



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)
- Safeguard 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

- **Duration and frequency 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 exceptional and compounded by adequate procedural safeguards. Any derogation should consist only of a (as brief as possible) postponement of the initial 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-by-case**
 - **no prejudice to the overall fairness of proceedings**
 - **by duly reasoned decision of a judicial authority**
- **In case of duly authorised 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:

1. The person has received prior legal advice or has obtained full knowledge of the consequences and
2. 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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