<i>CNUE-proposal</i>
	<p><b>1. The trader is only entitled to ask for payment of the price by the consumer before having fulfilled its main obligations under Article 91 if it offers sufficient protection for the refund of the total price, additional charges and costs in case of withdrawal, avoidance or termination by the consumer. Sufficient protection is provided by accredited escrow services, insurance companies or similar schemes ("payment protectors").</b></p> <p><b>2. A trader is prohibited from charging consumers, in respect of the use of a payment protector, fees that exceed the cost borne by the trader for the service.</b></p> <p><b>3. The trader is allowed to grant the consumer the right to choose whether the advance payment shall be protected according to paragraph (1) or not. The two options must be presented in a similar, non-discriminatory way.</b></p>

### **Amendment Proposal for a regulation**

#### **Annex I – 19 b (new)**

<i>Text proposed by the Commission</i>	<i>CNUE-proposal</i>
	<p><b>1. The trader must be a member of at least one accredited trustmark system.</b></p> <p><b>2. The trader must indicate prominently on</b></p>

<sup>9</sup> The trader only has to confirm receipt of the offer immediately and electronically (Art. 25 V DCEV). This confirmation does not mean, however, that the trader has accepted the offer.

	<p><i>its trading website the signet of the trustmark system it is part of. This signet must contain a hyperlink through which the consumer can obtain more information about the trader on the website of the trustmark system.</i></p> <p><i>3. The EU Commission shall adopt the detailed rules for implementation, such as the requirements for accreditation, the accreditation procedure, publication of accredited trustmark systems, the criteria trustmark systems have to supervise, and monitoring.</i></p>
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**Amendment Proposal for a regulation**  
**Annex I – Article 39 a (new)**

<i>Text proposed by the Commission</i>	<i>CNUE-proposal</i>
	<p><i>1. This Article applies where a trader provides the means for concluding a contract and where those means are electronic and do not involve the exclusive exchange of electronic mail or other individual communication.</i></p> <p><i>2. If not otherwise indicated by the trader, the trading website does not constitute an offer. The offer is made by the consumer by placing an order on the trader’s shopping system. Without prejudice to Article 71 the trader may not use default options which the consumer is required to reject in order to avoid an additional payment.</i></p> <p><i>3. The trader must provide appropriate, effective and accessible technical means for correcting or revoking the offer within at least one hour after the consumer has made an offer. During that time period any acceptance by the trader becomes invalid if the consumer corrects or revokes the offer. The consumer can explicitly waive the right of correction and revoking after having made the offer, provided that the trader has informed the consumer about this right in a clear and comprehensible manner. Chapter 5 remains unaffected.</i></p> <p><i>4. Without prejudice to Article 35 the trader must send a confirmation of the conclusion</i></p>

	<i>of the contract without undue delay after accepting the offer. 5. Without prejudice to Article 36 the offer lapses at the latest if it has not been accepted within four days. The trader has to inform the consumer about the termination of the offer without undue delay. Article 37 remains unaffected.</i>
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## VII. Model Contract Terms

The draft by the rapporteurs in the Legal Affairs Committee (JURI) proposes to entrust the Commission with the task of drawing up model contract terms for different types of contracts (amendment 20 with a view to a new recital 34c). In its communication of 11 October 2011, the Commission had taken the idea of giving an expert group a mandate to prepare model contract terms.<sup>10</sup>

The CNUE considers that such model contract terms are not without risk. They give the impression of having been authorised by a public authority and therefore to have no control over their content. Consequently, the model contract terms would be much used in practice and would make adapting the content of contracts to each individual case more difficult. In any case, it would be wrong to think that contracts are normally ‘mass contracts’ that do not require adaptation case by case.

This is an exception to the principle of autonomy (Article 1 CESL) that is, moreover, the guiding principle of the proposal for a regulation. This principle would be called into question by the elaboration of model contract terms.

### Amendment Proposal for a regulation

#### Recital 34 c(new)

<i>Text proposed by the Commission</i>	<i>Lehne/Berlinger (amendment 20)</i>	<i>CNUE-proposal</i>
	<i>(34c) To help facilitate the use of the Common European Sales Law, the Commission should work towards the development of European model contract terms. Such model contract terms could usefully complement the Common Sales Law rules when describing the specific features of a given contract and take into account the particularities of relevant</i>	<del><i>(34c) To help facilitate the use of the Common European Sales Law, the Commission should work towards the development of European model contract terms. Such model contract terms could usefully complement the Common Sales Law rules when describing the specific features of a given contract and take into account the particularities of relevant</i></del>

<sup>10</sup> COM(2011) 636, p. 13.

	<i>commercial sectors. They should respond to stakeholders' needs and draw lessons from the initial practical experience of the use of the Common European Sales Law. The model contract terms should be made available to the public as they would provide added value to traders who choose to conclude cross-border contracts using the Common European Sales Law. In order for those model contract terms to effectively accompany the Common European Sales Law, the Commission's work should start as soon as possible.</i>	<del><i>commercial sectors. They should respond to stakeholders' needs and draw lessons from the initial practical experience of the use of the Common European Sales Law. The model contract terms should be made available to the public as they would provide added value to traders who choose to conclude cross-border contracts using the Common European Sales Law. In order for those model contract terms to effectively accompany the Common European Sales Law, the Commission's work should start as soon as possible.</i></del>
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### VIII. Contract terms which are always unfair

Certain cases of unfair contract terms identified by the case law in the blacklist (contract terms which are always unfair) do not appear in the regulation either as contract terms which are always unfair (blacklist, Art. 84) or under contract terms which are presumed to be unfair (grey list, Art. 85). As the aim of the regulation is to guarantee the highest level of consumer protection, these unfair terms must be integrated within it.

**Amendment**                      **Proposal for a regulation**  
**Annex I – Article 84 lit. 1 (new)**

<i>Text proposed by the Commission</i>	<i>CNUE-proposal</i>
	<b><i>1) observe the consumer's agreement with contract terms that do not appear in the contract that the consumer accepts or that are included in another document to which there is no specific reference at conclusion of the contract and of which the consumer had no</i></b>

	<i>knowledge before conclusion; m) subordinate, in the case of a contract of indeterminate duration, the cancellation by the consumer to the payment of compensation to the trader.</i>
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## IX. Pre-contractual obligations

Because it constitutes a second regime of internal law, the Common European Sales Law is only applicable if a choice has been validated by both parties. In practice, this choice will be validated upon acceptance of the contract. Consequently, the optional instrument cannot apply only to pre-contractual obligations as, at this stage, the parties will not yet have opted for the optional instrument.

Although in theory it is possible to envisage, between professionals, the conclusion *ab initio* of an agreement submitting negotiations to the optional instrument, this hypothesis seems to have little chance of happening in practice, due to lack of interest. Indeed, the pre-contractual phase referred to in the proposal for a regulation is only envisaged with a view to the contract to which it will lead (thus the purpose of the information obligation is to enable proper enforcement of the contract; damages are envisaged in the event of poor fulfilment of the contract). Correlatively, the instrument does not include any specific provision concerning the unjustified termination of negotiations.

### Amendment Proposal for a regulation

#### Annex I – Article 11 par. 1 a (new)

<i>Text proposed by the Commission</i>	<i>Lehne/Berlinguer (amendment 68)</i>	<i>CNUE-proposal</i>
	<i>1a. Where the parties enter into negotiations, or otherwise take preparatory steps for the conclusion of a contract, with reference to the Common European Sales Law, the Common European Sales Law shall also govern compliance with and remedies for failure to comply with the pre-contractual information duties, and other matters that are relevant before the conclusion of a contract.</i>	<del><i>1a. Where the parties enter into negotiations, or otherwise take preparatory steps for the conclusion of a contract, with reference to the Common European Sales Law, the Common European Sales Law shall also govern compliance with and remedies for failure to comply with the pre-contractual information duties, and other matters that are relevant before the conclusion of a contract.</i></del>
	<i>The application of the Common European Sales Law as referred</i>	<del><i>The application of the Common European Sales Law as referred</i></del>



	<i>to in the first subparagraph is without prejudice to the law applicable under the relevant conflict of laws rules, where the trader has also made reference to other legal regimes.</i>	<del><i>to in the first subparagraph is without prejudice to the law applicable under the relevant conflict of laws rules, where the trader has also made reference to other legal regimes.</i></del>
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*Council of the Notariats of the European Union (CNUE)  
Brussels, 22 April 2013*