

EUROPEAN CRIMINAL BAR ASSOCIATION - MEASURE E

1. The ECBA has become the pre-eminent independent organisation of specialist defence practitioners in all Council of Europe Countries. Its aim is to promote the fundamental rights of persons under investigation, suspects, accused and convicted persons in criminal proceedings throughout Europe, and ensure that those rights are considered and respected. You will find more information on the ECBA on www.ecba.org.
2. The ECBA is not a political body, but an institution of legal practitioners who are able to provide legal expertise and practical experience nationally and transnationally on most issues of criminal and procedural law throughout Europe.
3. This draft paper contains the ECBA's main recommendations to the Commission on Measure E of the Stockholm programme for the appropriate rights and treatment of vulnerable Suspects.
4. As the ECBA pointed out in its News Letter (Issue 26) on Measure E: "The idea is to draft the ECBA's Cornerstones of special safeguards for suspected or accused persons who are vulnerable. This would support the the political EU decision makers at EC, EP and the Council to come to appropriate conclusions on how to protect vulnerable suspects in addition to the general rights and safeguards in criminal proceedings".
5. In this draft the ECBA wishes to concentrate on the most obvious group to be defined as vulnerable and that is persons not of full age, i.e. Children and Minors. When discussing Measure E we take it for granted that Measures A to D and F will form part of the EU Directives to the Member States. None of them can work effectively without the others.
6. We wish to make it clear that procedural safeguards adapted to the different needs of other vulnerable suspects are no less important than those of Children and Minors. Within the ECBA there is considerable experience of criminal cases throughout Europe. It is clear from that experience that vulnerable suspects who have reached full age also run the risk of mistakes being made in the early phases of an investigation which can undermine a fair trial. The ECBA is of the opinion that procedural safeguards in addition to those covered by Measures A to D and F are necessary to protect all vulnerable people (not just Minors and Children) so as to satisfy the standards set in the Stockholm Programme.
7. Unfortunately, in the time allowed, it has not yet been possible for our organisation specifically to analyse or define the safeguards necessary for other vulnerable persons apart from Children and Minors. And even in regard to suspects who are Children and Minors our proposals set out herein are only examples, rather than a full list of procedural safeguards.

8. Of course, all suspects, vulnerable or not, should have such rights as the right to an interpreter, a lawyer, legal aid, to communicate with a friend or relative, right of waiver of a lawyer in some circumstances, right of silence, right to information and to be cautioned, right to legal privilege and confidentiality, etc. These Cornerstones are part of the criminal procedure in the jurisdiction of the EU. They are also part of the ECHR and the jurisprudence of the ECtHR. They present an essential part of the legal base for the work on EU Directives to the Member States in accordance with the Stockholm Programme. All Cornerstones are part of an integral whole. One cannot abandon one without risk to the others.

9. However, suspects who are not ordinary but are vulnerable demand special treatment, and it is that with which Measure E is concerned and which the ECBA wishes to address.

10. It is very difficult to define “vulnerable” except in relation to Children and Minors who can be identified by their age.

A. Children and Minors.

11. We define persons under the age of 18 as children or minors, which is almost universally accepted for this group in Europe and in the UN Convention.

12. Members of the ECBA are practitioners who as defenders certainly meet children and minors as suspects in many cases. There is no doubt that there are problems concerning such suspects in the criminal process from the beginning of the pre-trial investigation through all the procedural stages. These problems can endanger a fair trial if not dealt with in a well-informed manner.

13. We wish to highlight certain principles within the cornerstones which specifically apply to Children and Minors.

(a) On arrest they must be able to understand what is happening.

(b) They must be able to contact a parent, member of their family or friend, or some appropriate adult, such as a Probation Officer or Social Worker, who is allowed to be present during any police interview from the start of the proceedings and be able at any time to interpret or explain anything not understood.

(c) There must be a mandatory right to a lawyer from the start of proceedings. They must not be able to waive that right unless their waiver is verified by an appropriate adult who is present and able to confirm the waiver as genuine. (N.B. in some petty cases (where custody is not at risk) there may be teenagers who do not want anyone to know of their arrest, and perhaps they should be allowed waiver without assistance).

(d) They must have the right to legal aid good enough to enable them to prepare and implement their defence.

(e) They must be cautioned as to their rights, including the right to silence.

(f) In communication with their lawyer they must have the right to the privilege of confidentiality and non-disclosure.

14. These principles are already a part of criminal procedure in many EU jurisdictions. Nevertheless, it is the experience of the ECBA that mistakes are made which sometimes lead to catastrophic miscarriages of justice. These experiences demonstrate the need to strengthen the safeguards in question.

B. Examples of what causes mistakes to be made in the pre-trial situation with Children or Minor Suspects.

15. It is clear that a person under the age of 18 generally has not yet a complete education in the modern school-systems in Europe. It is also clear that a child is still maturing through most of his years as a teenager. Most minors are dependent on their families - economically and in many other respects - to such an extent that it must be taken into consideration if he embarks on anti-social behaviour leading him to become a suspect in a criminal investigation.

16. The ECBA has experience of several cases in most of the European jurisdictions where a minor is under pressure from, for example, his parents or other older relatives to own up to crimes for which he is not fully responsible. The motive may have been that there would be perceived a better outcome if the minor takes the legal blame instead of the grown-ups in his family. (Hogsby - Case in Sweden recently).

17. There are also cases where a minor falsely takes all the responsibility when it comes to organised crimes or persons in or around gangs. The child might believe he will gain some advantage within the organisation or is under such pressure or even extortion to help older criminals mislead the police.

18. In most jurisdictions a minor suspect is seldom taken into custody and restricted from contact with his family and/or friends. That is, of course, the practice in most, if not all, jurisdictions. However, it may make it easier for somebody who wants to exercise unlawful power over the Child or Minor.

C. Additional safeguards needed

19. A Child or Minor who is a suspect in a police investigation must be assured of receiving legal advice before any questioning by the police. By appointing an experienced lawyer early to defend the suspect, he will probably be more able to answer questions during the course of the investigation in a more meaningful way.

He can then possibly work out for himself whether or not he has been involved in the commission of a criminal offence, once he understands the limits of the law.

He can also learn to differentiate between what he has done and what the police suspect, in the sense that what they suspect he has done would amount to a crime, but what he has in fact done would not, or would amount to a lesser crime.

He will then be able to consider whether he should use his right not to incriminate himself and, if so, how he should act. It must be said that it can be intellectually highly demanding for any suspect to make the right decision in this regard.

He can then consider what stance he should take on whether to exercise his right to remain silent and what consequences might follow.

He can analyse with his lawyer the consequences of the steps he decides to take during the investigation. For a child, as for an adult, who is under investigation it is of the utmost importance to have adequate time and the facilities for the preparation of his defence.

20. Looked at in the way expressed above it is of great importance that every child is given the opportunity, the time, the resources etc. to have personal contact with his defender/lawyer at the same time as he is presented by the police with the information that he is suspected of a crime.

21. European lawyers with most experience in defending suspects under the age of 18 say that such clients, after having spoken to their lawyer, whose advice they might value higher than that of the inquiring policeman, often come to the conclusion that they should accept the situation and recognise what they have done. In many of those cases, the advice of the lawyer has simplified and shortened the investigative procedure, often making it possible not to keep the youngster under arrest. Obviously good legal advice differs from case to case according to its merits. The age and vulnerability of the client is obviously of paramount importance.

22. Thus, it should be mandatory that a defence lawyer is provided at the earliest opportunity and right at the start of the investigation. Obviously, the defender may have to be paid by the State under its Legal Aid Rules and there have to be the resources to meet the Child or Minor's needs in each investigation.

23. For a lawyer to take on a new case at short notice should be a lawyer's responsibility in every jurisdiction. Bar Associations in all Jurisdictions will probably have to organise a list of lawyers willing to take that responsibility. There are already such regional "lists" in many European Member States.

D. Other vulnerable Suspects

24. Of course, apart from Children and Minors, there are very many vulnerable suspects who deserve special safeguards, and those suspects are not always easy to identify. It is obvious that those suspects are very difficult to define and the ECBA's work on that is only just starting. Accordingly we have dealt specifically so far with those who can be defined by their date of birth, i.e Children and Minors.

25. We agree with what Fair Trials International concluded in paragraph 38 of their August 2012 Report on Vulnerable Suspects, that "The application of Special Safeguards for vulnerable suspects at the earliest stage of criminal proceedings is essential to ensure that these suspects understand what their rights are and how to

exercise them. If people do not understand the proceedings because their vulnerability is not identified or because special safeguards are not in place, then this leads to a serious inequality of arms, undermining the chances of receiving a fair trial”.

26. Other vulnerable suspects, apart from Children and Minors, may be just as vulnerable, if not more so. For example, a 25-year old with a mental age of a 14 year-old.

27. It is obvious that, if someone who is not yet 18 warrants special safeguards, so then does a person over 18 who is just as vulnerable in fact, if not in age. This demonstrates just how difficult it is to define a vulnerable person, so as to decide who deserves special safeguards.

28. Of course, apart from minors, others can easily be identified as vulnerable, such as illiterates, the visually impaired, the deaf, the dumb, some addicts, those conspicuously physically disabled, or those who cannot speak the language of or understand an interviewer.

29. Other groups are also vulnerable for physical or mental reasons which are not obvious, and would not be recognised as vulnerable without expert medical or sociological assistance, nor by the police, unless highly trained.

30. The ECBA would suggest that the only way to be able to get anywhere near the task of identifying all vulnerable suspects as soon as possible after arrest, is to ensure that all suspects are provided with a competent lawyer (with legal aid if necessary) at the very outset of the investigation, who would be sufficiently competent to address what is necessary to be done in relation to obtaining expert advice or intervention relating to his client’s physical or mental condition.

31. Of course, lawyers can be fooled, but it would be a start.

32. Several ECBA members, for example, have had the experience of representing “serial confessors”, who confess to serious crimes which they have not committed, in order to please or to seek attention, or many other causes. In many of these cases, the Police and Courts have been fooled, leading to, sometimes sensational, miscarriages of justice.

33. The above is just a brief summary of a very real problem in relation to genuinely vulnerable suspects, whom it is difficult to define. The ECBA is eager to research this further, but time constraints have made it impossible to deal with it as yet. We have simply presented starting points.

34. Everyone who has had experience in criminal investigation knows of vulnerable suspects who, even if not Children or Minors, have some deviation in their personality or in the way they live which causes the police to check them more often than others as suspects of crime. It is clear from experience that there are characters and personalities of huge diversity, making it even more difficult to define who might



need special safeguards under Measure E. That, however, should not prevent us from trying to find a solution which could result in an Equality of Arms.

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