

AG: Questioning Without a Lawyer after Deadline for Appearing Has Passed Contravenes EU Law

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In two parallel infringement proceedings – [Commission v Hungary C-660/24](#) and [Commission v Czech Republic C-681/24](#) – Advocate General (AG) *Tamara Čapeta* [concluded](#) that Hungary and the Czech Republic have failed to correctly transpose key provisions of [Directive 2013/48/EU](#) on the right of access to a lawyer in criminal proceedings.

The cases concern national legislation permitting authorities to question suspects without the presence of a lawyer if no lawyer appears within a specified time limit (two hours in Hungary; up to 48 hours in the Czech Republic). According to the European Commission, such rules undermine the Directive's guarantee that suspects must be able to exercise their rights of defence "practically and effectively," including during police questioning.

A Fundamental Disagreement on the Scope of the Right

At the core of both cases lies a disagreement over how the right of access to a lawyer under Art. 3 of the Directive should be understood.

The Commission argued that the Directive establishes a general rule requiring the presence of a lawyer during questioning, subject only to narrowly defined exceptions. By contrast, Hungary and the Czech Republic maintained that the Directive merely requires that suspects be given the opportunity to access a lawyer, not that questioning must be delayed until a lawyer is actually present.

Ms *Čapeta* clearly endorsed the Commission's interpretation. She held that Art. 3(3)(b) of the Directive, which provides for the right of suspects to have their lawyer "present and participate effectively when questioned," must be understood as requiring the actual (physical) presence of a lawyer during questioning as a rule.

Strict Limits on Derogations

Ms *Čapeta* emphasised that questioning without a lawyer constitutes a derogation from that general rule. Such derogations are permissible only under the strict conditions set out in Art. 3(6) of the Directive, which allows temporary departures in exceptional circumstances and on the basis of compelling reasons, such as preventing serious harm or substantial jeopardy to criminal proceedings.

In her view, the national provisions at issue do not meet those requirements. They establish a general and automatic mechanism allowing questioning in the absence of a lawyer once a certain time has elapsed, without any case-specific assessment or demonstration of urgency. As such, they exceed the exhaustive system of derogations provided for in the Directive.

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Ms *Čapeta* further clarified that the Directive does not leave Member States discretion regarding the presence of a lawyer. The reference to national law in Art. 3(3)(b) concerns only the modalities of participation, not the existence of the right itself.

Effectiveness of Defence Rights

A central element of Ms *Čapeta*'s reasoning is the requirement that defence rights must be guaranteed in a practical and effective manner. Allowing questioning to proceed simply because a lawyer has not appeared within a fixed time period risks undermining that requirement, particularly at the pre-trial stage, where suspects are most vulnerable.

She rejected arguments that such rules are necessary to prevent abuse or delays in criminal proceedings and noted that national authorities have alternative means at their disposal, such as appointing substitute counsel, to ensure both the effectiveness of investigations and the protection of defence rights.

Relationship with ECHR Standards

Both Member States relied on case law of the European Court of Human Rights (ECtHR) to argue that the Directive does not require the physical presence of a lawyer in all cases. Ms *Čapeta* acknowledged that the European Convention on Human Rights (ECHR) sets a minimum standard of protection, but stressed that EU law may provide more extensive safeguards.

In any event, she considered that Strasbourg case law itself highlights the importance of a lawyer's presence during police questioning as a key safeguard against coercion and as a means of ensuring the effective exercise of defence rights.

Additional Breach by Hungary: Waiver of Rights

In the case against Hungary, Ms *Čapeta* also found a failure to transpose Art. 9 of the Directive on the waiver of the right of access to a lawyer.

Although Hungarian law characterises this right as inalienable, suspects may in practice choose not to exercise it. Ms *Čapeta* held that such situations are functionally equivalent to a waiver and therefore require the safeguards laid down in Art. 9, including that the decision be informed, voluntary, unequivocal, and properly recorded, and that it be revocable.

The absence of specific provisions implementing those safeguards was found to constitute a further infringement.

Implications for EU's Area of Freedom, Security and Justice

The Opinions underline the central role of the right of access to a lawyer as a cornerstone of fair trial rights within the EU's Area of Freedom, Security and Justice. By interpreting the Directive as requiring the presence of a lawyer during questioning as a rule, Ms *Čapeta* adopts a reading that strengthens procedural safeguards and reinforces mutual trust between Member States' criminal justice systems.

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