

ECBA Annual Conference The draft Directive on access to a lawyer Nicosia, 23-24 September 2011

European Commission
Justice

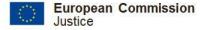
The Procedural Rights Roadmap - State of play

- Measure A right to interpretation and translation > Directive 2010/64/EU of 20 October 2010
- Measure B right to information about rights and about the charge – final stages of negotiations
- Measure C & D proposal COM (2011) 326
- Measure E rights of vulnerable suspects expected spring 2012
- Measure C2 legal aid expected 2013
- Measure F detention Green Paper published June 2011



The proposal for Measure C/D – the aims

- Streamline recent ECHR case-law (the Salduz doctrine)
- Clarify rights with fuzzy edges (e.g. activities of the lawyer; confidentiality)
- Improve the EAW system through dual defence
- Make rights effective through EU remedies
- Introduce a new EU right to communication with the outside world for people detained



What about legal aid?

- Legal aid will be the subject of a separate proposal.
 Why?
- Preparatory work is needed (Impact Assessment, analysis of legal aid schemes across Member States)
- Measure on access to a lawyer is urgent (need to comply with Salduz jurisprudence)
- Decoupling will make negotiations easier (financial considerations will not hold back the current proposal)
- Safguard clause ensures existing regimes continue to apply also in respect of 'new' access to a lawyer

The scope of the proposal – Article 2

Ratione personae

- Suspects and accused people...
- Persons subject to EAW proceedings...

Ratione temporis

- ...from the moment they are made aware by official notification or otherwise that they suspected or accused of a criminal offence (until conclusion of the proceedings)
- ...from the moment they are arrested in the executing State

Access to a lawyer – when?

- General principle: as soon as possible
- In any event:
 - 1. before the person is questioned
 - 2. as soon as the person is deprived of liberty
 - 3. when the competent authority carries out a procedural or evidence-gathering act at which the person has the right or the obligation to be present according to national law

What does "access to a lawyer" imply?

- The right to meet with one's lawyer.
- The right of the lawyer to be present at questioning and hearings of any kind and to ask questions, request clarification, make statements (all to be recorded)
- The right of the lawyer to be present at investigative or evidence-gathering act, if
 - the presence of the suspect/accused is required or permitted as a right under domestic law, and unless
 - the presence of a lawyer or the need to wait for him would prejudice the acquisition of evidence
- The right of the lawyer to check detention conditions and to have access to the place of detention



Communication with the lawyer

- <u>Duration and frequency</u> of meetings may not be limited in any way that prejudices the rights of the defence > no pre-determined duration which takes no account of complexity and circumstances of individual cases
- Confidentiality: an absolute requirement not open to any derogation
- Correspondence, telephone conversations and other forms of communication are covered by the same guarantees if they are permitted under national law

Derogations from access to a lawyer

- The rationale: access to a lawyer is so fundamental that any derogation ought to be <u>exceptional</u> and compounded by adequate procedural safeguards. Any derogation should consist only of a (as brief as possible) postponement of the <u>initial</u> access to a lawyer.
- Derogation possible only from some provisions: right to meeting, right to have a lawyer present at questioning, right to have a lawyer present at evidence-gathering acts
- Grounds justifying a derogation: only life and limb
 (« urgent need to avert serious adverse consequences
 for the life or physical integrity of a person »), no
 'needs of the investigation' or similar



Derogations from access to a lawyer (continued)

- Conditions:
 - compelling life and limb reasons;
 - necessity and proportionality ('not beyond what is necessary') in manner and time;
 - not based solely on gravity of offence (> no blanket derogation for certain crimes e.g. terrorism), but case-bycase
 - no prejudice to the overall fairness of proceedings
 - by duly reasoned decision of a judicial authority
- In case of duly auhorised derogation, no possibility to use statements or other evidence against the person (cf. Article 13)!



Can the right to a lawyer be waived?

Yes (Article 9) - save where domestic law provides otherwise.

Conditions:

- The person has received prior legal advice or has obtained full knowledge of the consequences and
- The person has the necessary capacity (e.g. minor, other vulnerable suspects) and
- 3. The waiver is given freely and unequivocally Any waiver may be revoked at any later stage.



Suspects and witnesses

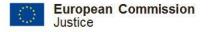
- Obligation to provide access to a lawyer if status changes during hearing or questioning (Article 10.1)
- Ban on use of statements made by witnesses before they have become suspects (Article 10.2)

Access to a lawyer in EAW proceedings

- Rationale: Dual defence in issuing and executing MS; no alteration of the mutual recognition principle
- Timing: promptly upon arrest
- Executing MS > same rights as for suspects/accused mutatis mutandis: meetings, presence at questioning, access to place of detention

Access to a lawyer in EAW proceedings (continued)

- Issuing MS > activities needed to support the lawyer in the executing MS
- No prejudice to the other activities a lawyer can carry out in the issuing MS under domestic law
- Obligation of executing MS to inform issuing MS of arrest/request for a lawyer



Legal aid: status quo

- No prejudice for existing domestic regimes
- Existing regimes must continue to apply, in conformity with the ECHR
- Prohibition of double standards (i.e. less favourable conditions for access to a lawyer granted by this Directive)

Remedies (Article 13) – a new frontier?

- General obligation to provide effective remedies in case of breach of the right to a lawyer
- Remedies = restitutio in integrum (cf. ECHR case-law)
- Exclusionary rule (Art. 13.3): statements/ evidence obtained in breach of the right to a lawyer may not be used as evidence. Applies to derogations too!

Remedies – a new frontier? (con'd)

- Conditions for exclusion of evidence:
 - breach of the right *or* derogation;
 - no use as evidence (may be used for other purposes), at any stage (= not just to secure conviction);
 - only against the person concerned;
 - proviso: unless use would not prejudice the rights of the defence (a difficult test!)

The right to communicate for people in detention (Articles 5-6)

- Scope: suspects/accused persons + persons subject to EAW proceedings if deprived of liberty
- Timing: as soon as possible
- Communication with at least one person named by the detainee
- Choice of form and means: left to MS

The right to communicate for people in detention (continued)

- Children: legal representative or another appropriate adult
- Derogations possible: same conditions as for access to a lawyer
- Communication with consular authorities for non nationals (mirror image of 1968 Vienna Convention)

Miscellanea

- Non regression clause (Article 14): standard provision
- Transposition: 24 months of adoption
- Entry into force: upon publication (> relevant for MS liability – cf the Interenvironnement Wallonie jurisprudence)
- Any questions?



Thank you for your attention!

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