

Selected issues on the right of access to a lawyer under Directive 2013/48/EU

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Right of access to a lawyer Overview

- ECHR - Salduz
- Roadmap - Commission proposal – Negotiations
- Nature of the right of access to a lawyer (A2L)
- Scope / Right of A2L, timewise (*rationae temporis*) and content wise (*rationae materiae*) / Confidentiality / Derogations / Waiver
- Special provisions in EAW proceedings
- Remedies

ECHR - Salduz

- ECHR, Article 6: right to a fair trial.
- Salduz (judgment ECtHR of 27 November 2008):
55. “(..) in order for the right to a fair trial to remain sufficiently “practical and effective”, (..) Article 6(1) [ECHR] requires that, as a rule, access to a lawyer should be provided *as from the first interrogation of a suspect by the police*, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. (..) The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.”
- Judgment had substantial consequences (e.g. FR, Scotland)

3

Roadmap – Commission proposal – Negotiations

- 2009 Roadmap: legal advice + legal aid (measure C).
- Commission proposal (June 2011): only access to a lawyer (A2L), no legal aid.
- UK and Ireland did not opt in, and DK out.
- Work by four EU Presidencies (PL, DK, CY, IE). Agreement in June 2013.
- Publication in OJ L 294 of 6 November 2013, p. 1.
- Implementation deadline: 27 November 2016

4

Nature of the right of access to a lawyer

- During negotiations two approaches: ‘opportunity approach’ and ‘guarantee approach’.
- Directive is based on the ‘opportunity approach’: in the circumstances set out by the Directive, the suspect or accused person has the *opportunity* to avail him/herself of a lawyer. Member States will not prevent the suspect or accused person from having a lawyer.
- However, when person is deprived of liberty, some sort of guarantees apply (Art. 3(4))
- Minimum rules!

5

Scope (Art. 2)

- Directive applies when persons are *made aware* that they are suspected or accused of a criminal offence
- Both persons that are deprived of liberty and at large
- Directive also applies to persons, such as witnesses, who become suspects or accused persons during questioning (rec. 21) (ECtHR Brusco v France 2010)
- Exception for certain minor offences – then the Directive shall only apply to the proceedings before a court having jurisdiction in criminal matters (+ rec. 16 and 17)
- Directive shall in any case fully apply when the suspect or accused person is *deprived of liberty*, irrespective of the stage of the criminal proceedings.

6

Right of access *ratione temporis* (Art. 3.2)

- Right of access to a lawyer applies from the following moments in time, whichever is the earliest:
 - (a) before questioning (preliminary questioning excl., rec 20);
 - (b) upon carrying out an investigative or other evidence-gathering act, at least the following: identity parades, confrontations, reconstructions of the scene of crime;
 - (c) without undue delay from deprivation of liberty (but no definition);
 - (d) in due time before the suspect or accused person appears before a court.

7

Right of access *ratione materiae* (Art. 3.3)

Right of access to a lawyer entails the following:

- (a) the right to meet in private and communicate with the lawyer, including prior to questioning;
- (b) the right for the lawyer to be present and participate effectively when the suspect or accused person is questioned (rec. 25);
- (c) as a minimum, the right for the lawyer to attend the following investigative or evidence-gathering acts, if provided for in the national law and if the suspect or accused person is required or permitted to attend the act concerned (see rec. 26):
 - i) identity parades;
 - ii) confrontations;
 - iii) experimental reconstructions of the scene of crime.

8

Confidentiality (Art. 4)

- Confidentiality - Guaranteeing possible?
- Member States shall *respect* the confidentiality of communication between a suspect or accused person and his lawyer *in the exercise of the right of access to a lawyer* provided for under this Directive. This shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law.
- Recitals 33 and 34, exceptions, notably avoiding that illicit enclosures be sent (screening) and safeguarding internal security.

9

Derogations (Art. 3(5) and (6) and Art. 8)

- In exceptional circumstances and in the pre-trial stage only
 - 1) In case of geographical remoteness (no questioning, see rec. 30)
 - 2) For the following compelling reasons:
 - (a) urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;
 - (b) immediate action by the investigating authorities is imperative to prevent a substantial jeopardy to criminal proceedings.
- Limited questioning! (see rec. 31 and 32)
- General conditions in Art 8 (proportionate, strictly limited in time, not exclusively based on seriousness or type of offence, not prejudice overall fairness)

10

Waiver (Art. 9)

- Conditions of waiver inspired by case law ECtHR (e.g. Zaichenko v. Russia 2010)
- Person must have been provided with clear and sufficient information in simple and understandable language about the content of the right of A2L and about the possible consequences of waiving it (e.g. use of testimony).
- The waiver must be given voluntarily and unequivocally.
- Waiver and circumstances in which it is given shall be noted.
- In case of waiver, Member States are not anymore obliged to make the necessary arrangements to ensure that suspects or accused persons who are deprived of liberty are in a position to effectively exercise their right of access to a lawyer (Art. 3.4 + rec. 28).

11

EAW proceedings (Art. 10)

- FD European Arrest Warrant (EAW) already provided the right of access to a lawyer in the *executing* State (Art. 11.2). Now made more specific.
- New: right to ‘appoint’ a lawyer in the *issuing* Member State, in order to assist the lawyer in the executing State (by providing information and advice, e.g. on the national arrest warrant underlying the EAW).

12

Remedies (Art. 12)

- Divergence between Member States
- Art. 12(1): there should be an effective remedy under national law in case of a breach of the rights under this Directive
- Art. 12(2): in the assessment of statements made by suspects or accused persons or evidence obtained in breach of the right of access to a lawyer, or where a derogation to this right was authorised, the rights of the defence and the fairness of the proceedings should be respected (+ rec. 50).

13

Interrelation ECHR – Directive 2013/48

- Directive on many points codifies (and clarifies) the case law of the ECtHR.
- Not one way, but cross-fertilization. One example comes from *AT v Luxembourg* (ECtHR, 2015): right to consult a lawyer not only during questioning, but also prior to questioning (Art. 3(3)a)). ECtHR refers to EU Directive and gives corresponding interpretation to ECHR.

14



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