



25 November 2007

Alberto Costa
Ministro da Justiça
Escadinhas De S.
Crispim 7
1100, Lisbon
Portugal

Dear Minister,
Proposal on the European Supervision Order in Pre-trial Procedures between Member States.

I am writing on behalf of the European Criminal Bar Association¹ to express our support for the proposal for a European Supervision Order which is currently under consideration in the Justice and Home Affairs Council. We have been following this proposal closely since its inception and strongly support the plan behind it: reducing enforced remand and promoting the equal treatment of resident and non-resident accused persons. We believe that the proposal could represent an important step forward in securing judicial protection of individual rights in the internal market and in avoiding discriminatory treatment of EU citizens in Member States other than their own. We urge you to take all possible steps to secure agreement on the proposal as soon as possible.

As defence practitioners working in criminal law, we can confirm that the issues which this proposal seeks to address are real and troubling – in our experience, non-nationals are frequently detained in custody pending trial in cases where nationals would not similarly be detained. If non-nationals are not detained in custody pending

¹ The ECBA was founded in 1997 and has become the pre-eminent independent organisation of specialist defence lawyers in all Council of Europe countries. Our aim is to promote the fundamental rights of persons under investigation, suspects, accused and convicted persons. We are an independent organisation of criminal defence practitioners and membership is open to all lawyers, whether practising or in academic life, who support our aims. In an era where supra-national bodies, such as the European Union, are increasingly influencing the future of criminal justice in Europe, we believe there is a need for an organisation of practising defence lawyers able to promote and protect the rights and procedural safeguards for all EU citizens. www.ecba.org

trial, they are often required to remain in the country, to surrender their passports and to report on a regular basis to police stations. Similar requirements, particularly the requirement to surrender passports are not imposed on nationals with the same degree of frequency, particularly in minor offences.

We are personally aware of many cases throughout Europe which bear out our concerns and believe that much hardship could be avoided if this proposal were to be adopted. Pre-trial detention periods can be lengthy and non-nationals who are detained in custody, or required to remain in a country other than their own pending trial frequently lose their jobs, lose contact with their families and suffer financial and social problems as a result. These issues can also have financial consequences for the home Member State of the accused person, which may have to provide support for family members.

We have canvassed our membership for examples of the kinds of cases which they have encountered in their practice and they include the following:

- A British citizen who was arrested in Latvia on theft charges and detained for over 2 months pending trial, then released on condition that he stay in Latvia until the trial took place; a number of Romanian citizens detained for between 2 and 3 ½ months pending trial on theft and fraud charges.
- A significant number of cases in Scotland where it is routine for the prosecution to refer to the nationality of the accused as a ground of opposition to bail. The normal solution is that the accused is required to surrender his passport and report daily to a police station. In similar circumstances, a national would not be required to surrender his passport. In Scotland, there are also some examples of post-conviction situations where nationality is taken into account in refusing bail pending resolution of appeal proceedings, thus extending the potential length of custody even further. We are aware of a case involving a Dutch national who was required to remain in the UK pending appeal and was forced, due to lack of income, to live in appalling conditions for an extended period of time while a date for appeal was set.
- A number of cases in Germany involving Dutch nationals on drugs charges who were detained for lengthy periods
- A number of cases in Italy where our members confirm that non-nationals are definitely not treated in the same way as nationals and are frequently detained in Italy, either in prison or in the community, but who are not permitted to go home to their home Member State.
- A recent case in England where the Environment Agency used the European Arrest Warrant to secure the arrest in Ireland of an Irish citizen thought to have been involved in offences related to the dumping of waste in the UK. The Irish citizen was sent back to the UK and has been bailed in the UK on condition that he hand over his passport and that he remains at a UK address.

We hope that these examples serve to demonstrate that there is a real problem throughout the European Union with the treatment of non-nationals in circumstances where nationals would be treated more favourably. In our view the European Supervision Order proposal could go a long way to addressing this problem and would ensure that this form of discrimination does not continue into the future.

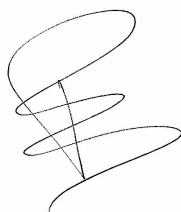
We agree that there were a number of issues in relation to the original proposal of 29 August 2006, but we believe that they can be resolved. We identified a number of problems with the previous draft which are highlighted in our attached submission which was made jointly with the CCBE.

In particular, we were concerned that in the initial draft, there were no provisions for the consent of the charged person to the transfer to the home Member State. This lack of provision for consent turns the European Supervision Order into a provision which introduces forced transfer to another Member State even in the case of crimes which are too minor to be covered by the European Arrest Warrant procedure. The introduction of such provisions represents a considerable interference with fundamental rights. We would expressly disagree if the European Supervision Order created a new, legal reason for arresting people and forcing their transfer to another Member State.

Further, we understand that a modified version of the European Arrest Warrant procedure may be added to the draft to deal with the situation where the accused person breaches the provisions of the supervision order and has to be forcibly returned to the Member State of trial. Again we are concerned that the fundamental rights of the person concerned should not be prejudiced in this process, particularly in situations where the crime concerned attracts penalties too minor to be caught by the European Arrest Warrant procedure as currently drafted. It is unacceptable that the European Supervision Order procedure should create forcible return without full respect for the fundamental rights of the person concerned. We would refer you to our joint response to the original proposal (attached) which sets out the provisions which we believe are required to safeguard the position of the suspect.

We urge you to work to make progress towards adoption of this Framework Decision and would be happy to work with you to find a solution to the drafting issues.

With best wishes



Han Jahae
President

cc: Dr Lovro Sturm, Minister of Justice, Slovenia
Commissioner Frattini
Council of Ministers.
Permanent Representations of all Member States in Brussels.