

Response to the European Commission's proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings (**Part of MEASURE E**)

1. In November 2013 the ECBA received from the Commission a package on procedural rights, which included a proposal for a Directive on procedural safeguards for children suspected or accused in criminal proceedings. It also included a Commission Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings. This was purported to be done under Measure E.

2. We are grateful for the Directive proposal and for the inclusion therein of some of the suggestions made in our ECBA Cornerstones submissions sent to you in May 2013, and the Commission's generous remarks about their value in letters sent to us. Indeed, we are gratified by the content and, as you will see later in this paper (after paragraph 21 at B), do not have much criticism to make.

A. GENERAL

3. We had known for some time that the Commission intended to concentrate on the position of children initially and had asked us to do the same, but we had expected, and still expect, that there would be a further proposal for a Directive referring to other vulnerables, or, more simply, an amendment of the current Directive proposal to include all vulnerables (i.e. children and adults). For the Commission to act otherwise would be to act in breach of their duty and commitment to the Stockholm Programme and Measure E. This is why we have headed this paper as "Part of Measure E".

4. The absence of such further proposal, nearly a year after we were asked to contribute to Measure E, causes us concern, because it might be thought that the Commission was "shelving" the question of other vulnerables. The Commission's Recommendation on other vulnerables holds no weight or value in its present form because it is not legally binding, and we see no point in responding to it in this paper.

5. Our concern is caused firstly by the fact that, as you know, on the 30th November 2009, a Resolution of the European Council was passed on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. The Resolution was (inter alia) to "endorse the Roadmap.....set out in the Annex...", stating that "The rights included in this Roadmap....are considered fundamental procedural rights and action in respect of these rights should be given priority at this stage...The Commission is invited to submit proposals regarding the measures set out in the Roadmap.....The Council will examine all proposals presented in the context of the Roadmap and pledges to deal with them as matters of priority." The Roadmap Measures are set out in the Annex, Measure E being relevant for our purpose, as follows:

“Measure E: Special Safeguards for suspected or Accused Persons who are Vulnerable Short explanation:

In order to safeguard the fairness of the proceedings, it is important that special attention is shown to suspected or accused persons who cannot understand or follow the content or the meaning of the proceedings, owing, for example, to their age, mental or physical condition”.

There is no mention of the word children and age is not the only factor. It clearly refers to all vulnerables.

6. The ECBA assumes that the Commission will agree with this and will in due course either amend the current proposal or produce another proposal for a Directive in relation to adults. Of course it will be more difficult to define an adult vulnerable, but it should not be an impossible task to propose safeguards to meet the possibility of adult vulnerability.

7. It is obvious that Measure E is not confined to ‘children’. A 28-year-old with the mental age of 14 springs to mind. Also all people are born under the age of 18 and would be deemed “vulnerable” until their 18th birthday. The great majority would then be no longer deemed vulnerable. But many of them might have an additional vulnerability and it cannot be justice for them to have no particular safeguards thereafter.

8. It is obvious why Measure E was drafted as it is and it is obvious that, if the Commission is to be faithful to its duty and commitment to the Stockholm Programme, there has to be a further proposal for a Directive on adults.

9. We trust you will agree with this and we will comment on any amendment or further proposal when we receive it.

10. In view of the above, it is necessary to go a little bit into the history of ECBA's involvement, so as to explain the problems which arose and why, perhaps, the Commission adopted the course they did.

11. By January 2013 the European Commission was ready to receive submissions on Measure E. Accordingly the ECBA formed a Working Group Co- Chaired by two members, from Sweden and the UK. There were members of the Group from various countries including Germany, England, Sweden, Ireland, Scotland, Estonia, Cyprus, Romania, Belgium and the Netherlands. Our remit was to gather information on the important problems in terms of vulnerable suspects in criminal proceedings throughout Europe, including legal and practical issues, experiences, case examples, including treatment of both children and vulnerable adults. The final remit was to draft ECBA Cornerstones to support the EU decision-makers at EC, EP and CMS to come to appropriate decisions on Safeguards in criminal proceedings. The political framework was, of course, the Stockholm Programme and Roadmap of December 2009. Accordingly, from the start the Working Group was briefed to deal with all vulnerables, we received considerable help on the subject from Fair Trials International who, in August 2012, after in depth research in many countries, produced an excellent Report.

12. The ECBA Working Group met for the first time on 16th March 2013 in London. From the start we all understood that our remit concerned all vulnerables, including children. Indeed we worked harder to try to devise a definition of adult vulnerables, because vulnerable children could easily be identified by age. We discussed at length a possible definition of all vulnerables.

13. At this meeting there was no question but that we were considering ALL vulnerables and not just children. Our ECBA Newsletter (Issue 26) in March 2013 made this clear, stating that “vulnerable persons could be children under 18- drunk people- people under the influence of drugs or other addictives - people suffering from mental or physical disabilities- people with mental disorders such as serial confessors.” In their report, Fair Trials International stated that, after obtaining responses from 100 defence practitioners, they were informed that 1. Vulnerable suspects are often mistreated by the police; 2. Police often lack awareness and fail to identify vulnerabilities; 3. While there are some safeguards for vulnerable suspects, their application varies widely from case to case; 4. Suspects with mental disabilities, mental health problems and addictions are most likely to be denied the necessary safeguards” FTI were certainly not confining themselves to children.

14. For the first time, at the end of March, we received information to the effect that Mrs. Heinkelmann from the Commission, who was working with others on an assessment study for Measure E, was rather focusing on younger suspects. Time now was of the essence, the aim being to complete the study in April.

15. So far as the ECBA was concerned matters in this regard changed when on April 9th 2013 our Co-Chair of the working group, Bertil Dahl, and the ECBA President, Professor Holger Matt, met Olivier Tell and others from the Commission in Brussels. They were told that the Commission was concentrating on child suspects, and apparently suggested that the ECBA’s submissions would be more likely to be listened to if we concentrate on children . This was the first hint that the Commission might be inclined to separate children from other vulnerables when considering Measure E. Olivier Tell also stressed the need for urgency and for the ECBA to provide its input before 10th May. We accordingly drafted a paper dealing with safeguards for children, but including reference to adult vulnerables, firstly because that is what the Roadmap Measure E requires us and binds the Commission and Council to do, and secondly because of concerns aired by some members of our Working Group.

16. One of our ECBA Working Group had sent an E-mail in which he said “Whilst accepting that Mr.Tell’s unit intends to limit matters to children and that we should assist in that regard, I suggest that to limit our paper in the current format, which omits our views on the proper approach to vulnerable suspects, is a lost opportunity for us. I believe that we should prepare our view of what should define a vulnerable suspect and then in addition to our views focus on the suggested and much more limited scope of child suspects. If we simply refer to child suspects we are seen to homologate the suggested approach, which from our point of view is flawed and deficient. This could be damaging to ECBA and its reputation in the long run as it allows politicians to say that they are only following what the practitioners recommend and they said nothing about anyone other than children”..

17. All persons who wrote in with contributions to the drafting of our submissions dealt specifically with all vulnerables. There was a particularly detailed paper from another member of our ECBA Working Group headed 'Measure E: Special Safeguards for suspected or Accused Persons who are Vulnerable' - She had no doubt that we had to consider all vulnerables. Accordingly we were keen to ensure that our submissions to the Commission made this clear. Although we were keen to cooperate with Olivier Tell's Group, who understandably believed that it would be politically easier for the decision-makers to devise safeguards for children, we were bound to stick to the Roadmap, so that our submissions were enlarged to include adults.

18. At the ECBA's Spring Conference in Istanbul at the end of April 2013, the Working Group finalised the ECBA's document to be ready for the Commission by mid-May. On our return it was sent to the Commission and Mrs. Reding personally on 15th May 2013. We made it clear that this was preparatory to the Commission's work on any coming Directive concerning procedural safeguards for vulnerable suspects (i.e. not just children). Our submissions were published on the ECBA Website.

19. Paragraph 3 made it clear that "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". We also made it clear that although we were concentrating on the most obvious group, i.e. children and minors, we said in paragraph 5 "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 out in the Stockholm Programme". The first 10 paragraphs dealt specifically with other vulnerables than children. Paragraphs 24 to 34 went back to the importance of safeguards for suspects who are not children.

20. Although pressure of time had not enabled us to contribute on other vulnerables beyond the above, we assumed that the Commission would nevertheless be able to make up their own minds on a Proposal (or possibly two) for a Directive under Measure E.. Not only did we receive no Directive proposal on other vulnerables, but received no comment on when a Directive proposal was to be forthcoming, to comply with the Council Resolution.

21. However, we are able to offer some comments on the Directive Proposal that we do have on children, although a little artificially, because that is only Part of Measure E, and probably less than half.

B. ECBA's Response to the Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings.

1. We are pleased to say that we find your Proposal in relation to Children encouraging, and are very grateful for the Commission's kind remarks in the e-mail of 11th June. As they also thanked us for useful comments on other vulnerables, we are encouraged to believe that they have not been forgotten.

2. We were particularly pleased to see that the Commission appears to have adopted the ECBA Cornerstones mentioned in paragraph 13(a) to (d) of the ECBA submissions in May 2013.

3. However, we note that nowhere in the Articles does the word "interpreter" appear, particularly in Article 4, the right to an interpreter does not appear, nor in Article 6, nor Article 8, nor Article 12, we suggest that the word should appear somewhere in the Articles to complement the word "understanding." Recitals (21) and (31) too make no mention of an interpreter

4. There is an absence of any specific reference in the Articles to the right of silence. This should be remedied. Equally, we can find no reference in the Articles to privilege, confidentiality or non-disclosure, at least not specifically. We feel that those should be specifically included, to avoid errors and unnecessary miscarriages of justice.

5. Article 6(1) provides that children are assisted by a lawyer "throughout the criminal proceedings" without any clear definition as to what that means. Article 2(1), however, states that "This Directive applies to children subject to criminal proceedings from the time when they become suspected or accused of having committed an offence and until the conclusion of the criminal proceedings". This seems to provide a definition of "throughout the proceedings", so that perhaps Article 6(1) could be amended for the sake of clarity to something like "...throughout the proceedings from the time when they become suspected or accused and before any questioning".

6. Article 6(1) also states that "The right to access to a lawyer cannot be waived", Page 5 of the Directive, dealing with Article 6, also states in paragraph 26 that "this article ensures mandatory access to a lawyer for children", and adds at the end of paragraph 27 that this is "an additional safeguard that children may not waive this right". However paragraph 29 states that "with regard to certain minor offences, mandatory access to a lawyer would be disproportionate" and "for such offences, the competent authorities other than a public prosecutor or a court having jurisdiction in criminal matters do not need to ensure the right of mandatory access to a lawyer granted under this Directive". There may be a little inconsistency here, but on the assumption that children's' access to a lawyer is mandatory, we are concerned as to who should pay for that lawyer's services. We are strongly of the view that the State should pay for this and there should be something in the Directive to that effect. It cannot be right that a child has to pay for something which is mandatory. There must be effective access to legal aid, e.g. without any means test, e.g. access to a lawyer and legal aid must be secured from the very beginning of a criminal proceeding as soon the child



or the parents are aware of this criminal proceeding, i.e. always before any questioning is starting.

7. We have one minor point on drafting. We feel that the Heading to Article 4 should read "Right of the child to information". It helps for clarity, and is consistent with the wording of the Heading to Article 5.

6th May, 2014

If you have any questions, please do not hesitate to contact us:

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