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Representing Europe's lawyers

PROPOSAL BY THE CCBE FOR THE ESTABLISHMENT OF A EUROPEAN CRIMINAL LAW OMBUDSMAN

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Conseil des barreaux européens – Council of Bars and Law Societies of Europe

association internationale sans but lucratif

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1. The present position: the Commission Communication to the Council and the European Parliament of the 26th July 2000 on Mutual Recognition of Final Decisions in Criminal Matters [COM (2000)495 final, 29.7.2000] stated that "it must therefore be ensured that the treatment of suspects and the rights of the defence would not only not suffer from the implementation of the principle (of mutual recognition) but that the safeguards would even be improved through the process". The experience of the CCBE is that suspects and the rights of the defence are "suffering", and that there are no, or no sufficient, safeguards in cross-border criminal cases, and where EU citizens find themselves involved in criminal proceedings in a Member State other than their own.

2. The Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters ("Programme of Measures") [OJ C 12, 15.1.2001, p.10] adopted by the Council and the Commission, pointed out that "mutual recognition is very much dependant on a number of parameters which determine its effectiveness", and that these parameters include "mechanisms for safeguarding the rights of suspects" (parameter 3). The view of the CCBE is that the mechanisms for safeguarding the rights of suspects set out in the Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union are inadequate.

3. In the European Union, Europol and Eurojust are working across borders in the interest of law enforcement, but there is an urgent need for a new form of "cross-border protection" of defence rights to counterbalance this. Legal aid for criminal cases is not available. The Council Directive of the 27-1-03 "to improve access to legal aid in cross-border disputes" 2002/8/EC provides in Article 2 that the Directive shall apply "to civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters". In the view of the CCBE there are too many initiatives on "Security" and Law and Order, but too little on Fundamental Rights and Justice, which results in these important elements being insufficiently reflected or addressed in the work of the Commission. This imbalance can only be remedied, the CCBE believes, by the creation of an independent body to safeguard the rights of the defence.

4. The Problems we are Encountering:

- (a) whilst the Strasbourg system and case-law is equipped to deal with proceedings when they are finished, it is ineffective in dealing with problems that occur when proceedings begin. There is no institution to deal with the violation of rights, nor when problems arise, nor to supervise, at the start of proceedings;
- (b) cross-border cases create special difficulties. There are two States involved, often with substantially different legal systems and procedures, and different languages. Communications between the authorities in different countries, the Courts, and different prosecution and defence lawyers become complex and difficult. The citizen in his or her home country will not have access to competent legal advice in the other State. These transnational complications lead in our experience to the breakdown of the principle of "equality of arms", and great hardship for defendants in criminal cases who need a better system than is presently available to them;
- (c) the Accession States need assistance with their legal systems, especially in cross-border cases;
- (d) the national Courts are only concerned with their national law, and can provide no remedy where a cross-border problem arises. To whom can a defence lawyer turn when a rights

violation occurs in the other country in a cross-border case? There is no supra-national authority or procedure to deal with this;

- (e) in the absence of legal aid, how does the defence lawyer in the home country obtain access to the file and get proper disclosure, organise a "double defence" [in both countries], and deal with the provision of interpreters? These problems, presently associated with the European Arrest Warrant, will become worse when the European Evidence Warrant comes into operation.

5. The Solution: The Area of Freedom, Security and Justice is built on a system of mutual recognition. Mutual recognition is based on mutual trust. The CCBE believes there must be a trusted mechanism for safeguarding the rights of suspects, and for it to be successful it must be independent. The CCBE therefore proposes that a European Criminal Law Ombudsman be created. The ECLO should be a criminal defence lawyer in independent practice. He or she will act as Chair of a College of criminal defence lawyers in independent practice, one drawn from each Member State. The ECLO must Chair a meeting of the College at least four times a year. The ECLO will be nominated by the appropriate Committee of the European Parliament. The term of office of the ECLO should be a term of years, with lawyers from different EU member states taking turns in applying for nomination. The ECLO should have a small staff and an office in Brussels, and should be given authority to collect information on cases from lawyers and clients whose cases are referred to him or her.

6. Functions of the ECLO: The primary concern of the ECLO is to protect and safeguard the rights of suspects, defendants, and those under investigation in cross-border or trans-national disputes or cases. In addition, he or she will:

- A. deal with problems and complaints in relation to the European Arrest Warrant, the European Evidence Warrant, and similar legislation;
- B. react swiftly to problems encountered in the early stages of proceedings in order to seek to provide a remedy;
- C. be able to approach the Commission and national authorities for information or assistance, and also the national Judiciary;
- D. be able to approach the appropriate bodies within the European Parliament, and to inform the public what is going on;
- E. coordinate action and provide help to construct a defence team in both the issuing and the executing state so that an effective defence can be put forward in both countries;
- F. provide assistance in locating legal aid or legal assistance or funding where required;
- G. address the lack of "equality of arms" where it arises.

The CCBE proposes that the ECLO and the College of lawyers becomes part of the measures provided for in the Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings, for which a legal basis clearly exists. The CCBE believes that this independent institution will be a progressive step in dealing with the present imbalance between the rights of the prosecution and the rights of the defence, and the CCBE will be happy to cooperate in devising more concrete provisions for the setting up of this proposal. Only then will there be a proper mechanism for safeguarding the rights of suspects, defendants, and those under investigation in cross-border cases.