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SUBMISSION FROM THE CCBE

TO THE

INTERGOVERNMENTAL CONFERENCE 2003

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Conseil des Barreaux de l'Union européenne – Council of the Bars and Law Societies of the European Union
association internationale sans but lucratif
Rue de Trèves 45 – B 1040 Brussels – Belgium – Tel.+32 (0)2 234 65 10 – Fax.+32 (0)2 234 65 11/12 – E-mail ccbe@ccbe.org – www.ccbe.org

CCBE SUBMISSION TO THE INTERGOVERNMENTAL CONFERENCE 2003

The CCBE (the Council of Bars and Law Societies of the European Union), which through its member bars and law societies in the European Union and the European Economic Area represents more than 500,000 European lawyers, is closely following the development of the new EU constitution, particularly as it impacts on the role of the European courts.

The CCBE sees it as its task to provide a meaningful contribution to this debate, as changes regarding the Court of Justice and the Court of First Instance inevitably concern access to justice and the effective judicial protection of citizens of the EU. There should be no need to stress that the Court of Justice and the Court of First Instance constitute a cornerstone of the Community legal order and continue to play a crucial role in ensuring that the European Union is a community based on the rule of law, i.e. a community characterised by enforceable legislation which is subject to review and providing effective and adequate judicial protection to the citizens of the Union.

The Intergovernmental conference will be considering issues which raises the very fundamental question of how the protection of fundamental rights can be guaranteed within the European Union in a situation where competences, decision making and judicial control have been (and increasingly are) transferred to the European Union.

At several Intergovernmental Conferences, last and extensively in the IGC 2000, the CCBE has provided submissions on the question whether the fundamental human rights are adequately protected in the European Union and has argued consistently that this is not the case.

The EU is a community based on the rule of law, with enforceable legislation that is subject to judicial review. This is an essential characteristic of the EU – indeed, the ability to seek judicial relief is one of the key elements that distinguishes democracies from other forms of government.

For this reason, the new constitution must give EU citizens the ability to seek redress if their rights are violated, or if they are affected by a decision that is at odds with the constitutional framework. The EU judicial system must enable individuals and legal entities to challenge legislation and acts or omissions of its institutions, with clear and guaranteed access to the courts. As part of this system, measures taken by all EU institutions and bodies, in all of the areas in which the EU acts, must be subject to judicial review.

For this reason, the CCBE would like to make three points in relation to the provisions of the draft Treaty establishing a Constitution for Europe which relate to judicial review. First, all parties materially affected by an EU measure – whether or not it is directed specifically at them – should have standing to bring a case in the European courts. Second, actions of all EU bodies should be subject to judicial review. Third, actions in all areas of EU competence should be subject to judicial review.

- **Parties should be able to challenge in the European courts any measure that materially affects them.** Under Article 230(4) of the existing EC Treaty, private parties may seek judicial review of individual decisions of EU institutions addressed to them. Private parties may challenge other acts only if they are able to demonstrate that they are "individually and directly concerned" by those acts. This very strict "individual concern" test makes it almost impossible for private parties to challenge measures which are not formally addressed to them, even if those acts directly and specifically affect their situation and cause grave and irreparable harm. In particular, it leaves parties without legal remedies at the European level against Directives and Regulations that infringe the EC Treaty in some fashion, even if those parties suffer harm. As a result, the EU offers less judicial protection to private parties than the judicial systems of Member States.

The ability of national courts to refer questions about the validity of EU acts to the European courts under the preliminary ruling procedure is not a satisfactory substitute for the possibility for private

parties to bring direct actions for annulment before the European courts. Private parties cannot invoke the preliminary ruling procedure at will, but are dependent on the willingness of the national courts to refer the requested questions. Experience shows that it is extremely difficult to obtain references under the preliminary ruling procedure and that it usually takes many years until the case is heard by the highest judicial body of the Member State, which is in principle (if not always in practice) obliged to refer the matter to the European courts. And, in those rare cases where references are made, the national court often asks the wrong questions.

Moreover, the ability of private parties to challenge EU acts by this indirect route varies from one Member State to another, meaning that EU citizens' rights with respect to EU law depend, in significant measure, on where they live. Indeed, in some countries, the only remedy is to allege the illegality of the law as a defence once a party is prosecuted for infringing it, hardly an attractive proposition.

In addition, national courts cannot declare an EU act invalid since this is within the exclusive competence of the European courts. It therefore does not make sense from the perspective of judicial economy that a party must bring a case in the national court if it is challenging an EU act. Meanwhile, it is agreed widely that the fear that opening access to the EU courts would result in a flood of cases is not supported by any empirical evidence. In any event, concern about the number of potential cases is not a valid argument for maintaining a system which, as the European Court of Justice itself has noted, may not be sufficient to guarantee adequate judicial protection against violations of fundamental human rights by EU Institutions.

The solution is clear: for effective judicial review, EU citizens should have the right to challenge in the European courts any action that materially and directly affects them, irrespective of whether it is directed expressly or implicitly towards them or is a measure of general application. While the draft Constitution's proposed reform of the current Article 230 (4) EC Treaty, i.e. Article III-270 (4) of the draft Treaty establishing a Constitution for Europe is progressive, it is by no means satisfactory as it deals with only one issue, i.e. that of EU legislative acts that require no implementing measures. Therefore, the CCBE urges that Article III-270(4) of the draft Constitution be changed as follows:

> "Any natural or legal person may, under the same conditions, institute proceedings against an act addressed to that person or that has a substantial adverse effect on his interest."

- **Parties should be able to challenge actions of all EU bodies.** Currently, the EC Treaty allows individuals to challenge only measures taken by the EU Institutions, most notably the Commission. Individuals cannot bring claims related to actions of other EU bodies, such as Europol and the increasing number of EU agencies. These bodies frequently – indeed, perhaps more frequently than the Commission – take actions directed at a particular individual (such as issuing an arrest warrant, or failing to approve a medicine) that should be susceptible to challenge before the European courts. Although it may be possible to obtain judicial relief by suing the Commission in some of these cases, this legal fiction should not serve as a substitute for effective remedies against the actual decision-maker. Moreover, the ability to bring actions against all EU bodies will increase citizens' knowledge of and certainty about their rights, and will help counter the allegations of a democratic deficit within the EU. In this regard the CCBE supports the proposed wording of Article III-270(1) of the draft Treaty establishing a Constitution for Europe.

- **Parties should be able to challenge actions in all areas of EU competence.** A single, coherent and complete system of judicial review that protects individuals from undue interference with their rights is a minimum requirement in a democracy based on the rule of law. Currently, the draft EU constitution contains carve-outs from judicial review in some key areas – most notably in the area of freedom, security, and justice. Ironically, this may be the area of EU competence that touches most closely upon fundamental rights, as it includes issues such as an integrated system of border management, a common visa policy, common measures against terrorism, combating trafficking in human beings, the fight against drugs, the European Arrest Warrant, and so on. The CCBE believes that actions in these areas, more than in most other areas, are likely to have a direct effect on citizens' rights and freedoms, and therefore require judicial oversight regarding the legality and proportionality of measures taken.

Under the current system, the ability of the European courts to review Member State actions in the area of police and judicial cooperation varies from country to country. Moreover, in the immigration area, only the highest courts of appeal in the Member States may make references for preliminary rulings to the European courts. And the European courts are expressly denied jurisdiction to rule on issues relating to the maintenance of law and order and the safeguarding of internal security.

The CCBE believes that this system restricts unduly the right of access to the European courts in cases pertaining to the validity or interpretation of EU law in the area of freedom, security and justice. This deficit in judicial protection is particularly apparent where acts of EU Institutions are at issue. National courts cannot invalidate such acts. But, as noted above, the European courts have limited or no jurisdiction to annul them. The net result is that individuals cannot have such acts declared invalid, even if those acts are manifestly illegal and seriously infringe their rights. This raises serious questions about the compatibility of EU law with the Charter of Fundamental Rights and the European Convention on Human Rights. For these reasons, in this critical area the EU constitution should provide for full applicability of the preliminary ruling procedure; of general actions for annulment, for failure to act, and for damages; of the plea of illegality; and of infringement procedures. In this regard, the CCBE would recommend that Article III-283 of the draft Treaty establishing a Constitution for Europe be changed to take into account these concerns.

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The CCBE welcomes this opportunity to comment on the provisions of the new EU constitution related to judicial review. We would be happy to discuss our comments in greater detail. For more information, please contact:

Peter Mc Namee
Tel: +32. (0) 2.234.65.10
Fax: +32. (0) 2.234.65.11/12
E-mail: mcnamee@ccbe.org