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Representations
Priority Actions and Political Reporting

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The following is an outline of the presentation but note that the speaker ad-libbed extensively!

Outline - The EU Directive on Access to a Lawyer (Measure C1/D)

On 7 October the Council adopted the directive on the right of access to a lawyer in criminal proceedings in a historic decision more than 10 years after the first attempts were made to agree on a legislative measure including the right to legal advice. Member states will have 3 years after the entry into force of the directive to adopt the necessary national provisions.

Historical background:

Tampere Conclusions and first JHA "work programme" (Mutual Recognition Programme of Measures from 2000 did not envisage any defence rights measures, simply enhancing judicial cooperation for investigation and prosecution. Hague Programme of 2005, very little. So this is a measure that nearly never was.

Green Paper – perceptions of need

2004 – 2007 FD on procedural rights failed.

Lisbon Treaty gave new hope and possibility of Roadmap.

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The negotiations (from the EP point of view) –

Oana Antonescu, the EP rapporteur, made the following observations.

At the 7 October 2013 vote, BE abstained. DK doesn't participate in Justice legislation and UK & IE opted out. So not all MS involved...

In July 2011, OA was initially optimistic, but as the process unfolded, the work expanded and took far longer to finalise than expected. The Presidencies involved were POL, DK, CY and IE.

The POL Presidency worked hard to advance the file but early optimism was foiled by a letter in September 2011 from 5 MS – NL, BE, FR, UK and IE announcing major reservations about the COM proposals. NL started lobbying on minor offences. BE was simply opposed to it at all. FR started out difficult but the situation changed when Hollande won the election in 2012. The new Minister of Justice changed FR's approach and they withdrew their objections (bar one or two small points e.g. geographic remoteness), IE and UK announced that they were opting out so not so important but NB even during IE Presidency when they wanted agreement, they still subtly insisted on certain national points.

On the positive side, all political groups worked well together within the EP and all got involved even "minor" parties such as the Greens and GUE. The LIBE orientation vote and subsequent vote on final text were almost unanimous.

DK started its presidency by sending a questionnaire to all MS with a number of questions. The final report enabled EP (and others) to see the huge differences in procedure between the MS, for example access to a lawyer at the police station – compare UK to NL.

When IE took over Presidency, it sent clear signals that they wanted to reach agreement but that there were a number of red lines from MS. Certain MS would not concede on some things and this would have been the case even if the file had gone to a second reading so no point in holding out over some issues. However, negotiations lasted right until the last moment when some concessions were achieved and vague drafting enabled MS with difficulties to read and interpret the text as they wanted to (e.g. NL on minor offences). SE, FR and DE were especially active in lobbying, FR at first on all text (but changed after Hollande victory), SE on remedies and DE on confidentiality.

OA's personal red lines were confidentiality, activities lawyer can perform and EAW. Derogations were discussed until the very end, but EP had to concede eventually on "ticking bomb" scenario and add derogation for "immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings".

OA had to concede this, plus give a little on minor offences, in order to get confidentiality. SE (the "Roadmap" country) had lobbied so effectively on remedies and won a number of allies that OA conceded on this but regrets it.

OA says the text is not always clear, but this enables MS to take what they need from it.

What's in the directive?

The directive sets out minimum rules on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, on the right to have a third party informed upon deprivation of liberty, and on the right to communicate, while deprived of liberty, with third persons and with consular authorities.

The directive covers, *inter alia*:

(1) The right of access to a lawyer for suspects and accused persons:

Subject to exceptional circumstances (which apply only during the pre-trial stage), every suspect/accused person must have access to a lawyer (in private) without undue delay and in any event from the earliest of (a) before questioning by law enforcement or judicial authorities; (b) at identity parades, confrontations or experimental reconstructions of the scene of crime if the suspect/accused is required to attend; (c) without undue delay upon detention; and (d) in due time prior to an appearance before a court with criminal jurisdiction. The lawyer may meet his client in private and may "participate effectively" during questioning.

(2) The principle of confidentiality of communications between the lawyer and the suspect or accused person:

The right to confidentiality of communications between the suspect/accused and his lawyer must be respected. But NB deplorable Recital 33.

(3) The right for a suspect or accused person to have a third person informed of his deprivation of liberty:

Subject to the possibility of temporary derogation if there is an urgent need to (a) avert serious or adverse consequences for the life, liberty or physical integrity of a person; or (b) prevent possible substantial jeopardy to criminal proceedings, every suspect/accused person in detention has the right to have at least one person informed of the detention without undue delay.

(4) The right for a suspect or accused person who is deprived of liberty to communicate with third persons and with his country's consular authorities:

Member States must allow every detained suspect/accused person to communicate without delay with at least one person. Detained persons have the right to have consular authorities notified of the detention and to communicate with them. There is a further right to be visited by consular authorities, to communicate with them and to have legal representation arranged by them (subject to the consular authorities' agreement and the suspect/accused's wishes).

(5) The right for requested persons subject to a European Arrest Warrant to have access to a lawyer in the executing state and to appoint a lawyer in the issuing state:

A person requested for surrender under an EAW has the right of access to a lawyer in the state executing the EAW. In addition, following detention by the executing state, the person also has the right to appoint a lawyer in the issuing state and the executing state is required to inform the person of this right. If the person wishes to exercise this right and has not already appointed a lawyer in the issuing state, the executing state must promptly inform the issuing state which shall without undue delay provide the information to facilitate the appointment of a lawyer there.

A person subject to an EAW shall also be entitled to the rights listed under (2) to (4) above.

Conclusions

- 1) Implementation is key!
- 2) A word about "opt out" countries.
- 3) ECBA has played, and will continue to play, a major role. Thank you.