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The Right of Access to a Lawyer and Legal Aid in Criminal Proceedings in Hungary

ANDRÁS KRISTÓF KÁDÁR – NÓRA NOVOSZÁDEK

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Executive summary

The present Country Report was written in the framework of the project "Strengthening Procedural Rights in Criminal Proceedings: Effective Implementation of the Right to a Lawyer/Legal Aid under the Stockholm Programme" (JUST/2015/JACC/AG/PROC/8630), which was funded by the Justice Programme of the European Union and coordinated by the Bulgarian Helsinki Committee. The author of the report is the Hungarian Helsinki Committee (hereafter: HHC), which participated in the project as a partner.

The project aimed to increase understanding of how *Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty* (hereafter: Directive 2013/48/EU) and the *Recommendation on the right to legal aid for suspects or accused persons in criminal proceedings (2013/C 378/03)* (hereafter: Recommendation or Recommendation on legal aid) are implemented in five EU jurisdictions (Bulgaria, Hungary, Lithuania, Poland and Slovenia). The Hungarian part of the research involved an assessment of the legal framework, an overview of the relevant statistical data, an analysis of the files of 150 closed criminal cases and interviews with practitioners. The Country Report summarises the results of this research.

ACCESS TO A LAWYER AND RIGHT TO LEGAL AID IN THE HUNGARIAN LEGAL SYSTEM

A) Criminal procedures

Defendants in criminal procedures shall have the right to defence. Defendants may defend themselves, or may be defended by a defence counsel at any stage of the proceeding. Only an attorney may act as a defence counsel.

Having a defence counsel is mandatory in certain cases stipulated in Act XIX of 1998 on the Code of Criminal Procedure (hereafter: CCP), e.g. if the criminal offence the defendant is suspected of is punishable with a sentence of imprisonment of five years or more, the suspect is detained, is a juvenile, or is unfamiliar with the Hungarian language or the language of the procedure, etc. In the court phase (after the indictment is filed by the prosecutor), defence is mandatory in other, additional cases as well. Whether these so-called "mandatory defence" grounds are in place is established by the proceeding authority, and in these cases the defendant may not decide to participate in the procedure without a defence counsel. (In the Hungarian system, this equals the "merits test" in terms of the Recommendation on legal aid.) The proceeding authorities may consider beyond the cases of mandatory defence whether the right to a fair trial, i.e. the interests of the defendant require the appointment of a defence counsel.

If it is foreseen that due to his/her financial situation, the defendant will be unable to pay the costs of the procedure, authorities may grant him/her so-called **personal cost exemption**. If such cost exemption is granted, upon the defendant's request the authorities shall appoint a defence counsel for him/her. (In the Hungarian system, this equals the "means test" in terms of the Recommendation on legal aid.) Personal cost exemption is dependent on the financial situation of the defendant as a main rule, but under certain circumstances (e.g. if the defendant is homeless) personal cost exemption will be granted without the examination of the defendant's economic situation. In line with § 15 of the Recommendation, decisions on personal cost exemption are subject to review. The provisions on personal cost exemption meet the requirements formulated in §§ 6 and 8 of the Recommendation also in the sense that the assessment of the applicant's economic situation is made on the basis of "objective factors" and "all relevant circum-

stances" are considered. However, the question arises whether the present system is sufficiently flexible and whether cost exemption is indeed available for all indigent defendants. In addition – in contradiction with § 10 of the Recommendation – defendants are expected to "prove beyond all doubt" that they lack the sufficient financial resources to cover the costs of the defence and the proceedings.

Research results showed that **defence counsels are appointed on the basis of cost exemption very rarely**, and the research revealed significant shortcomings concerning the information provided to defendants about personal cost exemption as well. The results seem to confirm the HHC's experience that if there is a ground for mandatory defence, it is much more likely that a defence counsel will be appointed on that basis, even if the defendant is indigent and his/her eligibility for personal cost exemption could be examined. This is detrimental to indigent defendants, since if a lawyer is appointed for them on the basis of cost exemption, the State will bear all the costs of the defence even if the defendant is convicted, whereas in cases of mandatory defence, these costs are only advanced, and if convicted, the defendant must reimburse them. The assessment of the system of appointments in general is hindered by the fact that no statistical data are available as to the ex officio appointments broken down according to the grounds for appointment.

The Hungarian legal framework mostly meets the requirements of Article 3(2) of Directive 2013/48/EU as to **the time from which the right of access to a lawyer is in place**: the right to defence shall be guaranteed to defendants from the very first procedural act that the investigating authority conducts against them upon the suspicion of a criminal offence. In addition, a person who is taken into police custody because he/she was caught in the act of committing a criminal offence shall have the right to defence from the outset of the arrest, and the concerned person shall be provided with the possibility of retaining a lawyer before his/her first interrogation is started. However, it remains a shortcoming that the right to defence (before the first interrogation) is not guaranteed to those who are taken into police custody upon the simple suspicion of having committed a criminal offence (thus, not caught in the act).

After the communication of the suspicion **the suspect must be informed of his/her right to choose or to request the appointment of a defence counsel**. If the participation of the defence counsel is mandatory in the procedure, the suspect also has to be informed that unless he/she retains a defence counsel in three days, the proceeding authority will appoint a counsel for him/her. If the suspect declares that he/she does not wish to retain a defence counsel, the authorities will immediately appoint one. As opposed to Article 9(1)(a) and Article 9(3) of Directive 2013/48/EU, the CCP does not prescribe that the suspect must be provided with information about the content of the right of access to a lawyer as well as about the possible consequences of waiving it and the possibility of revoking the waiver subsequently at any point during the criminal proceedings. (But of course the defendant may decide at any point during the proceedings to retain a counsel and also to withdraw a retainer given earlier to a lawyer.) At the beginning of the first interrogation, or if defence will become mandatory under the pertaining provisions of the CCP at a later stage of the procedure, then at the commencement of the next interrogation, **the suspect's statement concerning the retaining or appointing of a defence counsel shall be recorded**, in line with Article 9(2) of Directive 2013/48/EU. Furthermore, the suspect shall be informed about the possibility of personal cost exemption, but suspects do not automatically receive "information on the possibilities to complain in circumstances where access to legal aid is denied or a legal aid lawyer provides insufficient legal assistance", so § 5 of the Recommendation is complied with only partially.

The defendant is free to choose his/her retained counsel. Regional **bar associations keep a register of attorneys**, and the list of attorneys is published on their websites. Hence, the requirement stipulated by Article 3(4) of Directive 2013/48/EU according to which "Member States shall endeavour to make general information available to facilitate the obtaining of a lawyer by suspects or accused persons" is met.

If the defence counsel is appointed, then **the proceeding authority** (in the investigation phase the investigating authority, i.e. most often the police) **decides whom to appoint** (i.e. whom to choose from the regional bar association's register of the attorneys who can be appointed) – the defendant has no say in this issue, in contradiction with § 24 of the Recommendation. (At the same time the defendant may put forth a justified request for the appointment of another defence counsel, and the appointed defence counsel may also request – also in "justified cases" – that he/she be exempted from the appointment.) The present system of appointments has for long been strongly criticised by many stakeholders; the HHC's researches also show that the discretionary appointment system threatens the right to effective defence, it is non-transparent, opens room for abuses; and available data prove that as a result of the present system, the same few attorneys or law firms are appointed regularly by certain police units. As a response to the criticisms, the new Code of Criminal Procedure, which will enter into force on 1 July 2018, will introduce a significant change: it will make the selection of the appointed defence counsel the task of the respective regional bar association.

There are no additional statutory conditions that a lawyer must meet in addition to being a member of the bar association if he/she wishes to be included in the list of lawyers who can be appointed as ex officio defence counsels. This means that the Hungarian system does not satisfy the requirement formulated in § 19 of the Recommendation, according to which "A system of accreditation for legal aid lawyers should be put in place and maintained in each Member State". **Nor is there a system "to ensure the quality of legal aid lawyers"**, as required by § 17 of the Recommendation. The lack of quality assurance is a problem also because many researches showed deficiencies with regard to the level of performance of appointed defence counsels as compared to retained defence counsels, e.g. in terms of their presence at investigative acts and their level of active involvement. The present research has reinforced that this difference still prevails, so **indigent defendants represented by appointed defence counsels are still often provided with less effective defence** than those who can afford to retain a lawyer. Apart from the fact that appointments are made by the authorities, the causes underlying this difference include the fact that as compared to market rates, the fees of appointed defence counsels are still low, and appointed lawyers cannot claim a fee for all the activities that are necessary for effective defence (e.g. preparation for court hearings).

In accordance with Article 3(3)(b) of Directive 2013/48/EU, **the defence counsel may be present at the questioning of his/her client**. In addition to this, **the counsel may also be present at those investigative acts that are envisaged by Article 3(3)(c) of the Directive**. Accordingly, the defence counsel may be present at the questioning of witnesses whose hearing was motioned by the defence counsel or the suspect and also at confrontations that are held with the participation of such witnesses. The counsel shall be notified about these investigative acts. The defence counsel present may pose questions to the suspect and the witness. Both the suspect and the defence counsel may be present at the hearing of the expert, the inspection of scenes and objects, the reconstruction of events and identity parades. They also have the right to put forth evidentiary motions, make observations and pose questions to the expert. The authorities may exceptionally decide not to notify the defence about these acts if "the urgency of the investigative act" so justifies; and the defence shall not be notified if the protection of a person participating in the proceeding cannot be guaranteed in any other way. As of October 2016, if the defence is not notified, the defence counsel and the suspect shall be informed about the investigative act subsequently, and if either the suspect or the counsel requests so, the authorities shall deliver a formal resolution about the decision to not notify the defence, which opens the way for the defence to challenge the decision. According to reasoning provided by the legislator, the latter amendments were necessary in order to implement Article 8(2) of Directive 2013/48/EU. (However, it is still contrary to Directive 2013/48/EU that only upon the request of the defence shall temporary derogations be included into a formal decision.) Research results show that the authorities practically never resort to the possibility of not notifying the defence about investigative acts.

It is important to point out that in the investigation phase the mandatory nature of defence does not mean that the defence counsel's presence at the investigative acts is also mandatory. This means that **the authorities will question the suspect also in cases of mandatory defence if the** – adequately notified – **defence counsel does not appear for any reason**. (As opposed to the investigation, in the court phase the hearing cannot be held in the defence counsel's absence if defence is mandatory. If in such a case the retained lawyer does not appear at a hearing, the court designates a substituting counsel, while if the same happens with an appointed counsel, the court appoints a new counsel; both of them may be provided with time to prepare for the defence.)

With the exception of investigative acts that "brook no delay", **the defence counsel shall be notified about investigative acts** at which he/she can be present **in due time,** but at least 24 hours before the act is scheduled to take place. However, detained suspects must be questioned within 24 hours from the commencement of the detention, which means that if a suspect is taken into police custody and then into 72-hour detention, it is usually not possible to notify the defence counsel about his/her scheduled interrogation with at least 24 hours in advance. Research results support the conclusion that the timeliness of notifying defence counsels raises problems primarily in relation to the first questioning of suspects arrested and taken into 72-hour detention. According to previous research, in addition to the delays in notifications it was also a frequent problem that the notifications were sent at a time and in a manner that did not give counsels a realistic chance to attend the first interrogation. In the absence of any pertaining rule, practice varies on whether or not the police wait up for the lawyer letting them know that he/she can only arrive to the interrogation later than the scheduled time.

Thus, research results show that **in the investigation phase, provisions related to the notification and the presence of the counsel, or – in some cases – the lack of such provisions may lead to deficient implementation of the requirement set forth in Article 3(1) of Directive 2013/48/EU**, according to which "Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively". In addition, these circumstances **can in practice eliminate the "effectiveness" of exercising the right of access to a lawyer** as required by Article 3(4) of Directive 2013/48/EU in terms of suspects or accused persons who are deprived of their liberty.

In accordance with Article 3(3)(b) of Directive 2013/48/EU, the facts related to the notification, presence or absence of the defence counsel shall be recorded in the minutes of the interrogations. However, research results show that this is often not done adequately.

Defendants shall have the right to have sufficient time and possibility to prepare for their defence at any stage of the proceedings, and with regard to **defendants deprived of their liberty** the CCP expressly states that they **can consult with the defence counsel before the interrogation**, and that they have the right to contact their lawyer. Pre-trial detainees may communicate with their respective defence counsels in writing, in person and via telephone **without supervision.** However, if the defence counsel does not appear at the first interrogation, there is no possibility of consultation between the lawyer and the detained client via telephone, which is in contradiction with Article 3(3)(a) of Directive 2013/48/EU and also Paragraph (23) of the Directive's Preamble. It may threaten confidentiality that not every police building has premises for consultations where the requirements of both confidentiality and security, including the appropriately secure guarding of detained suspects, can be met simultaneously. In addition, since prison mobile phones were introduced, pre-trial detainees have often been compelled to consult with their defence counsels in front of their cellmates. Attorneys also signalled difficulties in terms of getting in contact with defendants detained in penitentiary institutions.

As far as remedies are concerned, the CCP provides defendants with **a general right to complain** in the investigation phase, hence, defence counsels may file a complaint if they are not notified or are notified with delay. At the same time, the "effectiveness" of the remedy, as required by Article 12(1) of Directive 2013/48/EU, is decreased by the fact that the CCP does not prescribe what the consequence of a "successful" complaint is. (Attorneys in the research were also of the view that complaints are in principle ineffective.) A significant **limitation** of the participants' procedural rights, such as the right of access to a lawyer **may** – in compliance with Article 12(2) of Directive 2013/48/EU – **lead to the exclusion of the testimony as evidence** (as opposed to the substandard performance of the defence counsel, which may not have a similar effect). In this regard Decision no. 8/2013. (III. 1.) of the Constitutional Court was a real breakthrough: it concluded that it is a constitutional requirement that the investigating authority must notify the appointed defence counsel about the time and place of the interrogation in a verifiable manner and at a time allowing the counsel to effectively exercise his/her procedural rights and attend the questioning, and in the absence of such a notification the statement of the defendant shall be inadmissible.

B) Petty offence procedures

In Hungary, the scope of Directive 2013/48/EU and the Recommendation on legal aid also extends to petty offence proceedings in some cases, and petty offence defendants also have the right to defence. Persons taken into petty offence custody shall be informed about this right in writing.

In any phase of the petty offence proceeding, the petty offence defendant may be represented by **his/her legal guardian or the adult he/she or his/her legal guardian retains in writing**; the retainer may be withdrawn at any point of the proceeding. The representative of the petty offence defendant **has the right to be present at any procedural act**, and to file motions, make comments and pose questions. The representative may **communicate** with the petty offence defendant he/she represents **without supervision** throughout the entire proceeding. Mandatory representation is only envisaged by the law in a special procedure, the so-called fast-track court proceeding: in these proceedings the police shall appoint a counsel if the petty offence defendant does not have one. The petty offence defendant may – in a justified petition, and only once – request the appointment of another counsel.

Similar to criminal procedures, it is also stipulated with regard to petty offence procedures that facts originating from evidentiary material that was obtained through a significant limitation of the participants' procedural rights, such as the right to defence and representation, shall not be admissible as evidence.

THE RIGHT TO HAVE A THIRD PERSON INFORMED OF THE DEPRIVATION OF LIBERTY AND THE RIGHT TO COMMUNICATE, WHILE DEPRIVED OF LIBERTY, WITH THIRD PERSONS

A) Criminal procedures

A **relative designated by the defendant shall be notified within 24 hours** about the defendant's 72-hour detention and the place of the detention; if there is no such relative, another person designated by the defendant may also be notified. However, there can be strong doubts as to whether the 24-hour deadline (which will be reduced to eight hours by the new Code of Criminal Procedure) can be regarded as satisfying the requirement of notification "without undue delay" as set forth by Article 5(1) of Directive 2013/48/EU. (It shall be added that according to the interviews made in the research, notification is

usually done way before the 24-hour deadline expires.) The notification shall be done by the police, and a note shall be written about the time and method of notifying the designated relative, or the reason for not carrying out the notification if that is the case.

Detained defendants have the right to communicate in a supervised manner in person, in writing or via telephone **with their relatives, or** – based on the permission of the prosecutor or the court – **with any other person**. Communication with a relative may only be forbidden or restricted to prevent interference with the course of justice, in compliance with Article 6(2) of Directive 2013/48/EU. The legal framework does not contain safeguards guaranteeing that communication shall be ensured "without undue delay" as required by Article 6(1) of Directive 2013/48/EU.

In compliance with Article 7 of Directive 2013/48/EU, if a foreigner is taken into 72-hour detention or pre-trial detention, **the consular or diplomatic representation of his/her State shall be notified** without delay. If the foreigner has multiple citizenships, the consular authority of his/her choice shall be notified. Upon the request of a non-national defendant, a consular official of his/her State of nationality **may be present at his/her questioning**. Also, the consular official **may retain a defence counsel for the non-national defendant**, and authorities may also appoint a counsel for the defendant upon the consular official's request, if it seems "necessary in the defendant's interest". Detained non-nationals have the right **to contact their consular officials** and communicate with them in writing or verbally without supervision.

Defendants may resolve to remedies if their above rights are violated.

B) Petty offence procedures

The police shall immediately inform about the ordering of petty offence custody **the relative or – in the absence thereof – any other person** designated by the petty offence defendant. If a juvenile is taken into custody, his/her legal guardian shall also be notified. The failure to notify a person nominated by the detained petty offence defendant is subject to a complaint. Defendants in petty offence custody also have a right to communication (petty offence custody must be implemented in a police jail), and the violation of this right may be subject to a complaint.

A.

Introduction

I. THE PROJECT "STRENGTHENING PROCEDURAL RIGHTS IN CRIMINAL PROCEEDINGS: EFFECTIVE IMPLEMENTATION OF THE RIGHT TO A LAWYER/LEGAL AID UNDER THE STOCKHOLM PROGRAMME"

The present Country Report was written in the framework of the project "Strengthening Procedural Rights in Criminal Proceedings: Effective Implementation of the Right to a Lawyer/Legal Aid under the Stockholm Programme" (JUST/2015/JACC/AG/PROC/8630), which was funded by the Justice Programme of the European Union and coordinated by the Bulgarian Helsinki Committee. The author of the report is the Hungarian Helsinki Committee (hereafter: HHC), which participated in the project as a partner.

The project aimed to increase understanding of how *Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty* (hereafter: Directive 2013/48/EU) and *Recommendation on the right to legal aid for suspects or accused persons in criminal proceedings (2013/C 378/03)* (hereafter: Recommendation or Recommendation on legal aid) are implemented in five EU jurisdictions (Bulgaria, Hungary, Lithuania, Poland and Slovenia), and to identify and promote examples of transferable good practice. The project also aimed to facilitate communication and coordination between legal practitioners and to deepen the knowledge of stakeholders about international and EU standards on the rights to access to a lawyer and legal aid of suspects and accused in criminal proceedings.

The Hungarian part of the research involved an examination of the legal framework, an overview of the relevant statistical data, an analysis of the files of closed criminal cases and interviews with practitioners. The Country Report summarises the results of this research.

II. THE IMPLEMENTATION OF THE STOCKHOLM PROGRAM DIRECTIVES IN HUNGARY

The deadline for the implementation of Directive 2013/48/EU expired on 27 November 2016, i.e. over two years after the deadline for transposing *Directive 2012/13/EU on the right to information in criminal proceedings* (2 June 2014; hereafter: Directive 2012/13/EU) and three years after the deadline for the implementation of *Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings* (27 October 2013). Therefore, by the time of writing this report, Hungary – as well as other EU Member States – had had to adopt those legislative and administrative provisions which are necessary to guarantee that their respective legal systems are in accordance with the requirements of Directive 2013/48/EU.

In Hungary, one of the most important impacts of the transposition of the above directives has been the significant change in the provisions regulating access to the case file. Until 1 January 2014, the defence's access to the case materials had been rather limited in the investigation phase. As a main rule, during the investigation, the defence still only has unlimited access to forensic expert opinions and the record of those procedural acts where the suspect or the defence counsel can be present, whereas under Act XIX of 1998 on the Code of Criminal Procedure (hereafter: CCP), the defence counsel may only be present at the suspect's interrogation, at witness hearings motioned by the defence and the confrontations concerning witnesses whom the defence motioned to be heard;[1] in addition, the counsel and the suspect may be present at the questioning of experts, the inspection of scenes and objects, the reconstruction of events

[1] CCP, Articles 186(1) and 184(2)

and identity parades.[2] Defence can only have access to other case materials if such access does not violate "the interest of the investigation".[3]

A significant change in this situation took place when in order to transpose Article 7(1) of Directive 2012/13/EU the CCP was amended. Since 1 January 2014, the CCP stipulates that if the prosecutor puts forth a motion for the ordering of the suspect's pre-trial detention, he/she must attach to the motion to be sent to the defence the copies of all those case file documents upon which the motion relies. Since 1 July 2015 the CCP also prescribes that if a motion for the prolongation of the detention is submitted, the copies of those case documents must be attached to the version sent to the defence, which substantiate the motion and which were produced after the most recent judicial decision concerning the deprivation of liberty.[4] This has been a significant change, because in the past years, the European Court of Human Rights delivered a number of decisions concluding that the degree to which the defence's access to the case file – including the documents substantiating remand – was restricted by the Hungarian laws in the investigation phase, amounted to a violation of the equality of arms, and thus of Article 5(4) of the European Convention on Human Rights.[5]

The Hungarian transposition of Directive 2012/13/EU on the right to information in criminal proceedings was assessed by the HHC in a comprehensive country report in late 2015.[6]

The CCP was again amended as of 28 October 2016 with the purpose of transposing Article 8(2) of the present report's subject, Directive 2013/48/EU. The amendment has opened the possibility to challenge before the court the authorities' decision to refrain from notifying the defence about certain procedural acts (for more detail on this issue, see Section C. of the present Country Report).

It must be noted that by the time this report was finalized, the Hungarian Parliament had adopted Act XC of 2017 on Code of Criminal Procedure (hereafter: New CCP), which will come into force on 1 July 2018. Some of its provisions will be described in the report, since they will bring about significant changes in access to a lawyer and also legal aid.

III. INTERNATIONAL AND DOMESTIC RESEARCH AND CONCLUSIONS CONCERNING ACCESS TO A LAWYER AND LEGAL AID

A number of international organisations have formulated recommendations concerning the Hungarian system of access to a lawyer and legal aid in recent years. After its 2013 visit, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) put forth recommendations regarding the system of ex officio appointed defence counsels and the deficiencies in the enforcement of the right to defence of certain groups of persons in police custody, as well as the time limits for informing third persons about the deprivation of liberty.[7] The ex officio appointment system was

2 CCP, Article 185(1)

3 CCP, Article 186(2)

4 CCP, Article 211(1a)

5 See, for instance: *X.Y. v Hungary* (Application no. 43888/08, Judgment of 19 March 2013), *A.B. v. Hungary* (Application no. 33292/09, Judgment of 16 April 2013), *Baksza v. Hungary* (Application no. 59196/08, Judgment of 23 April 2013), *Hagyó v. Hungary* (Application no. 52624/10, Judgment of 23 April 2013).

6 *EU Directives in Practice: Monitoring the Implementation of the EU Directive on the Right to Information in Criminal Proceedings. Country report – Hungary.* Hungarian Helsinki Committee, December 2015. Available at: http://www.helsinki.hu/wp-content/uploads/HHC_Measure_B_National_Report_on_Hungary_2015_HUN.pdf

7 *Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 3 to 12 April 2013*, Strasbourg, 30 April 2014, CPT/Inf (2014) 13, https://rm.coe.int/1680696b7f, § 22–24

also criticised by the UN Working Group on Arbitrary Detention (UN WGAD) in the report on its 2013 visit,[8] and the UN Human Rights Committee also mentioned in its 2010 concluding observations that the right to defence shall be guaranteed to every person deprived of their liberty.[9] (These recommendations and observations will be discussed in detail in Sections C. and E.)

Besides international monitoring bodies, several Hungarian authors have dealt with the issues of access to a lawyer and legal aid, and the HHC has also conducted extensive research into the enforcement of these rights.[10] Presenting these exercises would exceed the framework of the present report, so we are highlighting only two that were carried out by state actors.

The first one is the series of examinations launched by the Commissioner for Fundamental Rights (Hungary's Ombudsperson) in 2012 under the title *"The situation of lawyers, the protection of the rights of lawyers and their clients"*.[11] The exercise focused on the enforcement of rights guaranteed to members of the legal profession and their clients, the relevant practices of bar associations and the assessment of the legal framework from a constitutional perspective. In the framework of this project, the Ombudsperson produced Report no. AJB-3107/2012, which concluded that "the current regulation of the system of ex officio appointed defence counsels causes violations in relation to legal certainty as stemming from the rule of law; the right to defence; and the fundamental right to a fair trial".

It must also be mentioned that in 2014, the President of the Curia (Hungary's highest court) established a jurisprudence-analysing group to examine *"Defence rights in the court proceeding"*,[12] the summary opinion of which was published in April 2015.[13]

IV. THE STAKEHOLDERS CONCERNED BY DIRECTIVE 2013/48/EU AND THE RECOMMENDATION ON LEGAL AID

Besides suspects, accused persons and the authorities (investigating bodies, prosecution and the courts) Directive 2013/48/EU and the Recommendation concern defence counsels, so before the assessment of the extent to which Hungary meets the requirements of these norms, it is necessary to describe the Hungarian system of bar associations and their role in defence work.

In Hungary, lawyers are organised into bar associations. The bar association is a public body, which performs its task independently from the State. Act LXXVIII of 2017 on the Activities of Attorneys (hereafter: New Attorneys Act), which was adopted in June 2017 and came into effect on 1 January 2018, describes

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8 *Report of the Working Group on Arbitrary Detention. Addendum. Mission to Hungary*, 3 July 2014, A/HRC/27/48/Add.4, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/072/58/PDF/G1407258.pdf?OpenElement, § 126 and 130

9 *Concluding observations of the Human Rights Committee. Hungary,* 16 November 2010, CCPR/C/HUN/CO/5, http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsnm97%2bRfSonZvQyDICMC7tqXDuQxN3ZOcb6KEl9RMaNjSEJLTtBwEivqvvQSj13jY%2fn%2fyetmReJvWx1ztwYYpUo8V7nvsyae8ieU5KMbZjZW, § 13

10 For a summary see: Kádár, András Kristóf – Novoszádek, Nóra – Selei, Adrienn: *Ki rendelt itt védőt? Egy alternatív védőkirendelési modell tesztelésének tapasztalatai [Who Ordered a Counsel Here? – The Experiences of Testing an Alternative Model of Appointing Defence Counsels].* Hungarian Helsinki Committee, Budapest, 2012, pp. 7–9. Available at: http://helsinki.hu/wp-content/uploads/MHB_Ki_rendelt_itt_vedot_2012.pdf.

11 In Hungarian: *Az ügyvédség helyzete, az ügyvédek és hozzájuk fordulók jogainak védelme.*

12 Act CLXI of 2011 on the Organisation and Administration of Courts, Article 29(1): "The task of the jurisprudence-analysing group is to examine the jurisprudence. The subjects of examination shall be determined by the President of the Curia annually after consulting the Divisions of the Curia. […]"

13 The opinion of the jurisprudence-analysing group is available at: http://www.kuria-birosag.hu/sites/default/files/joggyak/elfogadott_osszegzo_velemeny.pdf.

the bar association as a public body of practitioners carrying out attorneys' activities, which is based on the principle of self-governance and performs tasks related to professional matters and the representation of interests.[14] The bar association organises the attorneys' trainings, performs disciplinary functions through its bodies elected by the membership, represents attorneys and their interests before the public, and plays an active role in the training of trainee attorneys. The bar association decides about the establishing and termination of the individual attorneys' membership.

The system of bar associations consists of the national bar association (Hungarian Bar Association[15]) and the regional bar associations. The Hungarian Bar Association is the national organisation of practitioners carrying out attorneys' functions, its membership consists of the regional bar associations.[16] Regional bar associations are also public bodies with representative and administrative units and an independent budget. Within its geographical area of competence, it performs the functions it is vested with by the law. The regional bar associations' geographical areas of competence coincide with those of the regional courts,[17] so there are regional bar associations in Budapest and the 19 counties of Hungary. A practitioner authorized to carry out attorneys' tasks may not be member to more than one regional bar association.[18]

Upon his/her request, everyone shall be admitted to the bar association who meets the following requirements: he/she (i) is the citizen of a country that is a member of the European Economic Area, (ii) has a law degree, (iii) has passed the Hungarian bar exam, (iv) was a trainee attorney for at least a year within the 10 years preceding the submission of the petition for admission, (v) has a liability insurance guaranteeing that pecuniary or non-pecuniary damages caused by his/her activities as an attorney can be paid, (vi) has (within the geographical area of the bar association's competence) an office that is suitable for conducting legal work, (vii) meets the requirements necessary for the electronic processing of cases, (viii) has concluded an agreement for substitution with an attorney or a law firm (or is a member of a law firm), and (ix) does not fall under any of the clauses excluding the performing of attorneys' activities.[19]

There is no special division for defence counsels within the bar associations, nor is there institutionalised specialisation within the legal profession. Bar associations have a dual role in relation to criminal defence. Firstly, they keep a register of attorneys who can be appointed as ex officio defence counsels[20] (the authority appointing a defence counsel selects from this list), and also keep a general register of members.[21]

There are no additional statutory conditions that a lawyer must meet (besides being a member of the bar association) if he/she wishes to be included in the list of lawyers who can be appointed as ex officio defence counsels. This means that **the Hungarian system does not satisfy the requirement formulated in § 19 of the Recommendation, according to which "A system of accreditation for legal aid lawyers should be put in place and maintained in each Member State"**. **Nor is there a system "to ensure the quality of legal aid lawyers", as required by § 17 of the Recommendation**, although the HHC highlighted this shortcoming in one of its studies as early as 2007.[22]

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14 New Attorneys Act, Article 144(1)

15 Webpage: http://magyarugyvedikamara.hu/.

16 New Attorneys Act, Articles 155(1) and 155(3)

17 New Attorneys Act, Article 166(1)–(3)

18 New Attorneys Act, Article 145(1)

19 New Attorneys Act, Article 58(1).

20 New Attorneys Act, Article 38(1)

21 New Attorneys Act, Articles 189–194

22 Kádár, András Kristóf –Tóth, Balázs – Vavró, István: *Without Defense – Recommendations for the Reform of the Hungarian Ex Officio Appointment System in Criminal Matters*. Hungarian Helsinki Committee, Budapest, 2007, pp. 25–27. Available at: http://helsinki.hu/wp-content/uploads/Without_Defense.pdf.

In addition to keeping the registers of attorneys, the bar association is also vested with the task of conducting disciplinary proceedings against them (in relation to both criminal and civil cases). Such a proceeding is started when the suspicion of a disciplinary violation arises. A disciplinary violation is committed by a member of the bar association if (i) within the framework of carrying out attorneys' activities, he/she intentionally or out of neglect violates his/her professional obligations stemming from a law, the statutes of the Hungarian Bar Association or a regional bar association, or the Code of Ethics; or (ii) his/her intentional or neglectful behaviour outside the professional context severely threatens the prestige of the legal profession.[23] If found to be at fault, the lawyer can be sanctioned with: written reprimand, fine, ban from participating in the affairs of the bar association, ban from employing a trainee attorney, exclusion from the bar association.[24]

23 New Attorneys Act, Article 107(1)

24 New Attorneys Act, Article 108

B.

The scope of Directive 2013/48/EU and the Recommendation on legal aid

In Hungary, the scope of Directive 2013/48/EU and the Recommendation on legal aid extends to criminal procedures and in some cases (as outlined below) also to petty offence proceedings.[25]

I. CRIMINAL PROCEDURES IN HUNGARY

From the point of view of the implementation of Directive 2013/48/EU and the Recommendation, the stages and characteristics of the Hungarian criminal procedure system are the following.

Under the CCP, a criminal procedure may be launched against a person if there is substantiated suspicion that he/she has committed a criminal offence. Under Act C of 2012 on the Criminal Code (hereafter: Criminal Code), a criminal offence may be a felony or a misdemeanour. A felony is an intentional criminal offence that is rendered punishable by the Criminal Code with imprisonment exceeding two years. Any other offence is a misdemeanour.

The criminal procedure consists of the following stages: **investigation, prosecutorial phase, court phase**. It starts with the investigation during which – in terms of the CCP – the authorities shall clarify the circumstances of the offence, identify the perpetrator, find and secure the evidence. The facts of the case shall be established to an extent that enables the prosecutor to decide whether charges shall be pressed.[26] The investigation is carried out by the investigating authority (in most cases by the police[27]) or the prosecutor.[28] During the investigation the suspect is heard. At the beginning of the first investigation, the suspect is informed about the charges against him/her. This is the so-called "communication of the suspicion", when the concerned person formally becomes a suspect. The "presentation of the case file" (the presentation of the evidence) takes place after the investigation is completed: this is when the full case file is presented to the suspect and the defence counsel.[29] The file is then forwarded to the prosecutor, who – in his/her capacity of public prosecutor[30] – decides about the pressing of charges,[31] which formally happens when he/she submits a bill of indictment to the court.[32]

In the court phase, the court holds a hearing to which the person under the procedure (now identified as the "accused person") is summoned.[33] The evidentiary procedure starts with the hearing of the accused person,[34] other evidentiary actions and their order are determined by the court.[35] After the evidentiary procedure is completed, the prosecutor and the defence counsel hold their closing speeches, and the accused person may also address the court.[36] Subsequently, the court delivers its judgment, in which it decides about innocence or guilt and the sanction to be applied.[37] If the prosecution or the defence appeals the first instance judgment, it does not become final and binding: the case is referred to the court of

25 The scope of Directive 2013/48/EU and the Recommendation extends to European Arrest Warrant procedures, but the present Country Report does not touch upon these proceedings.

26 CCP, Article 164(2)

27 CCP, Article 36(1)

28 CCP, Articles 28(3) and 35

29 CCP, Articles 193–194

30 CCP, Article 28(1)

31 CCP, Article 216

32 CCP, Article 217(1)

33 CCP, Article 279(1)

34 CCP, Article 286(1)

35 CCP, Article 285(2)

36 CCP, Article 314(1)

37 CCP, Articles 329–330

second instance. Second instance decision can only be subject to further appeal in certain cases.[38] In such cases, there is a third instance procedure, and only the third instance decision will be regarded as final and binding. Thus, the scope of Directive 2013/48/EU and the Recommendation extends to the whole criminal procedure [under Article 2(1) of the Directive and § 1 of the Recommendation respectively].

In terms of the CCP, a **"defendant"** (in Hungarian: *terhelt*) is the person against whom a criminal procedure is conducted. The defendant is called "suspect" during the investigation, "accused person" during the court phase and "convict" after the handing down of the judgment (provided that he/she is sanctioned or a measure is imposed on him/her, such as reprimand, probation, restitutive work or time to be served in a juvenile reformatory).[39] (The term "defendant" will be used throughout the report to denote all three categories, where distinction according to the stage of the proceeding is irrelevant.)

Since Directive 2013/48/EU regulates certain aspects of access to a lawyer in relation to **suspects and accused persons "deprived of liberty"**, mention must be made of those coercive measures of the Hungarian criminal procedure system that involve the deprivation of the liberty of suspects and accused persons: 72-hour detention and pre-trial detention.

72-hour detention is the temporary deprivation of the suspect's liberty without a judicial decision. It can be ordered if there is a well-grounded suspicion that the concerned person has committed a criminal offence punishable with imprisonment, provided that his/her pre-trial detention is likely. This form of detention may last up to 72 hours, after which – unless the court orders his/her pre-trial detention – the suspect shall be released.[40] The suspect may file a complaint against his/her 72-hour detention.[41] This type of detention is implemented in police jails.[42]

Pre-trial detention is the judicial deprivation of the defendant's personal liberty prior to the delivery of the final decision on the merits of the case. It can be ordered in both the investigation and the court stage (until the submission of the bill of indictment, it is ordered by the so-called "investigation judge" upon the prosecutor's motion,[43] after that, the decision is made by the trial court). Pre-trial detention ordered before the submission of the bill of indictment can be maintained by the trial court. Pre-trial detention ordered or upheld by the first instance court shall last until the promulgation of the first instance judgment. Thus, defendants may spend the whole period from the communication of the suspicion to the delivery of the first instance judgment in pre-trial detention (however, in most – though not all the – cases, there is an absolute upper limit).[44] Pre-trial detention as a main rule shall be implemented in a penitentiary institution.[45]

The 72-hour detention may be preceded by **police custody** under Act XXXIV of 1994 on the Police (hereafter: Police Act). The police officer *shall* arrest and present to the competent authority a person who is caught in the act of committing a criminal offence and *may* arrest a person who is suspected of having committed an offence. (Persons taken into police custody are not regarded as defendants – suspects –, since the suspicion has not been formally communicated to them.) The police may maintain the deprivation of liberty until it is absolutely necessary, but for not longer than eight hours. If the objective of the deten-

38 CCP, Article 386

39 CCP, Article 43(1)

40 CCP, Article 126

41 CCP, Article 195

42 Act CCXL of 2013 on the Implementation of Punishments, Measures, Certain Coercive Measures and Petty Offence Confinement, Article 427(2)

43 The investigation judge performs the tasks of the courts before the submission of the bill of indictment.

44 In detail see: CCP, Articles 129–132.

45 Act CCXL of 2013 on the Implementation of Punishments, Measures, Certain Coercive Measures and Petty Offence Confinement, Article 388

tion has not been realised, this term may be prolonged by four hours on one occasion.[46] The time spent in police custody shall be taken into account when the time spent in the 72-hour detention is calculated.[47]

The defendant may defend himself/herself, but may also resort to assistance by a **defence counsel** at any moment of the procedure.[48] The counsel may be retained or appointed ex officio. Having a defence counsel is mandatory in certain cases stipulated in the CCP.[49]

II. PETTY OFFENCE PROCEDURES IN HUNGARY

Under Act II of 2012 on Petty Offences, the Petty Offence Procedure and the Petty Offence Records System (hereafter: Petty Offence Act), the local branches of Government Offices, or – in certain cases – the police or the national tax office conduct petty offence procedures.[50] Their decisions may be challenged by the concerned person, and if they do not change the challenged decision within their own scope of competence, it is eventually reviewed by the local court. The concerned person also has the right to challenge again the decision if it is changed by the petty offence authority upon the first challenge, but he/she still believes that the decision is unlawful. In such cases, the second challenge is adjudicated by the local court.[51] In cases where the petty offence is punishable with confinement (and in certain other cases listed by the Petty Offence Act), only a court can make a decision.[52] (In such instances, the police shall conduct a so-called preparatory procedure aimed at clarifying the circumstances of the case, identifying the perpetrator and finding and securing the evidence.[53]) This means that **petty offence cases may end up before courts in a number of ways**, therefore, in terms of Article 2(4) of Directive 2013/48/EU, Hungary was under the obligation to transpose the relevant directive provisions in relation to those stages of the petty offence procedure which are conducted by the courts.

As far as the deprivation of liberty is concerned, if a petty offence is punishable with confinement, the police may take into petty offence custody a perpetrator who is caught in the act, if it is decided that a so-called fast-track court procedure is to be conducted in his/her case. **Petty offence custody** shall be implemented in a police jail and as a main rule, it can last 72 hours.[54] The concerned person may appeal against the petty offence custody.[55]

The person under a petty offence procedure (hereafter: petty offence defendant) may at any time be **represented by his/her legal guardian, or any adult authorised by him/her or the legal guardian**.[56] Only in fast-track court procedures[57] is representation mandatory: "The police shall appoint a counsel, if the petty offence defendant does not have one."[58]

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46 Police Act, Article 33(3)

47 CCP, Article 126(5)

48 CCP, Article 5(3)

49 CCP, Article 5(4)

50 Petty Offence Act, Article 38(1)–(2)

51 Petty Offence Act, Articles 105–106

52 Petty Offence Act, Article 38(3)

53 Petty Offence Act, Article 117

54 Petty Offence Act, Article 73(1) –(2)

55 Petty Offence Act, Article 73(5)

56 Petty Offence Act, Article 53(1)

57 Petty Offence Act, Article 124(1)

58 Petty Offence Act, Article 124(3)

C.

Access to a lawyer and right to legal aid in the Hungarian legal system

I. ACCESS TO A LAWYER AND RIGHT TO LEGAL AID IN THE CRIMINAL PROCEDURE

1. Persons vested with the right of access to a lawyer

Article XXVIII(3) of the Fundamental Law of Hungary stipulates the following: "Everyone under a criminal procedure shall have the right to defence in all stages of the procedure." Accordingly, under Article 5(1) of the CCP, the defendant shall have the right to defence. The defendant may defend himself/herself, or may be defended by a defence counsel at any stage of the proceeding. The court, the prosecutor or the investigating authority shall guarantee that the person against whom the procedure is conducted may exercise his/her right to defence in the way and manner stipulated by the law.[59] Having a defence counsel is mandatory in certain cases prescribed by the CCP.[60] Only an attorney may act as a defence counsel – defence may be provided on the basis of either a retainer or appointment by the competent authority.[61]

Under Joint Decree 23/2003. (VI. 24.) of the Minister of Interior and the Minister of Justice on the Detailed Rules of Investigation Authorities Under the Instruction of the Minister of Interior and the Rules of Recording Investigative Acts in Ways Other than Taking Minutes (hereafter: Joint Decree 23/2003), as a main rule, the suspect may exercise his/her criminal procedural rights from his/her first interrogation on (this is when the suspicion is communicated and he/she formally becomes a suspect), however, "the right to defence shall be guaranteed from the very first procedural act that the investigating authority conducts against the concerned person upon the suspicion of a criminal offence".[62] Joint Decree 23/2003 lists as such acts – among others – the following: summoning the concerned person for the first interrogation, the implementation of a coercive measure depriving him/her of his/her liberty, or the issuing of an arrest warrant, meaning that the concerned person shall be provided with the possibility of exercising his/her right to defence from the time of these actions, even if they are preceding the actual initial interrogation.

In relation to suspects deprived of their liberty, it is an additional safeguard concerning access to a lawyer that Article 4(4) of Joint Decree 23/2003 claims the following: a person who is taken into police custody because he/she was caught in the act of committing a criminal offence, **shall have the right to defence from the outset of the arrest**. Furthermore, Joint Decree 23/2003 stipulates that **after a decision has been made about the deprivation of liberty** – in cases falling under Article 4(4), from the outset of the arrest – **the concerned person shall be provided with the possibility of retaining a lawyer before his/her first interrogations is started**.[63] Joint Decree 23/2003 has since 1 June 2007 guaranteed the right to defence to those who are taken into police custody because they have been caught in the act of committing a criminal offence. Before that date, this had not been the practice (since until the first interrogation and the communication of the suspicion within its framework, these persons were not regarded to be formal "suspects", and therefore were not guaranteed the right to defence), so it was an important step forward. However, it remains a **shortcoming** that Joint Decree 23/2003 still fails to expressly extend the right to defence (before the first interrogation) to those who are taken into police custody under Article 33(2)(b) of the Police Act upon the simple suspicion of having committed a criminal offence (the differentiation between this group and those who are taken into custody, because they have been caught in the act, is very difficult to explain).

59 CCP, Article 5(3)

60 CCP, Article 5(4)

61 CCP, Article 44(1)

62 Joint Decree 23/2003, Article 4(1)–(2)

63 Joint Decree 23/2003, Article 6

The extension of the right to defence to persons taken into police custody under Article 33(2)(b) of the Police Act would be in line with the recommendation the CPT formulated after its 2013 visit: "The CPT recommends that the Hungarian authorities take further steps to ensure that access to a lawyer is granted to all detained persons (irrespective of their precise legal status) as from the outset of their deprivation of liberty."[64] A similar recommendation was made by the UN WGAD as well, which called upon the Hungarian authorities "to take steps, including at the legislative level, to ensure that all detained persons have access to a lawyer as from the very outset of their deprivation of liberty".[65]

Based on the above, it can be said that the Hungarian legal framework **mostly meets the requirements of Article 3(2) of Directive 2013/48/EU** as to the time from which the right of access to a lawyer is in place. The Hungarian legal framework does not allow for the temporary derogation stipulated in Article 3(5) of Directive 2013/48/EU.

2. Informing the suspect about the right of access to a lawyer

After the communication of the suspicion **the suspect must be informed of his/her right to choose or to request the appointment of a defence counsel**. [Persons taken into police custody based on Article 33(1)(a) of the Police Act – i.e. because they were caught in the act of committing a criminal offence – must be informed about their right to defence at the time of the arrest.[66]] If the participation of the defence counsel is mandatory in the procedure (see below), the suspect also has to be informed that unless he/she retains a defence counsel in three days, the prosecutor or the investigating authority will appoint a counsel for him.[67] If the suspect declares that he/she does not wish to retain a defence counsel, the prosecutor or the investigating authority will immediately appoint a defence counsel.[68] **As opposed to Article 9(1)(a) and Article 9(3) of Directive 2013/48/EU**, the CCP does not prescribe that the suspect must be provided with information about the content of the right of access to a lawyer as well as about the possible consequences of waiving it and the possibility of revoking the waiver subsequently at any point during the criminal proceedings.

Under Article 5 of Joint Decree 23/2003, at the beginning of the first interrogation, or if defence will become mandatory under the pertaining provisions of the CCP[69] at a later stage of the procedure, then at the commencement of the next interrogation, **the suspect's statement concerning the retaining or appointing of a defence counsel shall be recorded. This is in line with Article 9(2) of Directive 2013/48/EU.** Under Article 166(3) of the CCP, the records shall contain the description of the investigative act in a manner that makes it possible to subsequently assess whether the procedural requirements pertaining thereto have been complied with.

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64 *Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 3 to 12 April 2013*, Strasbourg, 30 April 2014, CPT/Inf (2014) 13, https://rm.coe.int/1680696b7f, § 23

65 *Report of the Working Group on Arbitrary Detention. Addendum. Mission to Hungary,* 3 July 2014, A/HRC/27/48/Add.4, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/072/58/PDF/G1407258.pdf?OpenElement, § 126

66 The case file research found that the police reports on the deprivation of liberty in such cases contain the following text: "Verbal information was provided about the exercise of the right to defence at [date and time] in accordance with Article 4(4) of Joint Decree 23/2003. (VI. 24.) BM-IM."

67 According to leading judgment BH1998. 117, the interrogation of the suspect in the absence of the defence counsel does not violate the procedural rules even if the defence is mandatory, provided that he/she is warned that if he/she does not retain a lawyer within three days, a lawyer will be appointed for him/her, and subsequently he/she says that he/she will decide about whether to retain a counsel only later, and he/she voluntarily decides to make a statement.

68 CCP, Article 179(3)

69 Based on CCP, Article 46(a)–d) and f).

The CCP also stipulates that the suspect **shall be informed** that if it is foreseen that due to his/her financial situation he/she will be unable to pay the costs of the procedure, and he/she can verify this in accordance with the relevant legal norms, upon his/her request or the request of his/her counsel, the prosecution or the court may grant him/her so-called **personal cost exemption**. The information shall also extend to the fact that if the cost exemption is granted, the fees and costs of the ex officio appointed defence counsel will not only be advanced, but also borne by the State.[70]

These provisions of the CCP meet the requirements set forth by Article 3 of Directive 2012/13/EU, however, according to the experience of the HHC, the practice of providing the information were not in line with the written norms for a long time. In the **investigation phase**, police officers often inform the suspect about his/her rights by reading out to him/her the template-warnings generated by "RoboCop NEO", the integrated management and electronic file-processing system of the police: this system generates a template for – among others – the recording of the interrogations, and that template contains the warnings that all suspects must receive before their interrogation (about their rights, such as the right to silence) for their testimonies to be admissible. As a research by the HHC points out, in 2015, the "RoboCop NEO" system only contained the warning about the right stipulated in Article 3(1)(b) of Directive 2012/13/EU (the right of access to a lawyer), but not about the right enshrined in Article 3(1)(b) (entitlement to free legal advice and the conditions for obtaining such advice).[71] The situation has somewhat improved since 2015, as the template now provides information about the fact that legal aid may be requested, but the conditions of obtaining legal aid are still missing from the text.

With regard to **defendants deprived of their liberty,** Article 12(5) of Act CCXL of 2013 on the Implementation of Punishments, Measures, Certain Coercive Measures and Petty Offence Confinement (hereafter: Penitentiary Code) prescribes – in accordance with Articles 3 and 4 of Directive 2012/13/EU – that persons under coercive measures shall be informed in writing about "the right to defence" as well as "the right to request personal cost exemption and the conditions thereof". However, the practice is not fully satisfactory: the written information note (Letter of Rights) provided by the police to detainees[72] contains information only in relation to the right to defence. (The information note provided to persons detained in penitentiary institutions[73] covers both the right to defence and the right to personal cost exemption and the conditions under which it may be exercised.[74])

In sum, one can conclude that **§ 5 of the Recommendation on legal aid is abided by only partially**, and suspects do not automatically receive "information on the possibilities to complain in circumstances where access to legal aid is denied or a legal aid lawyer provides insufficient legal assistance".

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70 CCP, Article 179(3a)

71 *EU Directives in Practice: Monitoring the Implementation of the EU Directive on the Right to Information in Criminal Proceedings. Country report – Hungary.* Hungarian Helsinki Committee, December 2015, p. 11. Available at: http://www.helsinki.hu/wp-content/uploads/HHC_Measure_B_National_Report_on_Hungary_2015_HUN.pdf.

72 Instruction 3/2015. (II. 20) of the National Chief of Police on the Order of Police Jails, Annex 11, available at: 3/2015. (II. 20.) ORFK utasítás

73 Annex 2/A of the Sample House Rules issued as a circular of the National Prison Administration

74 At the same time, the information note does not explain what personal cost exemption exactly is, so the information that if it is granted a defence counsel will be appointed for the defendant and his/her fees and costs will be borne by the State, is also missing.

3. Retaining a defence counsel, contact between defendant and lawyer

A defence counsel may primarily be retained by the defendant, but a retainer may also be given by the legal guardian or an adult relative of the defendant. In such cases the defendant must be notified about the retainer.[75] The retainer shall be submitted to the court, prosecutor or investigating authority which is conducting the proceeding at the time when the retainer is submitted. The retained counsel may exercise his/her rights from the moment of the retainer's submission.[76]

The defendant is free to choose his/her retained counsel. As mentioned in the introduction, regional bar associations keep the register of attorneys,[77] and the list of attorneys is published on their websites. (In addition, the websites of the Hungarian Bar Association and certain regional bar associations allow attorneys to display the list of those fields of law which their practice covers.) Hence, the Hungarian law meets **the requirement stipulated by Article 3(4) of Directive 2013/48/EU,** according to which "Member States shall endeavour to make general information available to facilitate the obtaining of a lawyer by suspects or accused persons".[78]

If in a case defence is not mandatory under the CCP, and consequently, the defendant does not retain a counsel at the beginning of the proceeding, he/she may – **in accordance with Article 9(3) of Directive 2013/48/EU** – **decide at any point during the proceedings to retain a counsel and also to withdraw a retainer given earlier to a lawyer**.

If the defendant is detained, the court, prosecutor or investigating authority conducting the proceeding shall immediately notify the detaining institution about the name and availability of the retained defence counsel.[79]

4. The appointment of the defence counsel in cases of mandatory defence and personal cost exemption

4.1. Cases when a counsel is appointed

As mentioned above, in certain cases determined by the CCP defence is mandatory,[80] however, there are differences between the cases and content of mandatory defence in the investigation and the court phase.

During the investigation, defence is mandatory

- if the criminal offence the defendant is suspected of is punishable by a sentence of imprisonment of five years or more,
- the suspect is detained,
- the suspect is hard of hearing, deaf and blind, blind, unable to speak or has a mental disability (regardless of his/her mental capacity),

75 CCP, Article 47(1)

76 CCP, Article 47(2)

77 New Attorneys Act, Articles 189–194

78 See Paragraph (27) of the Preamble of Directive 2013/48/EU: "Member States should endeavour to make general information available, for instance on a website or by means of a leaflet that is available at police stations, to facilitate the obtaining of a lawyer by suspects or accused persons. However, Member States would not need to take active steps to ensure that suspects or accused persons who are not deprived of liberty will be assisted by a lawyer if they have not themselves arranged to be assisted by a lawyer. […]"

79 CCP, Article 47(3)

80 CCP, Article 5(4)

- the suspect is unfamiliar with the Hungarian language or the language of the procedure,
- the suspect is unable to defend himself/herself in person for any other reason,[81]
- the suspect is a juvenile[82] (i.e. he/she was at least 12 years of age but younger than 18 when the offence was committed[83]),
- the proceeding concerns a so-called "case of outstanding importance".[84]

The above are the **cases of so-called "mandatory defence"** – whether they are in place is established by the proceeding authority, and in such cases the defendant is not allowed to take part in the proceeding without a defence counsel. If defence is mandatory, but the defendant does not have a counsel, the proceeding authority (investigating authority, prosecutor or court) appoints a counsel for him/her.[85] This can happen right after the communication of the suspicion: if the suspect does not retain a defence counsel within three days from the communication of the suspicion in such cases, or if declares after the communication of the suspicion that he/she does not wish to retain a lawyer, the investigating authority or the police shall appoint a defence counsel for him/her.[86] If defence is mandatory because the suspect is detained, the appointing of the counsel must take place before the first interrogation.[87]

In the court phase, defence is mandatory in more cases. In addition to the above listed cases, defence is mandatory in the following cases:

- if the regional court is the first instance court in the given case, unless the CCP stipulates otherwise,
- if the accused person who has been regularly summoned declares that he/she does not wish to attend the court hearings,
- if a supplementary private prosecutor is involved in the case.[88]

If the prosecutor participates at the hearing and the accused person did not retain a lawyer, the presiding judge may appoint a defence counsel if he/she regards it necessary. If the accused person requests so, in such cases the appointment of a counsel is mandatory.[89]

Defence is also mandatory in certain special procedures, such as fast-track procedures,[90] proceedings against an absent defendant,[91] procedures[92] concerning criminal offences related to the border fence,[93]

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81 CCP, Article 46(a)–(e). An example for a person unable to defend himself/herself is provided by leading judgment EBH2013. B.22., according to which defence is mandatory if it is obvious to the court that – due to his severe illness – the defendant is unable to follow the developments of the trial, and he cannot or can only with great difficulties formulate his answers to the questions.

82 CCP, Article 450

83 Criminal Code, Article 105(1)

84 CCP, Article 554/D. Cases of outstanding importance are listed by Article 554/B of the CCP.

85 CCP, Article 48(3)

86 CCP, Article 179(3)

87 CCP, Article 48(1)

88 CCP, Article 242(1)

89 CCP, Article 242(2)

90 CCP, Article 522(1)

91 CCP, Article 530(1)

92 CCP, Article 542/L

93 These offences are the following: forbidden crossing of the border fence (Criminal Code, Article 352/A), damaging the border fence (Criminal Code, Article 352/B), obstructing construction works related to the border fence (Criminal Code, Article 352/C).

and in special hearings concerning cases in which the defendant waived his/her right to a full court trial.[94] Defence is also mandatory in extraordinary review procedures by the Curia,[95] in extraordinary review procedures initiated by the Chief Public Prosecutor,[96] and procedures where the defendant provides a deposit to be allowed to be absent.[97]

If – in a case where defence is mandatory – the defendant or any other person entitled to do so retains a lawyer, the court, the prosecutor or the investigating authority withdraws the appointment of the appointed counsel.[98]

It is important to point out that **in the investigation phase the mandatory nature of defence does not mean that the defence counsel's *presence* at the investigative acts is also mandatory**. (An exception is when the investigation judge holds a hearing through a closed-circuit video network, because in such cases the defence counsel must be present at the hearing.[99] In addition, no hearing on coercive measures can be held in the absence of the defence counsel if the defendant is a juvenile.[100]) Thus while **the requirement set forth by Article 3(4) of Directive 2013/48/EU** that "Member States shall make the necessary arrangements to ensure that suspects or accused persons who are deprived of liberty are in a position to exercise effectively their right of access to a lawyer" **seems to be respected in the investigation phase**,[101] the possibility of the counsel's absence – and the problems relating to the notification of lawyers, which will be detailed later – can in practice eliminate the "effectiveness" of exercising this right. In the court phase, this problem does not prevail, as if defence is mandatory, no court hearing can be held in the defence counsel's absence.

The proceeding authorities may consider beyond the cases of mandatory defence **whether the right to a fair trial requires the appointment of a defence counsel**: the court, the prosecutor or the investigating authority may – ex officio or upon the request of the defendant, the defendant's legal guardian or adult relative or, if the defendant is a foreign national, of his/her country's consular official – appoint a defence counsel for the defendant if this is deemed necessary in the defendant's interest.[102]

If it is foreseen that due to his/her financial situation, the defendant will be unable to pay the costs of the procedure, and he/she can verify this in accordance with the relevant legal norms, upon his/her request or the request of his/her counsel, the prosecution or the court may grant him/her so-called **personal cost exemption**. If such cost exemption is granted (and the defendant has no defence counsel), upon the defendant's request the court, the prosecutor or the investigating authority shall appoint a defence counsel for him/her.[103]

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94 CCP, Article 541(2)

95 CCP, Article 420(2)

96 CCP, Article 434(2)

97 CCP, Article 586(6)

98 CCP, Article 48(4)

99 CCP, Article 211(5)

100 CCP, Article 456(1)

101 See also Paragraph (28) of the Preamble of Directive 2013/48/EU: "Where suspects or accused persons are deprived of liberty, Member States should make the necessary arrangements to ensure that such persons are in a position to exercise effectively the right of access to a lawyer, including by arranging for the assistance of a lawyer when the person concerned does not have one, unless they have waived that right. Such arrangements could imply, inter alia, that the competent authorities arrange for the assistance of a lawyer on the basis of a list of available lawyers from which the suspect or accused person could choose. Such arrangements could include those on legal aid if applicable."

102 CCP, Article 48(3)

103 CCP, Article 74(3)(a)

It is an important difference for the defendant between appointment based on mandatory defence and appointment based on cost exemption that in the latter case the fees and costs of the appointed defence counsel are borne by the State[104] even if the defendant is found guilty at the end of the proceeding, whereas if the appointment is based on a case of mandatory defence, then the State only advances these items, and if the defendant is convicted he/she must repay the advanced amounts as part of the legal costs.[105] If personal cost exemption is granted in an ongoing proceeding, where the defendant has an appointed defence counsel due to a reason triggering mandatory defence, the fees and costs of the appointed defence counsel will only be borne by the State from the date when the cost exemption was granted (i.e. fees and costs that arose beforehand, will have to be paid by the defendant).[106]

Based on the above, it can be said that **the Hungarian system of cost exemption is in accordance with §§ 4 and 13 of the Recommendation on legal aid**. However, the Hungarian provisions do not expressly take into account the "complexity of the case", and do not consider the granting of legal aid to be in the interests of justice on the sole basis that "a person is suspected or accused of an offence that carries a custodial sentence as a possible penalty".

4.2. The process of appointment, contact between defendant and lawyer

The defence counsel is appointed and also selected by the proceeding authority in all cases (in the investigation phase the investigating authority, i.e. most often the police), the defendant has no say in this issue – in contradiction with § 24 of the Recommendation.[107] As mentioned in the introduction, under the New Attorneys Act, **the regional bar associations keep a register of the attorneys who can be appointed**, and the authorities may only choose from this list,[108] but they are completely free to select any lawyer who is on the list. The bar associations are obliged to compile this list in a way guaranteeing that the number of lawyers on it is sufficient to fulfil the tasks stemming from appointments and to sustain the undisturbed functioning of the justice system and that – beyond voluntary application – all attorneys have an equal chance of being included in the list.[109] The bar associations must keep the list up to date and publish the changes on their websites.[110]

After the appointment, the defendant must be notified about the name of the appointed defence counsel.[111] If the defendant is detained, the detaining institution shall be immediately informed about the appointed defence counsel's name and availabilities.[112] The CCP stipulates in relation to appointed defence counsels as well that they shall contact the defendant without undue delay.[113]

104 CCP, Article 74(3)(c)

105 CCP, Articles 338(1) and 74(1)(c)

106 Joint Decree 9/2003. (V. 6.) of the Ministry of Justice, the Ministry of Interior and the Ministry of Finance on the Application of Personal Cost Exemption in Criminal Proceedings, Article 7(2)

107 CCP, Article 48(1)

108 New Attorneys Act, Article 38(1)

109 New Attorneys Act, Article 38(2)–(3)

110 New Attorneys Act, Article 38(4)

111 CCP, Article 48(1) and (8)

112 CCP, Article 48(8)

113 CCP, Article 50(1)(a)

In relation to the system of appointments, significant changes will be implemented by the New CCP, which will come into effect on 1 July 2018. Under the new regulation, the selection of the appointed defence counsel would be performed by the regional bar association located in the geographical area of competence of the proceeding court, prosecution or investigating authority.[114] The regional bar association will perform the selection function through operating a computerised system, which "to the extent that it is possible, guarantees the immediacy of the selection and the effective availability of the selected defence counsels".[115] If however, the regional bar association cannot select a defence counsel within an hour from receiving the proceeding authority's decision on appointment, the selection will be made (as it is today) by the prosecutor or the investigating authority during the investigation, and by the court in the trial phase.[116]

In accordance with the above, a provision of the New Attorneys Act will – as of 1 July 2018 – prescribe that the regional bar association shall identify the appointed defence counsel through random, electronic selection in a procedure defined by the bar association's internal regulations. Furthermore, when the selection is made, regard must be taken of the proportionate workload of attorneys who can be appointed and to the geographical proximity between the attorney's office and the appointing authority.[117] Finally, in order to guarantee that appointments can be made in mandatory defence cases, bar associations will – similarly to the current rules – be required to organise a duty lawyer system for weekends and banking holidays.[118]

It must be emphasised that **the present system of appointments has for long been criticised by many stakeholders**, and the HHC has also warned in numerous cases that its research shows: the system is deficient, and one of the main problems is that the investigating authority is completely free to choose a lawyer from the register compiled by the regional bar associations. This creates mistrust between the defence counsel and the defendant, and data also show that the same few attorneys or law firms are appointed regularly by certain police units, as a result of which the attorney's practice will become dependent on the police's good will. Hence, besides being non-transparent, this system of selection threatens effective defence and the independence of attorneys.[119] (For more details see Section E. of the report.)

The same conclusion was drawn by **Report no. AJB-3107/2012 of the Commissioner for Fundamental Rights**, which states the following: "In my opinion, the existing system of appointments does not meet the requirement that constitutional rights must be effectively enforced. In the appointment process, *the defence counsel is selected by authorities which* – with the exception of the courts – *are interested in the success of the indictment*. This solution creates a situation where a relationship of dependence evolves between the police and the lawyer, which can hinder the effective enforcement of the defendant's right to defence. […] Based on the above, my conclusion is that *the current regulation of the system of ex officio appointed defence counsels causes violations in relation to legal certainty as stemming from the rule of law; the right to defence; and the fundamental right to a fair trial.*"[120]

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114 New CCP, Article 46(1) (in effect from 1 July 2018)

115 New CCP, Article 46(3) (in effect from 1 July 2018)

116 New CCP, Articles 47 and 49 (in effect from 1 July 2018)

117 New Attorneys Act, Article 37(3)–(4) (in effect from 1 July 2018)

118 New Attorneys Act, Article 36(3)

119 For a summary see: Kádár, András Kristóf – Novoszádek, Nóra – Selei, Adrienn: *Ki rendelt itt védőt? Egy alternatív védőkirendelési modell tesztelésének tapasztalatai [Who Ordered a Counsel Here? – The Experiences of Testing an Alternative Model of Appointing Defence Counsels]*. Hungarian Helsinki Committee, Budapest, 2012, pp. 7–9. Available at: http://helsinki.hu/wp-content/uploads/MHB_Ki_rendelt_itt_vedot_2012.pdf.

120 Emphasis in the original.

A change in the present system of appointments would also be in line with the recommendation made by the **CPT** after its 2013 visit to Hungary: "The CPT recommends to the Hungarian authorities that the necessary steps be taken, in consultation with the Bar Association, to ensure that ex officio lawyers are not chosen by police officers (or prosecutors) and that such lawyers meet their clients while in police custody."[121]

4.3. Granting personal cost exemption

An application for personal cost exemption may be filed by the defendant or the defence counsel **with the investigating authority (which forwards the request to the prosecution) before the bill of indictment is submitted, or the court, after the indictment has taken place** – in this latter case, the application shall be filed within 15 days from the serving of the bill of indictment.[122] After this deadline, an application may only be submitted if the conditions for personal cost exemption arose later (even in such cases the application must be submitted within 15 days from the date on which the conditions of cost exemption came about) or if the procedure was conducted against an absent defendant (in such cases the application must be submitted within 15 days from the serving of the summons to the hearing).[123]

As a rule, the application must be filed in the format determined by the Annex of Joint Decree 9/2003. (V. 6.) of the Ministry of Justice, the Ministry of Interior and the Ministry of Finance on the Application of Personal Cost Exemption in Criminal Proceedings (hereafter: Joint Decree 9/2003).[124] The defendant must make a declaration about his/her income and assets, certain personal circumstances, his/her statutory or contractual obligations to provide for anyone, as well as about the income and assets of his/her spouse or partner living in the his/her household and of relatives who have an obligation to provide for him/her. The declaration must be substantiated with certain documents or be certified by the defendant's employer or other competent authorities.[125]

If the defendant lives alone, the condition of personal cost exemption is that the defendant's monthly income does not exceed double of the actual minimum old age pension. If the defendant shares the household with someone, this threshold pertains to the per capita income of the household. An additional condition is that the defendant does not have assets other than the ones required for everyday life and work and the real estate he/she lives in. This condition must be in place in relation to the spouse or partner living in the defendant's household as well as any relative who has an obligation to provide for the defendant.[126] To put these criteria into context: in 2016, the minimum old age pension was HUF 28,500 per month, whereas in the same year, Policy Agenda calculated the subsistence income level for a single adult household to be HUF 88,619 in a month,[127] so for a defendant living on his/her own to be eligible for personal cost exemption, he/she must live way below the minimum subsistence level. This raises the question whether the present system of criteria is indeed suitable and whether cost exemption is available for all indigent defendants.

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121 *Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 3 to 12 April 2013*, Strasbourg, 30 April 2014, CPT/Inf (2014) 13, https://rm.coe.int/1680696b7f, § 24

122 Joint Decree 9/2003, Article 3(1)

123 Joint Decree 9/2003, Article 3(2)

124 Joint Decree 9/2003, Article 3(3)

125 Joint Decree 9/2003, Article 3(4)–(6)

126 Joint Decree 9/2003, Article 2(1)–(2)

127 See e.g.: https://24.hu/fn/penzugy/2017/05/15/a-magyarok-bo-harmada-elt-tavaly-letminimum-alatt/.

Irrespective of his/her financial situation, the defendant must be granted personal cost exemption if he/she is under-age and has been taken into temporary or long-term care; if he/she (or the person obliged to provide for him/her) receives certain types of social allowances; or if he/she is homeless.[128]

The court or the prosecutor establishes the financial situation of the defendant (or his/her relatives) on the basis of the data included in the form and the documentation attached. When establishing the income, the authorities shall take into account the actual number of persons for whom the defendant provides.[129] If based on the form and the documentation, the court or the prosecutor concludes that the defendant foreseeably will not be able to pay the costs of the proceeding, personal cost exemption is granted to him/her.[130] The decision on the application must comply with the general requirements for formal decisions delivered in the course of criminal proceedings, therefore, it must be in writing and it must be reasoned.[131] Hence, **the requirements set forth by § 16 of the Recommendation are met**.

In summary, it can be concluded that **the provisions on personal cost exemption meet the requirements formulated in §§ 6 and 8 of the Recommendation on legal aid** in the sense that the assessment of the applicant's economic situation is made on the basis of "objective factors" and "all relevant circumstances" are considered. However, **the requirement set by § 7 of the Recommendation**[132] **is missing from the system, and – in contradiction with the recommendation set forth by § 10 – defendants are expected to "prove beyond all doubt" that they lack of sufficient financial resources** to cover the costs of the defence and the proceedings.

In line with § 15 of the Recommendation, decisions on personal cost exemption are **subject to review**. If the decision is made by the prosecutor, a complaint may be submitted against it under Article 195 of the CCP (the complaint is adjudicated by the superior prosecutor), and the court decision can also be challenged through an appeal to the court of second instance.[133] The complaint and the appeal against decisions on cost exemption have a suspensive effect.[134]

The cost exempted defendant is under the obligation to inform the authorities about any change in his/her or his/her relatives' economic situation or personal circumstances that has a bearing to the conditions of granting cost exemption (with the exception of any decrease of income).[135] Based on the notification (or – in the absence of notification – on an annual basis), the court or the prosecutor reviews whether the conditions of cost exemption are still in place,[136] but a review may also be done ex officio if information becomes available according to which the conditions of cost exemption were absent from the beginning or ceased to prevail subsequently.[137] Cost exemption may be withdrawn on the basis of the review.[138]

128 Joint Decree 9/2003, Article 2(3)

129 Joint Decree 9/2003, Article 5(1)

130 Joint Decree 9/2003, Article 6(1)

131 CCP, Articles 169(1)–(2) and 257

132 "Where the household income of families is taken into account in the means test, but individual family members are in conflict with each other or do not have equal access to the family income, only the income of the person applying for legal aid should be used."

133 CCP, Article 347

134 CCP, Article 74(4)

135 Joint Decree 9/2003, Article 8(1)

136 Joint Decree 9/2003, Article 8(2)

137 Joint Decree 9/2003, Article 8(3)

138 Joint Decree 9/2003, Articles 9–10

5. The defence counsel's notification and presence at procedural acts during the investigation

In accordance with Article 3(3)(b) of Directive 2013/48/EU, **the defence counsel may be present at the questioning of his/her client**. In addition to this, **the counsel may also be present at those investigative acts that are envisaged by Article 3(3)(c) of the Directive**.

The defence counsel may be present **at the questioning of witnesses whose hearing was motioned by the defence** (the defence counsel or the suspect) and also at **confrontations that are held with the participation of such witnesses**. The counsel may pose questions to the suspect and the witness.[139] **The counsel shall be notified about these investigative acts**.

Both the suspect and the counsel **may be present** at the **hearing of the expert, the inspection of scenes and objects, the reconstruction of events and identity parades**. They also have the right to put forth evidentiary motions, make observations and pose questions to the expert. The authorities may exceptionally decide not to notify the defence about these acts if "the urgency of the investigative act" so justifies. The defence must not be notified if the protection of a person participating in the proceeding cannot be guaranteed in any other way.[140] [This provision was introduced into the CCP as of 28 October 2016. The text it replaced[141] was amended with a view to implement Directive 2013/48/EU, because in the legislator's view, "it did not fully comply" with Article 3(6)(a) of the Directive.[142]]

As of 28 October 2016, Article 185(4) of the CCP stipulates that if the defence is not notified, the investigating authority or the prosecutor shall inform the counsel and the suspect about the investigative act subsequently. If either the suspect or the counsel requests so within three days of receiving this information, the authority **shall deliver a formal resolution** about the decision to not notify the defence, which opens the way for the defence to challenge the decision through submitting a formal complaint against the resolution under Article 195 of the CCP. If the authority that has delivered the resolution does not find the complaint well-founded, it shall forward the complaint within three days to its superior authority (in the case of the investigating authority it is the prosecutor, in the case of the prosecutor, it is the superior prosecutor that decides about the complaint). According to the CCP as amended with effect from 28 October 2016, a further remedy is available at this point: if the complaint is rejected by the superior authority, its rejecting decision is subject to **judicial review**. These amendments of 28 October 2016[143] were justified[144] by **the obligation to implement Directive 2013/48/EU**, Article 8(2) of which prescribes that decisions authorising temporary derogations under Article 3(5) or (6) must be subject to judicial review. We believe however **that it is contrary to Directive 2013/48/EU, that only upon the request of the defence shall such decisions on temporary derogations be included into a formal decision**, as the Directive's respective provision states that "temporary derogations […] may be authorised only by a duly reasoned decision taken on a case-by-case basis, either by a judicial authority, or by another competent authority".

Under Joint Decree 23/2003, **with the exception of investigative acts that "brook no delay", the defence counsel shall be notified about investigative acts at which he/she can be present** (including obviously the questioning of the suspect) **in due time, but at least 24 hours before the act is scheduled**

139 CCP, Article 184

140 CCP, Article 185(1)

141 "The authority shall refrain from notification if it would disclose to the suspect, the counsel and the victim those data of the witness that are processed in a confidential manner."

142 See the reasons attached to Bill T/11232: http://www.parlament.hu/irom40/11232/11232.pdf, p. 83.

143 Act CIII of 2016 on the Amendment of Acts Regulating European Union and International Cooperation in the Area of Criminal Justice and of Certain Acts Concerning Criminal Law with the Purpose of Harmonisation

144 See the reasons attached to Bill T/11232: http://www.parlament.hu/irom40/11232/11232.pdf, p. 83.

to take place. However, under Article 179(1) of the CCP, detained suspects must be questioned within 24 hours from the commencement of the detention, which means that **if a suspect is taken into police custody and then into 72-hour detention, it is not possible to notify the defence counsel about his/her scheduled interrogation with at least 24 hours in advance**. If the suspect claims before the interrogation that he/she has already retained a lawyer and asks that the lawyer be notified about the questioning, the investigating authority shall notify the counsel via fax or e-mail, or if it is not possible, via telephone.[145] Article 48(1) of the CCP stipulates that if a counsel is appointed ex officio, in the appointing decision information must be provided about the place where the defendant is detained and the scheduled time and place of the interrogation. **In relation to appointed defence counsels neither the CCP nor Joint Decree 23/2003 determines the desired method of notification.**

Decision no. 8/2013. (III. 1.) of the Constitutional Court – In this decision the Constitutional Court declared that it is a constitutional requirement stemming from Article XXVIII(3) of the Fundamental Law that when applying Article 48(1) of the CCP, the investigating authority must notify the appointed defence counsel about the time and place of the interrogation in a verifiable manner and at a time that the defence counsel has the possibility to exercise his/her procedural rights and attend the questioning. In the absence of such a notification the statement of the defendant shall be inadmissible.[146]

It is again important to emphasise that in the investigation phase the mandatory nature of defence does not mean that the defence counsel's presence is mandatory at the investigative acts and the investigating authority is not obliged to actually wait for the defence counsel to appear. This entails that **the authority will question the suspect if the – adequately notified – defence counsel does not appear for any reason**. Joint Decree 23/2003 stipulates that if the counsel has been notified about the investigative act, but has failed to appear, this fact shall be made known to the suspect and he/she shall be informed that the counsel's absence does not prevent the investigative act from taking place.[147]

The research results presented below (see Section E.) show that some of the above outlined **provisions related to the notification and the presence of the counsel, or – in some cases – the lack of such provisions** (e.g. the lack of mandatory presence or that the method of notification is not regulated in detail) **may lead to deficient implementation of the requirement set forth in Article 3(1) of Directive 2013/48/EU**, according to which "Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively".

The New CCP will also bring about positive change in relation to notification about questioning. It sets forth that if the suspect or the formally not charged person who is suspected of having committed an offence wishes to retain a lawyer, or if the authority appoints a defence counsel, the authority shall immediately notify the defence counsel and shall postpone the questioning until the defence counsel's arrival, but for a maximum of two hours. If within this time the defence counsel does not appear, or if – after consulting the defence counsel – the suspect agrees that the questioning can be started, the authority commences the interrogation.[148]

145 Joint Decree 23/2003, Article 9(1)

146 See also leading decision BH2016. 327.

147 Joint Decree 23/2003, Article 9(2)

148 New CCP, Article 387(3) (in effect from 1 July 2018)

As opposed to the investigation, in the court phase the hearing cannot be held in the defence counsel's absence if defence is mandatory. The defendant and the defence counsel are summoned if defence is mandatory, if not, the counsel is only notified about the session.[149] The CCP only contains deadlines with regard to the defendant: the summons must be served to the accused person with at least eight days before the hearing.[150]

Joint Decree 23/2003 stipulates **an obligation to record the notification** of the defence counsel: the facts related to the notification, presence or absence of the defence counsel shall be recorded in the minutes of the questioning,[151] which is **in accordance with Article 3(3)(b) of Directive 2013/48/EU**, which requires that where a lawyer participates during questioning, "the fact that such participation has taken place shall be noted using the recording procedure in accordance with the law of the Member State concerned". The document certifying the receipt of the written summons or notification of the note made of the fact that the summons (notification) was served through another suitable means (telephone, fax, e-mail) must be placed in the file of the investigation.[152]

6. The defence counsel's substitution and the consequences of non-attendance

If the appointed defence counsel must resort to a substituting counsel, he/she shall immediately notify the defendant or the proceeding court, prosecutor or investigating authority about the name of the substituting counsel,[153] however, none of these actors can "veto" the substitution.

If the presence of a defence counsel is mandatory, and **he/she is prevented from appearing**, the defence counsel shall under Article 50(1)(e) of the CCP arrange his/her substitution (unless of course the obstacle is unforeseeable and cannot be diverted). In terms of Article 50(1)(f) of the CCP, if the presence is mandatory, and the defence counsel is prevented from appearing and he/she cannot arrange his/her substitution, the counsel is also obliged, if possible, to notify about these facts the proceeding authority before the scheduled time of the procedural act.

If in the court phase the summoned defence counsel fails to appear, the defendant may retain another lawyer. If the retained lawyer does not appear at a hearing where defence is mandatory, and also fails to arrange for his/her substitution, **the court designates a substituting counsel**, if the same happens with an appointed counsel, **the court appoints a new counsel**. The substituting counsel or the new appointed counsel may be provided with time to prepare for the defence. The hearing may be held, but if the accused person or the counsel so requests, the evidentiary procedure shall not be closed, and a new hearing date must be set at the expense of the lawyer who failed to attend.[154]

If the summoned defence counsel does not attend a procedural act where his presence is mandatory and fails to arrange for his/her substitution, he/she may be **fined** and must be obligated to cover the costs caused by his/her non-attendance. These consequences shall not be applied if the lawyer has fulfilled the notification obligations set forth in the above outlined Article 50(1)(f) of the CCP, or if the obligation could not be met because of the nature of the obstacle that prevented him/her from attending.[155]

149 CCP, Article 279(1)

150 CCP, Article 279(3)

151 Joint Decree 23/2003, Article 9 (4)

152 Joint Decree 23/2003, Article 12 (1)

153 CCP, Article 48(7)

154 CCP, Article 281(3)

155 CCP, Article 69(1a)–(1b)

7. Consultation, confidentiality, contact

In relation to the investigation, the CCP does not contain a provision generally stipulating the possibility of consultation between the defence counsel and the defendant before the questioning,[156] but with regard to **defendants deprived of their liberty** it expressly states that they **can consult with the lawyer before the interrogation**,[157] and that they have **the right to contact their lawyer and consult him verbally or in writing without any supervision**.[158] In this respect, it is problematic from the point of view of compliance with Directive 2013/48/EU that **if the** (retained or appointed) **counsel does not appear at the first interrogation, there is no possibility of consultation between the lawyer and the client via telephone**. This is **in contradiction with Article 3(3)(a) of Directive 2013/48/EU**, which stipulates that "Member States shall ensure that suspects or accused persons have the right to meet in private and communicate with the lawyer representing them, including prior to questioning by the police or by another law enforcement or judicial authority",[159] and also **Paragraph (23) of the Directive's Preamble**, which declares that communication between the defence counsel and the client "may take place at any stage, including before any exercise of the right to meet that lawyer".

The Penitentiary Code confirms – **in accordance with Article 4 of Directive 2013/48/EU** – the **confidentiality** of the communication between the counsel and the defendant, when it stipulates that **pre-trial detainees may communicate with their respective defence counsels in writing, in person and via telephone without supervision**.[160]

Consequently, the correspondence between the lawyer and the remand prisoner shall not be controlled,[161] and the remand prisoner may hand over his/her notes concerning the case without supervision by the authorities. If however there is a reasonable ground to presume that the letter received or sent by the pre-trial detainee is not from or not addressed to the defence counsel whose name is indicated on the envelope, the letter must be opened in the detainee's presence, and an official record of the opening shall be made. In cases like that, the degree of supervision shall not extend beyond identifying who the actual sender or addressee is,[162] which is in compliance with what is set forth in Paragraph (33) of the Preamble of Directive 2013/48/EU.[163]

The pre-trial detainee may call the defence counsel on the telephone designated by the detaining institution. According to the Penitentiary Code, the defence counsel may also once a week call the detainee with the purpose of assisting him/her in exercising his/her procedural rights for no longer than an hour and in

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156 Although this right may be inferred from the defendant's right to have sufficient time and possibility to prepare his/her defence [CCP, Article 43(2)(c)].

157 CCP, Article 184(3)

158 CCP, Article 43(3)(a)

159 Also see Paragraph (23) of the Preamble of Directive 2013/48/EU: "Suspects or accused persons should have the right to communicate with the lawyer representing them. Such communication may take place at any stage, including before any exercise of the right to meet that lawyer. Member States may make practical arrangements concerning the duration, frequency and means of such communication, including concerning the use of videoconferencing and other communication technology in order to allow such communications to take place. Such practical arrangements should not prejudice the effective exercise or essence of the right of suspects or accused persons to communicate with their lawyer."

160 Penitentiary Code, Article 394(1)(a)

161 Penitentiary Code, Article 403(3)

162 Penitentiary Code, Article 398(4)

163 "[The requirement of confidentiality] is without prejudice to any mechanisms that are in place in detention facilities with the purpose of avoiding illicit enclosures being sent to detainees, such as screening correspondence, provided that such mechanisms do not allow the competent authorities to read the communication between suspects or accused persons and their lawyer. […]"

accordance with the house rules of the detaining institution.[164] The penitentiary institution has the right to check the identity of the defence counsel the detainee is talking to, and for this purpose, the call may be interrupted.[165]

The accused person may – without disturbing the court order – communicate with his/her defence counsel during the court session, but during his/her questioning, this can only be done if the presiding judge gives permission.[166]

8. Withdrawal of the retainer and the termination of the appointment

The retainer and the appointment are as a rule (and unless the retainer stipulates otherwise) effective until the final and binding judgment, but they also extend to retrials, extraordinary reviews by the Curia, and so-called special procedures.[167]

The defendant may withdraw the retainer of his/her counsel at any point of the proceeding irrespective of whether it was him/her or someone else (e.g. a family member) who gave the retainer.[168] The appointing decision is not subject to appeal, but the **defendant may put forth a justified request for the appointment of another counsel**. (The defendant is informed – rather briefly – about this possibility in the appointing decision.[169]) The appointed counsel may also request (in "justified cases") that he/she be exempted from the appointment. These requests are decided upon by the proceeding court, prosecutor or investigating authority.[170] If the appointed counsel requests his/her exemption, the defendant does not have a right to express an opinion on the matter before the authorities make their decision, so the requirement of § 25 of the Recommendation ("the legal aid system should endeavour to ensure continuity in legal representation by the same lawyer, if the suspect or accused or requested person so wishes") is not satisfied.

9. The consequences of restricting the right to defence, remedies

Besides the remedies against the lack of notification about certain investigative acts (see above, under Point 4.), Article 196(1) of **the CCP provides defendants with a general right of complaint in the investigation phase**, when it stipulates: "Anyone whose rights or interests are directly breached by an action or omission of the prosecutor or the investigating authority can file a complaint within eight days from becoming aware thereof." Hence, the defence may file a complaint if the defence counsel is not notified or is notified with delay. At the same time, **the "effectiveness" of the remedy, as required by Article 12(1) of Directive 2013/48/EU, is decreased** by the fact that the CCP does not prescribe what the consequence of a "successful" complaint is, i.e. what should happen if the complaint is found to be justified.

164 Penitentiary Code, Article 398(3)

165 Penitentiary Code, Article 11(7)

166 CCP, Article 289(3)

167 CCP, Article 49(1)

168 CCP, Article 47(4)

169 According to the experience of the case file research, the information is provided with the following wording: "Under Article 48(5) of the CCP, there is no remedy against the appointing decision, but the defendant may put forth a – justified – request for the appointment of another counsel."

170 CCP, Article 48(5)–(6)

Article 78(4) of the CCP stipulates: "Facts originating from evidentiary material that was obtained by the court, prosecutor or investigating authority through [...] a significant limitation of the participants' procedural rights, shall not be admissible as evidence." The term "procedural rights" obviously covers the right to defence, so the unlawful limitation of access to a lawyer may – **in compliance with Article 12(2) of Directive 2013/48/EU – lead to the exclusion of evidence** (as opposed to the substandard performance of the counsel, which may not have a similar effect). In this regard Decision no. 8/2013. (III. 1.) of the Constitutional Court was a real breakthrough in the Hungarian jurisprudence.

Decision no. 8/2013. (III. 1.) of the Constitutional Court – In this decision the Constitutional Court declared that it is a constitutional requirement stemming from Article XXVIII(3) of the Fundamental Law that when applying Article 48(1) of the CCP, the investigating authority must notify the appointed counsel about the time and place of the interrogation in a verifiable manner and at a time that the counsel has the possibility to exercise his/her procedural rights and attend the questioning. In the absence of such a notification the statement of the defendant shall be inadmissible.

Leading judgment BH2007. 402. – If defence is mandatory, the investigating authority's failure to appoint a defence counsel is such a significant limitation of the defendant's rights that it renders the statement made by the defendant at the interrogation inadmissible as evidence.

Irregularities of the first instance court procedure are sanctioned by Article 375(1) of the CCP. This prescribes that the court of second instance shall quash the first instance decision and order the first instance court to retry the case if in the first instance proceeding there was a procedural violation that had a significant impact on the proceeding, the conclusion concerning guilt, the qualification of the offence or the sanction imposed, provided that this violation cannot be remedied in the framework of the second instance proceeding. Article 375(1) provides examples, including "breaches of provisions relating to the lawfulness of evidencing; preventing participants of the proceeding from exercising their rights or limiting them in doing so". Furthermore, the CCP expressly prescribes that the court of second instance shall quash the first instance decision and order the first instance court to retry the case if the hearing was held in the absence of a person whose presence would have been mandatory under the law (e.g. the defence counsel in cases of mandatory defence).[171]

Leading judgment BH2014. 204. – It is a procedural violation unconditionally necessitating the quashing of the first instance judgment if in a case where defence is mandatory under the law, the defence counsel of one of the defendants did not attend all the hearings, and the defendant was heard in the absence of his defence counsel.

Leading judgment BH2017. 45. – Referring to the absence of the defence counsel as an absolute procedural violation justifying extraordinary review can only be well-grounded if in the given case defence was mandatory.

Opinion 21/2007. of the Criminal Division – It is a violation of procedural rules (even in a case where defence is not mandatory) if the defendant's retained lawyer leaves the hearing, and the judge continues the hearing without adequately warning the defendant about his/her right to defence.

[171] CCP, Article 373(1)(II)(d)

II. RIGHT OF ACCESS TO A LAWYER AND LEGAL AID IN PETTY OFFENCE PROCEDURES

Under the Petty Offence Act, petty offence defendants also have the right to defence. Persons taken into petty offence custody shall be informed about this right in writing.[172]

In any phase of the petty offence proceeding, the petty offence defendant may be represented by his/her legal guardian or the adult he/she or his/her legal guardian retains in writing (hereafter: the representative of the petty offence defendant).[173] The petty offence defendant may at any point of the proceeding withdraw the retainer he/she or his/her legal guardian has given.[174]

The representative of the petty offence defendant has the right to be present at any procedural act, and to file motions, make comments and pose questions in any phase of the proceeding.[175] The representative may communicate with the petty offence defendant he/she represents without supervision throughout the entire proceeding.[176]

Mandatory representation is only envisaged by the Petty Offence Act in so-called fast-track court proceedings.[177] It states that "the police shall appoint a counsel, if the petty offence defendant does not have one. The decision to appoint a counsel is not subject to appeal, but the petty offence defendant may – in a justified petition, and only once – request the appointment of another counsel."[178] Under the Petty Offence Act, the police notifies the counsel about the time and date of the hearing, and provides him/her with the possibility to get acquainted with the case materials and to consult the petty offence defendant before the hearing.[179]

Similar to the CCP, the Petty Offence Act also stipulates that facts originating from evidentiary material that was obtained by the petty offence authority, the court or the official vested with the right to impose a fine on the spot, through a significant limitation of the participants' procedural rights, shall not be admissible as evidence.[180] The right to defence and representation is among those procedural rights that are concerned by this provision.

172 Petty Offence Act, Article 73(11)

173 Petty Offence Act, Article 53(1)

174 Petty Offence Act, Article 53(3)

175 Petty Offence Act, Articles 53(4) and 52(3)

176 Petty Offence Act, Article 53(4)

177 Under Article 124(1) of the Petty Offence Act, if a petty offence is punishable with confinement, and the police takes the perpetrator into petty offence custody, he/she shall be presented to the court with the purpose of conducting a fast-track procedure.

178 Petty Offence Act, Article 124(3)

179 Petty Offence Act, Article 124(4)

180 Petty Offence Act, Article 57(3)

D.

The right to have a third person informed of the deprivation of liberty and the right to communicate, while deprived of liberty, with third persons – legal framework

I. THE RIGHT TO HAVE A THIRD PERSON INFORMED OF THE DEPRIVATION OF LIBERTY AND THE RIGHT TO COMMUNICATE, WHILE DEPRIVED OF LIBERTY, WITH THIRD PERSONS IN CRIMINAL PROCEEDINGS

1. The right to have a third person informed of the deprivation of liberty

The CCP prescribes that **a relative designated by the defendant shall be notified within 24 hours about the defendant's 72-hour detention** and the place of the detention;[181] if there is no such relative, another person designated by the defendant may also be notified.[182] There is no possibility of temporary derogation from this provision according to the CCP. However, in our view **there can be strong doubts as to whether the 24-hour deadline can be regarded as satisfying the requirement of notification "without undue delay"** as set forth by Article 5(1) of Directive 2013/48/EU.

In terms of Joint Decree 23/2003, when the decision to take the suspect into 72-hour detention is communicated to him/her, he/she must be asked to designate the person he/she wishes to have informed about the deprivation of liberty.[183] The person acting on behalf of the proceeding authority shall write a **note** about the time and method of notifying the designated relative, or the reason for not carrying out the notification if that is the case. The note is to be handed over to the institution implementing the defendant's detention.[184] The relevant provisions do not detail the potential methods of notification.

If the defendant is a juvenile, the decision on the measure depriving him/her of his/her liberty (including the decision on the 72-hour detention) shall also be communicated to the defendant's legal guardian or caretaker.[185] Upon the motion of the prosecution (before the bill of indictment is submitted) or the court (after that), the guardianship authority appoints an ad hoc guardian for the juvenile if the legal guardian committed the offence together with the juvenile or if his/her interests are in contradiction with those of the juvenile.[186] Until the appointment of the ad hoc guardian, the prosecutor or the court (depending on the stage of the proceeding) may exclude the legal guardian from the proceeding. As the ad hoc guardian will fulfil the role of the legal guardian in the proceeding, the decision on the deprivation of liberty will also be communicated to him/her, which is **in compliance with what is required by Article 5(2) of Directive 2013/48/EU**.

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181 In terms of Article 601(3) of the CCP and Point 14 of Article 459 of the Criminal Code, the following persons are regarded as relatives:

a) lineal relative, his/her spouse or partner,

b) adopting or foster parent (including step-parent living in the same household), adopted and foster child (including step-child living in the same household),

c) sibling, sibling's spouse,

d) spouse, partner,

e) spouse's or partner's lineal relative.

182 CCP, Article 128(1)

183 Joint Decree 23/2003, Article 59(1)

184 Joint Decree 23/2003, Article 59(2)

185 CCP, Article 458(1)

188 CCP, Article 452(1)(a)

The New CCP will also introduce changes in relation to the notification of relatives. The adult designated by the defendant will have to be notified about the ordering of the 72-hour detention and the place of the custody within eight instead of 24 hours. It is a novelty that the court, prosecutor or investigating authority ordering the detention will have the right to deny the notification of the designated person if that would pose a risk to the life or physical integrity of a person or it would jeopardise the criminal proceedings, however, in such cases the suspect will have the right to designate another adult. If not even this could guarantee that notification is performed within eight hours, the defendant and the counsel will be able to seek remedy against the denial of notification.[187]

2. Right to communicate, while deprived of liberty, with third persons

The CCP stipulates that the detained defendant has the right to communicate in a supervised manner in person, in writing or via telephone with **his/her relatives, or – based on the permission of the prosecutor** before the submission of the bill of indictment **or the court** in the court phase – **with any other person**. Communication with a relative may only be forbidden or restricted to prevent interference with the course of justice.[188] This regulation is **in compliance with Article 6(2) of Directive 2013/48/EU**, which sets forth that communication with third persons may be limited or deferred "in view of imperative requirements or proportionate operational requirements".[189] There is however **a lack of compliance with the requirement outlined in Paragraph (36) of the Directive's Preamble**, according to which "when the competent authorities envisage limiting or deferring the exercise of the right to communicate in respect of a specific third person, they should first consider whether the suspects or accused persons could communicate with another third person nominated by them".

In accordance with the CCP's above quoted provision, Article 429(2) of the Penitentiary Code sets forth that unless there is a ban from the prosecutor or the court, a **person in 72-hour detention** may communicate with the designated relatives as follows:

- He/she may make a phone call to the relative in a maximum duration of 10 minutes per day.
- He/she may be visited by his/her relatives every day at a time previously agreed with the commander of the jail. The visit must take place within office hours (i.e. only on weekdays), its maximum duration is 30 minutes and the detainee may receive one visitor at a time.

In terms of Article 429(3) of the Penitentiary Code, persons in 72-hour detention may communicate with other third persons (not including the defence counsel and consular officials of their country of origin) with the permission of the prosecutor or the court (depending on the phase of the proceeding).

The Penitentiary Code also determines the framework within which a **pre-trial detainee** may communicate with his/her relatives and other persons:

- the frequency and volume of written correspondence is not limited (unless the court or the prosecutor poses restrictions on the correspondence);

187 New CCP, Article 275(1)–(4) (in effect from 1 July 2018)

188 CCP, Article 43(3)(b)

189 See Paragraph (36) of the Preamble of Directive 2013/48/EU: "Such requirements could include, inter alia, the need to avert serious adverse consequences for the life, liberty or physical integrity of a person, the need to prevent prejudice to criminal proceedings, the need to prevent a criminal offence, the need to await a court hearing, and the need to protect victims of crime."

- visitors can be received twice per month;
- the detainee may make phone calls to persons on his/her contact list for at least 10 minutes per day;
- he/she may receive a parcel at least once a month.[190]

For juveniles who are remanded in a juvenile reformatory home instead of a penitentiary institution, the Penitentiary Code prescribes the following: "the juvenile defendant has the right to communicate with his/her relatives, the parent exercising parental rights and/or his/her legal guardian unless a reason justifying the limitation of communication arises".[191]

The Hungarian legal framework does not contain safeguards guaranteeing that communication shall be ensured "without undue delay", so in this regard **compliance with Article 6(1) of Directive 2013/48/EU is not secured**.

3. Right to communication with consular authorities

Under the Penitentiary Code, if a foreigner is taken into 72-hour detention or pre-trial detention, the consular or diplomatic representation of his/her State shall be notified without delay about his/her admission to the police detention facility or penitentiary institution. The notification may only be dispensed with if the foreign defendant expressly requests so in writing. If the foreigner has multiple citizenships, the consular authority of his/her choice shall be notified.[192]

Upon the request of a non-national defendant, a consular official of his/her State of nationality may be present at his/her questioning.[193] The consular official may retain a defence counsel for the non-national defendant (in a similar manner as a relative may retain a counsel for the defendant).[194] Furthermore, the court, the prosecutor or the investigating authority may also appoint a counsel for the defendant upon the consular official's request, if it seems "necessary in the defendant's interest".[195]

The CCP also stipulates that detained non-nationals have the right to contact their consular officials and communicate with them in writing or verbally without supervision.[196] In line with this, the Penitentiary Code sets forth that non-national remand prisoners may communicate with the consular officials of their respective States of nationality in person, in writing or via telephone without supervision,[197] and this also pertains to those juveniles who are detained in juvenile reformatory homes.[198]

These provisions are **in compliance with Article 7 of Directive 2013/48/EU**.

190 Penitentiary Code, Article 394(1)(b)

191 CCP, Article 490(1)

192 Penitentiary Code, Articles 207(1), 386(1) and 427(1)

193 CCP, Article 184(5)

194 CCP, Article 47 (1)

195 CCP, Article 48(3)

196 CCP, Article 43(3)(a)

197 Penitentiary Code, Article 394(1)(a); Joint Decree 23/2003, Article 178

198 Penitentiary Code, Article 419(2) Communication without supervision shall be provided – in accordance with the house rules – between the remanded juvenile and […] *f)* the diplomatic representative, consular official of his/her State of nationality, or (if there is no such State) the representatives of the State that represents his/her interests.

4. Remedies of violations of the above rights

Remedies against the decisions of the prosecutor concerning communication with third persons may be sought under the above described Article 196(1) of the CCP if the nominated third person is not notified within 24 hours or at all; if the authorities breach those provisions of the CCP which regard the notification of consular authorities; if the prosecutor does not allow maintaining contacts with a third person or decides to limit the suspect's right to communicate with his/her relatives. In terms of Article 347 of the CCP, judicial decisions on communication with third persons (including the decision to restrict the communication between the pre-trial detainee and his/her relatives) is subject to appeal.

Court decisions concerning communication with third persons (e.g. limiting a pre-trial detainee's right to communicate with his/her relatives in the court phase) can be challenged under the above quoted Article 347 of the CCP.

As far as complaints against measures or omissions of detaining authorities in relation to communication with third persons or consular authorities is concerned, defendants detained in both police jails (as persons in 72-hour detention or pre-trial detainees) and penitentiary institutions (as pre-trial detainees) have the right to submit complaints as follows.

Under Article 21(1) of the Penitentiary Code, a complaint may be submitted against a measure, decision or omission of the institution implementing the detention to the head of that institution. The complaint may be filed by the detainee, the defence counsel, or the person who is concerned by the measure, decision or omission (in the case of communication rights, the persons whose communication with the detained defendant was prevented or hindered).[199] The complaint must be submitted in writing within 15 days from the date that the decision or omission is made, or the measure is taken.[200] The decision of the head of the institution is not subject to appeal.[201]

II. THE RIGHT TO HAVE A THIRD PERSON INFORMED OF THE DEPRIVATION OF LIBERTY AND THE RIGHT TO COMMUNICATE, WHILE DEPRIVED OF LIBERTY, WITH THIRD PERSONS IN PETTY OFFENCE PROCEEDINGS

In terms of the Petty Offence Act, the police shall immediately inform about the ordering of petty offence custody the relative or – in the absence thereof – any other person designated by the petty offence defendant.[202] If a juvenile is taken into custody, his/her legal guardian shall also be notified.[203] No temporary derogations are allowed in this respect.

In relation to the notification of consular authorities, the Petty Offence Act stipulates that when taken into custody, the petty offence defendant shall be given detailed information about his/her right to have his/her consular authority notified.[204]

199 Penitentiary Code, Article 21(2)

200 Penitentiary Code, Article 21(3)

201 Penitentiary Code, Article 21(5)

202 Petty Offence Act, Article 73(6)

203 Petty Offence Act, Article 73(7)

204 Petty Offence Act, Article 73(11)(f)

Under Article 35 of the Petty Offence Act, a decision, measure or omission of the petty offence authorities – e.g. the failure to notify a person nominated by the detained petty offence defendant – are subject to a complaint that can be submitted by anyone concerned thereby. The deadline for such complaints is eight days from the decision/measure or from the day on which the concerned person became aware of the omission.[205]

Petty offence custody must be implemented in a police jail,[206] and the right to communication is governed by the same rules as in the case of criminal defendants taken into 72-hour custody (see above) with the only difference that the decisions on the restriction of communication are made by the authority that has ordered the petty offence custody.[207] The above quoted provisions of the Penitentiary Code related to the submission of complaints therefore also apply to persons in petty offence custody.

205 Petty Offence Act, Article 35(2)–(4)

206 Petty Offence Act, Article 73(1a)

207 Petty Offence Act, Article 73(14)

E.

Access to a lawyer and right to legal aid in the practice

In the framework of the project the HHC tried to map the practice of access to a lawyer and the right to legal aid in criminal proceedings through case file research, interviews and focus groups with stakeholders. With permission from the National Police Headquarters we interviewed eight police officers serving at county police headquarters in five counties and Budapest. We also interviewed a former judge and the creators of the internet portal http://www.e-umk.hu/, which was established to facilitate the substitution of defence counsels when such a need arises. In addition, two focus group discussions were organised in Budapest and one county seat with the participation of altogether 15 defence counsels and two trainee attorneys. The focus group discussions were designed, moderated and analysed by Dóra Szegő (Foresee Research Group[208]).

In addition, in December 2017, the HHC carried out in the framework of the research "The Implementation of Directive 2013/48/EU on the Right of Access to a Lawyer in Criminal Proceedings", coordinated by the JUSTICIA European Rights Network[209] (hereafter: JUSTICIA research) a questionnaire-based survey among defence counsels about their experience in the previous one year. 14 defence counsels responded to the questionnaire.

Furthermore, based on the permission of the National Judicial Office's President we analysed the case files of 150 closed criminal cases at five local (district) courts in the geographical area of competence of different regional courts of appeal. The list of the cases was provided by the Hungarian Justice Academy. In accordance with the methodology determined by the research coordinator, the Bulgarian Helsinki Committee, we requested the National Judicial Office to provide permission for the analysis of 150 cases that started on or after 1 January 2011 and ended on or before 31 December 2015 with the conviction or the acquittal of the defendant. It was also part of the Bulgarian Helsinki Committee's methodology (which was to be applied in a unified manner in all participating countries) that the distribution of the cases to be analysed had to reflect the national distribution of proceedings conducted by different first instance courts (in Hungary: local courts and county courts), and we also requested that at least one research premise be designated in the geographical area of competence of each regional court of appeal. However, due to the specificities of the way in which the cases are registered in Hungary, it was not possible to provide such a sample (among other reasons because the court register of cases does not contain information about when the investigation in a particular case commenced), so eventually we were provided with the possibility of analysing 30 cases bearing a court case number issued between 2011 and 2015 at each research premise.[210] The statistical analysis of the data gathered was carried out by Júlia Koltai (ELTE University, Faculty of Social Sciences – Hungarian Academy of Sciences, Centre for Social Sciences).

208 http://foresee.hu/

209 http://eujusticia.net/

210 The list provided by the National Judicial Office contained five cases adjudicated by county courts in the first instance. These were also analysed, but due to methodological reasons, we finally decided not to include them in the sample.

The main features of the analysed cases:

- 85.9% of the 150 cases (128 cases) had only one defendant (but we analysed cases with more defendants only with respect to only one of the defendants).
- The distribution of the cases based on the year of the defendant's first interrogation is the following:

Table 1

Year of the defendant's first interrogation	N	Percentage
2005	1	0.7%
2006	1	0.7%
2007	2	1.4%
2008	7	4.8%
2009	6	4.1%
2010	33	22.6%
2011	25	17.1%
2012	25	17.1%
2013	22	15.1%
2014	20	13.7%
2015	4	2.7%
Total	**146**	**100.0%**

- The sample contained 49 so-called fast-track cases (32.9%) and 10 cases where the sentence was delivered without hearing (6.7%).
- The average length of the investigation was 375.4 days, the average length of the first instance court proceeding was 486.5 days (not counting the fast-track procedures and the cases in which the sentence was delivered without hearing).
- There were only 11 cases (7.5%) where the communicated suspicion contained violent offence(s) against a person,[211] and the committing of such offences was established in only 14 judicial sentences (9.5%). In none of the cases was the defendant suspected of or sentenced for having committed a violent offence against property.[212]
- The final and binding judicial decision found the defendant guilty in 95.3% of the cases (142 cases).[213] There were only four cases in the sample where the first instance judgment was appealed, and the case was decided at the second instance.
- Effective imprisonment was handed down in only 11 cases, the average length of effective imprisonment was 16 months.

211 Cf. Article 459 Point 26 of the Criminal Code and Article 137 Point 17 of Act IV of 1978 on the Criminal Code.

212 Cf. Chapter XXXV of the Criminal Code.

213 The prosecutorial success rate in 2016 was 97.45%. See: *A büntetőbíróság előtti ügyészi tevékenység főbb adatai I. – A 2016. évi tevékenység [Main Data on Prosecutorial Activity before Criminal Courts – Activities in 2016]*, Chief Prosecutor's Office, Budapest, 2017, http://ugyeszseg.hu/repository/mkudok3630.pdf, p. 6.

The main features of the defendants in the analysed cases:

- All defendants were adults at the time of their initial interrogation as suspects, their average age was 39.4 years at this point in the procedure. 84.6% of the defendants were males, 15.4% females.
- 79.2% of the defendants were Hungarian citizens (118 cases), 82.6% of the defendants (123 cases) spoke Hungarian.
- The distribution of defendants according to their highest level of accomplished education at the time of the first interrogation was as follows:

Table 2

Level of education	N	Percentage
Less than eight grades of elementary school	12	8.5%
Eight grades of elementary school	39	27.5%
Vocational school	48	33.8%
Graduation from high school or vocational high school	20	14.1%
Vocational school providing higher education degree	1	0.7%
College, BA, BSc	10	7.0%
University, MA, Msc	12	8.5%
Total	**142**	**100.0%**

- The distribution of defendants according to whether they were employed at the time of their first interrogation as suspects:

Table 3

	N	Percentage
Yes	86	57.7%
No	51	34.2%
Other inactive (e.g. retired, student)	8	5.4%
Total	**145**	**100.0%**

- 95 defendants had no previous criminal record.

Main features of the defence in the analysed cases:

- Not counting the fast-track procedures, the defendant had a defence counsel throughout the whole investigation phase in 54 cases (55.1%), had no defence counsel in the investigation phase in 21 cases (21.4%), and had a defence counsel in certain parts of the investigation phase in 23 cases (23.5%).
- The defendant had a defence counsel throughout the whole court phase in 90.5% of the cases (134 cases), had no defence counsel in the court phase in 8.8% of the cases (13 cases), and had a defence counsel in certain parts of the court phase in one case. There were significant differences in this regard among the different courts.[214]

214 The differences were significant on P>0.05 level – based on the khí-square test. At the case file research results, in the case of two-variable analysis, we tested the existence of the relationships with khí-square tests for cross-tabulations, and F-tests for means analysis. Due to the tests' case-sensitivity, we only provide information about the significance of cross-tabulations, when the number of cases is at least 50; and of means, when the number of cases is at least 20.

- In the investigation phase, the defendant was defended by only appointed defence counsel(s) in 89 cases, and by only retained counsel(s) in 22 cases. Looking at the entire procedure, 78 defendants were defended by only appointed defence counsel(s), whereas only retained counsel(s) defended the defendant throughout the whole procedure in 21 cases.
- Defence was mandatory at the time of the first interrogation in 66 cases.
- At the time of the first interrogation, the majority of suspects (120 out of 150) were not detained, and out of the remaining suspects only 17 were detained in the case under research, the remaining 13 suspects were detained in relation to other, parallel cases.
- A hearing related to coercive measures (pre-trial detention) was held in altogether four cases.

Below we are summarising those findings from the interviews, the focus group discussions and the case file research that highlight the problems and good practices in relation to the practice of implementing Directive 2013/48/EU and the Recommendation on legal aid. Our analysis is limited to the practice of criminal proceedings, the petty offence procedure will not be touched upon.

We would like to thank our interviewees and the participants of the focus group discussions for their willingness to share their thoughts with us, to the National Police Headquarters for permitting the interviews, and to the National Judicial Office, the Hungarian Justice Academy and the presidents and employees of the concerned courts for making the case file research possible.

I. THE IMPLEMENTATION OF DIRECTIVE 2013/48/EU IN PRACTICE

Article 3 – The right of access to a lawyer

As we pointed out in our assessment of the legal framework, some of the provisions related to the notification and the presence of the counsel, or – in some cases – the lack of such provisions may lead to deficient implementation of the requirement set forth in Article 3(1) of Directive 2013/48/EU, according to which "Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively".

a) The method and timeliness of notifying defence counsels, with special regard to appointed counsels

The timeliness of notifying defence counsels raises problems primarily in relation to **the first questioning of detained suspects** – the research has not revealed any significant deficiency in connection to subsequent hearings, other investigative acts or the initial interrogation of non-detained suspects. Based on the interviews with police officers, it can be said that **defence counsels are notified about the first questioning of detained suspects 1–4, or at most 5 hours before the scheduled time of the interrogation**, but four out of the eight interviewed officers said that sometimes notification is sent **less than an hour** before the questioning is started.

The defence counsels asked in the framework of the JUSTICIA research were also of the view **that defendants have a better chance of effectively availing themselves of legal assistance before the**

beginning of their first interrogation as suspects if they are not detained. With regard to detained defendants, seven out of 14 lawyers said that legal assistance is available in practice in only a minority of cases at this point in the procedure, whereas only two lawyers were of this view in relation to defendants who are not detained.

Participants of one focus group felt that it was expected from counsels to appear immediately when they are notified, and it often happens that notification about a late evening interrogation is made only half an hour before it is scheduled to start, although the client has been in detention since morning, during which time "the police makes all kinds of offers to him". Participants of the other group said that there were differences concerning the timing of the notification between cases taken on the basis of a retainer or an appointment: retained counsels are generally taken more seriously than appointed defence counsels, and are therefore usually notified in a timely manner.

According to previous research,[215] besides the delays in notifications it is also a frequent problem that the notifications are sent at a time and in a manner that does not give counsels a realistic chance to attend the first interrogation, a classic example being the fax sent to the office number of the lawyer late at night about an interrogation that is scheduled to take place during the night or early next morning. Our former judge respondent who had had the chance to monitor the police practice in this area for over 25 years until recently is of the view that the police practice of appointments has improved recently, thanks to Decision no. 8/2013. (III. 1.) of the Constitutional Court and a negative "feedback" from the courts. Courts now do not admit as evidence testimonies by defendants made in the absence of the counsel, if the notification was inadequate. This is confirmed by the interviewed police officers, many of whom said that it was also in the police's interest to have the counsels present at the interrogations.

Seven out of the eight officers stated that at first they always attempt to reach the counsel via telephone, and if an appointment is to be made, they inform him/her about the scheduled time of the questioning and ask him/her whether he/she can accept the appointment. They claimed that notification is to be regarded as completed if they can talk to the lawyer: faxing the appointing decision is not sufficient. (The eighth respondent said that a fax is only sent within office hours, between 8:00 a.m. and 4:00 p.m., and after the fax is sent, a phone call is also made to the lawyer.) However, one of the interviewees mentioned that **due to the high workload, at local police units there is no time to try to notify the counsel via telephone in every case about the interrogation**. It can be mentioned as good practice that at the unit of one respondent practically all interrogations take place in the counsel's presence, especially if the suspect is detained. In such cases they keep on calling lawyers until they find one that not only accepts the appointment but is also willing to attend the questioning at the station.

The case file research has shown that while in a number of cases the defence counsel failed to show up for the first interrogation of the suspect in spite of the authorities' fair approach and timely notification, there were some instances where the way the authorities proceeded was an obstacle to the defendant's effective access to legal assistance.

> *For instance, in one of the cases the suspect was not arrested, but summoned, and although it was clear that the prospective punishment for the offence (imprisonment of five years or more) made defence mandatory in the case in terms of Article 46(a) of the CCP, the investigating prosecutor did not appoint a counsel for the defendant: "I interrogated [the defendant] as a suspect from 10:30 a.m. I informed him that under Article 46(a) of the CCP, defence is mandatory in the case, [the suspect]*

215 See for example: Iván, Júlia – Kádár, András Kristóf – Moldova, Zsófia – Novoszádek, Nóra – Tóth, Balázs: *A gyanú árnyékában. Kritikai elemzés a hatékony védelemhez való jog érvényesüléséről [A Critical Account of Enforcing the Right to Effective Defence]*. Hungarian Helsinki Committee, Budapest, 2009, pp. 21–23. Available at: http://helsinki.hu/wp-content/uploads/A-gyanu-arnyekaban-final1.pdf.

did not wish to exercise his right to choose a lawyer, he asked me to appoint a counsel. Therefore, at 10:35 a.m. I contacted dr. D. E., the lawyer on duty, I informed him about the fact that I had appointed him, as well as the time and place of the interrogation. The appointed counsel informed me that he had understood that he had been appointed, but due to his other obligations he did not wish to attend the interrogation of the suspect."

In another case, the police requested on 25 October 2010 that the suspect be transported for his interrogation from the penitentiary institution where he was serving a prison sentence, i.e. at this date it was already known to the police that the suspect was detained, and thus defence was mandatory. In spite of this fact, they appointed a counsel for him only on 16 November 2010, on the spot and at the time of his interrogation: "Today, before R. Z.'s interrogation, I personally contacted dr. F. Gy. lawyer, who happened to be in the building. I informed him that I had appointed him as the [suspect's] counsel, and provided him with a copy of the appointing decision. Dr. F. Gy. accepted the appointment, but told me that he had to attend another interrogation, so he could not attend the [suspect's] interrogation. After R. Z.'s interrogation I contacted dr. F. Gy. via phone, and informed him that R. Z. confessed to committing the crime, so I will [close the investigation] and present the evidence. Dr. F. Gy. said that he did not wish to attend the presentation of the evidence, so I informed him that I will forward the case file to the prosecutor's office in Z. with the recommendation that charges be pressed."

It is important to point out that the police's course of action in the above cases was, strictly speaking, in line with the law, since, if defence is mandatory in a case, the suspect shall be informed after the communication of the suspicion that if he/she does not retain a lawyer within three days, a lawyer will be appointed for him/her, but the above cases illustrate what problems in practice this provision may cause. (It must be added that according to one of the lawyers interviewed in the JUSTICIA research "the practice" is that if defence is mandatory the defence counsel is usually appointed simultaneously with the summoning of the suspect. In his experience, if the suspect indicates at the interrogation that he/she would like to retain a lawyer, the interrogation is postponed for a short period of time – but at least three days –, and if the suspect does indeed retain a lawyer during this time, the appointment is withdrawn.)

It is to be welcomed that seven officers interviewed in the present research claimed that if the lawyer lets them know that he/she could only attend the interrogation later than the scheduled time, they **wait for him/her** within "reasonable" limits taking into account the maximum period of the 72-hour detention (this usually means an additional 1-2 hours of waiting). Participants of one focus group had different experience: they were of the view that the **investigating authority is often inflexible** (with regard to both retained and appointed defence counsels) and is not willing to postpone the commencement of the questioning – not even with an hour. In the other focus group it was mentioned that if a defence counsel is appointed, **the authority often starts the interrogation before the arrival of the defence counsel**, and by the time the defence counsel gets there, the questioning is already in progress. **The experience of the defence counsels interviewed in the framework of the JUSTICIA research was rather positive**: only two lawyers said that generally or in the majority of cases the police would not wait for them if they inform them that they could only attend the interrogation at a later time, while the other 11 lawyers who responded to this question said that the police can be flexible in such situations.

It can thus be concluded that **the fact that not even at the first interrogation is the presence of the counsel mandatory in cases of mandatory defence can significantly undermine the defendant's right to effective defence in practice**. The importance of this issue is illustrated by the fact that when we asked the lawyers in the framework of the JUSTICIA research how they would amend the legal regulations pertaining to the right of access to a lawyer, many of them said that they would make the presence of the counsel mandatory at the first interrogation or all interrogations of the suspect.

All the six officers expressing their views in this regard stated that subsequent interrogations are practically never regarded as "urgent" investigative acts, so the counsels are notified about these with days in advance.

The counsels participating in one of the focus group discussion supported the New CCP's provisions[216] (at the time of the focus group discussions: Bill T/13972's proposed provisions) concerning the notification of counsels, while the participants of the other group were of the view that the new regulations only make sense if the suspect could speak to the defence counsel via telephone before the questioning.

b) The presence and substitution of the defence counsel

As it was mentioned above, not only late notification, but also **the fact that the presence of defence counsels is not mandatory**, even if defence is, **has a negative impact on the effective exercise of defence rights** in the Hungarian system. Numerous empirical research projects detected **significant problems in relation to both the attendance rates** and the level of activity **of appointed counsels in the investigation phase**:[217] a 2009 research by the HHC based on files of 150 closed criminal cases showed that 16% of first interrogations had been held in the presence of the appointed counsel, his/her trainee attorney or substitute counsel, whereas the same rate was 63% for retained counsels.[218] (The roots of this phenomenon – such as the lack of quality control and the low remuneration of appointed defence counsels – and other issues related to the performance of appointed counsels will be discussed in the section on the practical implementation of the Recommendation on legal aid.)

In the cases concerned by the case file research, **57.7% of appointed defence counsels attended the first interrogation** (personally or substituted by their trainee attorneys or other lawyers). This means 30 cases with significant differences[219] among the different courts, and only in 18 cases did the appointed counsel attend the interrogation himself/herself. As opposed to this, **retained lawyers attended the interrogations in 94.4% of the cases** (17 cases). In those cases where the suspect had an appointed defence counsel throughout the whole investigation phase (not counting fast-track procedures), the counsel showed up at the first interrogation in only 43.2% of the cases, and in 32.4% of the cases the counsel did not show up for any investigative act (including the presentation of the evidence at the end of the investigation).

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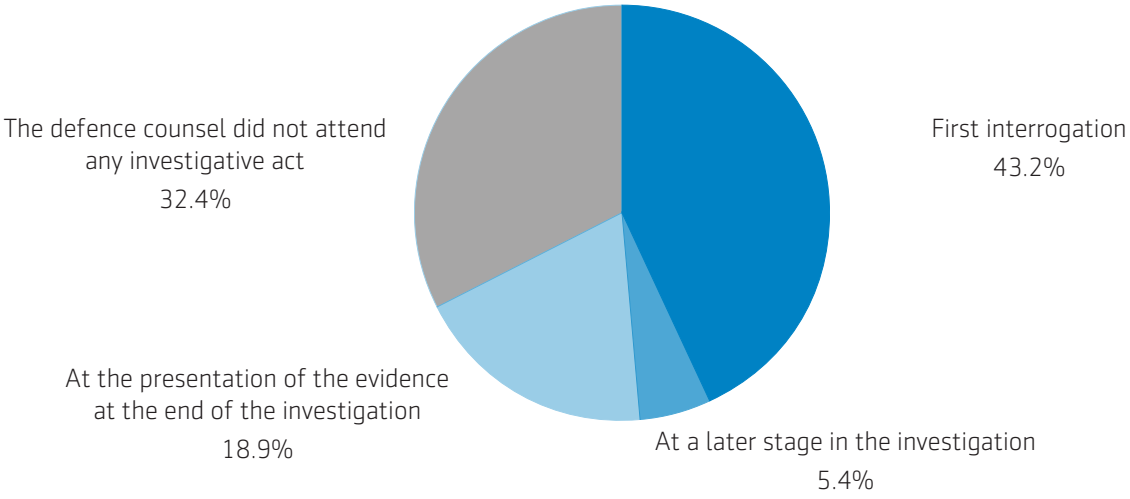
216 New CCP, Article 387(3) If the suspect or the formally not charged person who is suspected of having committed a criminal offence wishes to retain a lawyer, or if the investigating authority or the prosecutor appoints a defence counsel, the investigating authority or the prosecutor shall immediately notify the defence counsel and shall postpone the questioning until the defence counsel's arrival, but for a maximum of two hours. If within this time a) the defence counsel does not appear, or b) after consulting the defence counsel, the suspect agrees that the questioning can be started, the investigating authority or the prosecutor commences the interrogation.

217 For a summary see for example: Kádár, András Kristóf – Novoszádek, Nóra – Selei, Adrienn: *Ki rendelt itt védőt? Egy alternatív védőkirendelési modell tesztelésének tapasztalatai [Who Ordered a Counsel Here? – The Experiences of Testing an Alternative Model of Appointing Defence Counsels]*. Hungarian Helsinki Committee, Budapest, 2012, pp. 7–9.

218 Iván, Júlia – Kádár, András Kristóf – Moldova, Zsófia – Novoszádek, Nóra – Tóth, Balázs: *A gyanú árnyékában. Kritikai elemzés a hatékony védelemhez való jog érvényesüléséről [A Critical Account of Enforcing the Right to Effective Defence]*. Hungarian Helsinki Committee, Budapest, 2009, p. 21.

219 The differences were significant on $P<0.01$ level – based on the khí-square test.

Figure 1 – When did the appointed defence counsel first attend an investigative act (not counting fast-track procedures, in cases when the suspect had an appointed counsel throughout the entire investigation phase)?



In this regard there were significant geographical differences between the cases: at two local courts, the appointed counsel was absent from all investigative act in 75 and 66.7% of the cases respectively, whereas there was a local court where no such absence was recorded by the researchers. At two of the local courts the appointed counsels attended 80 and 75% of the first interrogations respectively, while at one court this proportion was only 16.7%. The criminal offence also seems to have had an impact on attendance: in proceedings launched on the suspicion of a violent crime against a person 50% of the first interrogations and 50% of the presentation of evidence were attended by the appointed counsel, in all other cases these proportions were 42.9% and 17.1% respectively, and in 34.3% of the cases the appointed counsel did not show up for any investigative act in the latter kind of cases.

In the present research all interviewed officers stated that **retained lawyers always or almost always attend the first questioning**, while four of them expressed the view that **the attendance rate of appointed defence counsels is somewhat or significantly lower**. Four respondents thought that the time of the day has a bearing on the willingness to attend: defence counsels are less likely to appear at interrogations held during the night or very early in the morning. The case file research has provided examples of the opposite too.

> *In one case for example the appointed defence counsel attended the first interrogation in spite of the fact that it started at 6:02 a.m., and the notification was sent some time during the night (as the suspect was arrested at 2:50 a.m. on the same morning, and the appointing decision was dated on the same day too).*

It must be noted that in its report on its 2013 visit to Hungary, the CPT also emphasised that "a number of persons interviewed stated that they met an ex officio lawyer for the first time only shortly prior to appearing before a judge who remanded them in custody, and some were not aware of having any lawyer even at that stage of the proceedings". For this reason the CPT recommended "to the Hungarian authorities that the necessary steps be taken […] to ensure that ex officio lawyers […] meet their clients while in police custody".[220]

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220 *Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 3 to 12 April 2013*, Strasbourg, 30 April 2014, CPT/Inf (2014) 13, https://rm.coe.int/1680696b7f, § 24

It has to be added though that in the cases included in the case file research **the presence or absence of the counsel at the first interrogation had no impact on the final outcome of the case**: in those cases where all necessary data could be found, the ratio of final and binding convictions in cases where the counsel was present at the first interrogation was 91.5% (47 cases), whereas in those cases where the counsel was absent (23 instances), the proportion of convictions was 91.2%. (What had a significant impact on the outcome of the case was rather whether a retained or appointed counsel defended the defendant – see below.)

With regard to **subsequent interrogations** six police officers said that appointed defence counsels are less likely to attend than their retained colleagues (although the problem of late notification is less likely to arise in relation to subsequent interrogations, since in these cases notifications are usually sent out to the defence counsels days before the scheduled time of the questioning). This was confirmed by the case file research (although the sample was small with 27 and 8 subsequent interrogations respectively): the appointed defence counsels attended 44.4% of the 27 subsequent interrogations, whereas retained lawyers were present at all the eight such interrogations.

> *The following case may be mentioned as good practice from the point of view of the course of action taken by the police: the subsequent interrogation of the suspect was scheduled for 11:00 a.m., 14 February 2011, the trainee attorney of the appointed counsel was notified about this on 10 February 2011, however, the counsel failed to show up: "The counsel confirmed the receipt of the notification and assured me that he would attend. I tried to inform said lawyer about the fact that his defendant had arrived [at the police station] today [on the day for which the interrogation was scheduled] via both his office phone [landline] and his mobile phone, since he had not shown up at our department at the time when his client had. Since trainee attorney dr. Sz. R. had not notified me about his absence from the [suspect's] subsequent interrogation and since I could not contact him at the above availabilities, the suspect was interrogated in the absence of the lawyer, which was understood and acknowledged by the suspect." The following text is from the official records of the interrogation: "[Officer]: I inform you that dr. P. K., the appointed defence counsel appointed in your case has been notified about your interrogation. The trainee attorney proceeding in your case, dr. Sz. R. confirmed the receipt of this information and assured me that he would be present at the interrogation, however, he failed to show up today at the scheduled time of the interrogation. [Suspect]: I have understood and acknowledged the information provided by the investigator." The subsequent interrogation was started at 11:50 a.m., later than originally scheduled – most probably because of the officer's efforts to reach the lawyer.*

According to the majority of the respondents (five officers), the willingness to attend **other investigative acts** (reconstruction of events, identity parades, etc.) depends on the type and significance of the concerned procedural act, and only three officers said that there was a difference between retained and appointed defence counsels in this respect too. In the researched cases, there were altogether 13 investigative acts that could be attended by the counsel. The lawyers showed up for eight of these.

Participants of both focus groups emphasised: a diligent attorney must be thorough and well-prepared irrespective of whether the case is taken on the basis of a retainer or an appointment, however, there can be differences in the intensity of attendance and communication with the client. **When retained, a lawyer is more likely to attend more investigative acts**, but the participants believed that it also depends on the individual attorney how differently he/she approaches his/her retained and appointed cases. At the same time, the participants had very negative experience of interrogations conducted in the defence counsel's absence. A number of the lawyers asked in the JUSTICIA research have said that they always advise their clients not to testify if they are not present.

The former judge interviewed agreed that there were differences in the levels of activity of retained and appointed defence counsels, and appointed defence counsels appear at investigative acts less frequently. She emphasised as a problem that **in approximately one third of the cases it happens that although the defence counsel's presence is mandatory at the court hearing, the lawyer does not show up** and fails to arrange his/her substitution, so a substitute counsel must be designated or another ex officio defence counsel appointed. She mentioned that **if the counsel notifies the court even five minutes before the scheduled session about the fact that he/she cannot appear and has not arranged for substitution, he/she cannot be fined** (see Section C.). In such cases one option is "internal substitution", i.e. when the defence counsel of one of the defendants in the case substitutes the defence counsel of another defendant, in which event attention must be paid to make sure that there is no conflict of interest between the two defendants.[221] The other option is the appointment of an "external" lawyer. Our respondent said that in more severe cases it is not acceptable if the judge "snatches" an attorney from e.g. the canteen of the court, and in her view, the duty system operated by the Budapest Bar Association for such instances is also useful only if the case is less severe (e.g. it belongs to the scope of competence of the local court).

As far as the case file research is concerned, there was no case in the sample in which the court had to appoint a substitute counsel due to the retained counsel's failure to attend a court hearing in a case of mandatory defence. (In one case the retained lawyer did not show up, but nor did the defendant, so the hearing was postponed and therefore there was no need for appointing a substitute counsel.) There were three cases when the appointed counsel failed to show up, and therefore a new defence counsel had to be (or in one case: would have had to be) appointed by the court, but only in one of these cases did the court apply a sanction against the lawyer. In another case, the appointed lawyer remained absent, however, according to the court records of the hearing he had not been summoned properly. In spite of this fact, the hearing was held, and no new counsel was appointed, although defence was mandatory in the case.

In relation to substitution it must be mentioned as a good practice that a number of attorneys have created an internet portal (**www.e-umk.hu**) with the purpose of **finding an effective way to arrange for substitution** if a counsel is unexpectedly prevented from attending a procedural act, and thus increasing the attendance of lawyers at such acts. The user uploads into the system the basic data of the procedural act (place, time, stage of proceeding) for which he/she seeks substitution, and the other users may undertake to substitute him/her by a simple click. Users may request to be notified in e-mail about newly uploaded cases (procedural acts). The user uploading an act is also informed in an e-mail about the fact that someone has undertaken the substitution. Parallel to that the system generates a template for the substitution agreement. To undertake a substitution one must have "credit" which can be purchased at a minimal price (ca. EUR 1.1). At the time of the interview with the attorneys operating the system (end of March 2017), the system had 301 users. Since the spring of 2013, substitution for altogether 2,130 procedural acts has been arranged through the system, primarily in criminal cases. Practically all substitution requests are successful, often within minutes, feedback from the users is positive. The system is also open to the courts and the police units (they can upload cases where appointment is required, and by clicking on the case the users indicate their willingness to take the case on the basis of appointment from the court or police unit), but this type of use has been very restricted so far. The system can be developed if necessary to ensure for instance an even distribution of appointments or maximise the number of cases that may be taken by an individual attorney in a certain time period, so it can be made suitable for managing the whole system of appointments as well as the selection of lawyers to be appointed.

221 See also the opinion issued by the Curia's Jurisprudence-analysing Group: *Védői jogok a bírósági eljárásban – Összefoglaló vélemény [Defence rights in the court proceeding – Summary opinion].* Curia, Criminal Division, Jurisprudence-analysing Group, 2014.EL.II.E.1/10.VÉDŐ-50., pp. 54–56. Available at: http://www.kuria-birosag.hu/sites/default/files/joggyak/elfogadott_osszegzo_velemeny.pdf.

Figure 2 – Case not taken:

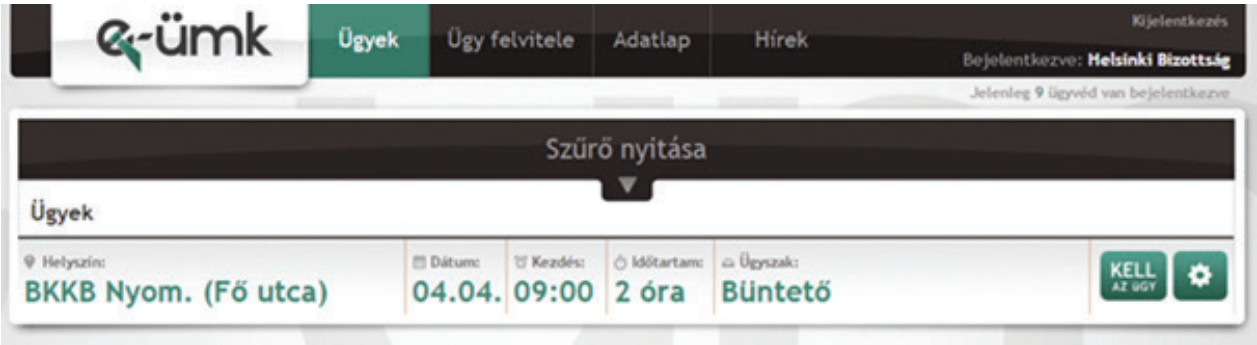


Figure 3 – Case taken:

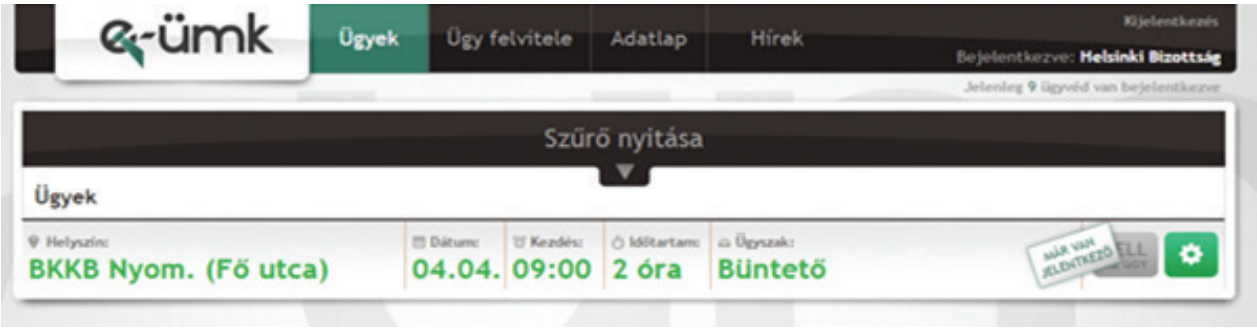
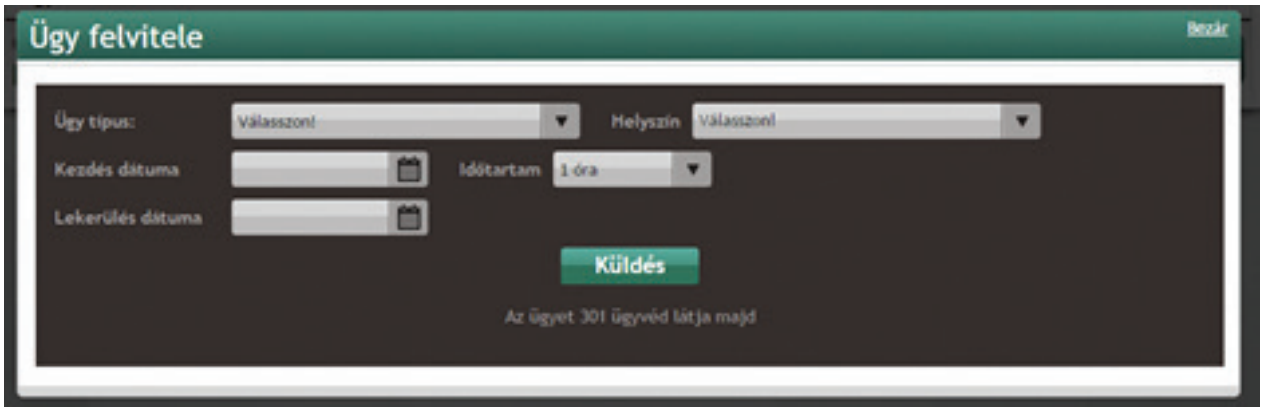


Figure 4 – Uploading of a case:



c) Temporary derogation: refraining from notification

As outlined in Section C., the CCP allows for temporary derogations in relation to investigative acts other than interrogations (hearing of the expert, inspection of objects or scenes, reconstruction of events, identity parades) as regulated by Article 3(6) of Directive 2013/48/EU: the authority may exceptionally decide not to notify the defence counsel (and if the protection of a person participating in the proceeding may not be guaranteed otherwise, it is obliged to refrain from notifying the counsel). It is positive that **seven out of the eight police officers stated that they had never resorted to this possibility** (although one of them added that it sometimes happens that the defence counsel is notified about the inspection only when it is actually started).

In the researched cases there were altogether 13 investigative acts that the counsel could have attended. In three out of these it was not possible to establish whether the counsel had been notified (there was no documentation about the notification and the counsel did not show up), but there was no case in which it could be established beyond doubt that the notification had not taken place.

According to the responses received in the JUSTICIA research, confrontations and reconstructions can usually be attended by the lawyers, whereas the situation concerning identity parades is less favourable.

Table 4 – In your experience, are you in practice provided with the possibility to attend the following investigative acts?

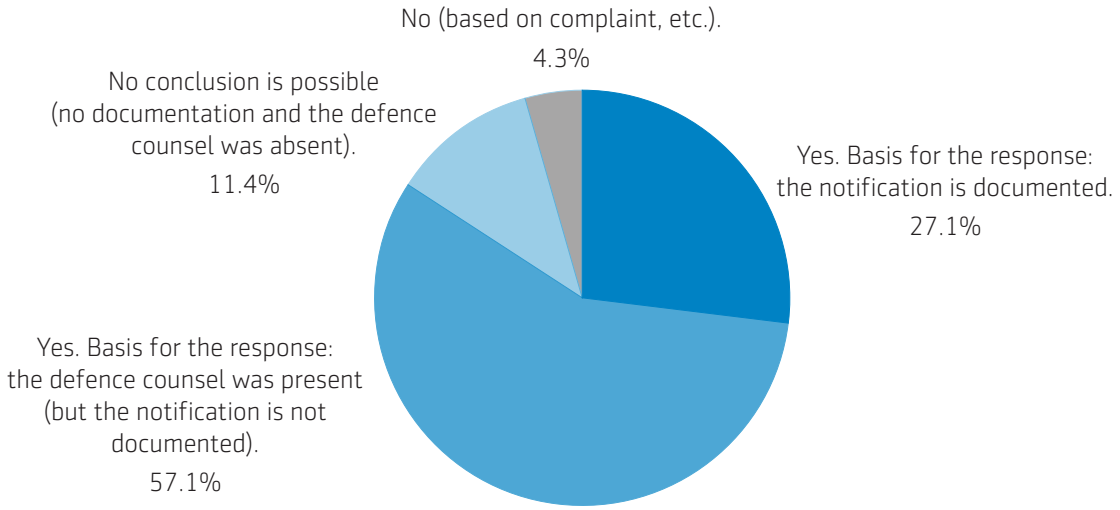
	No	Yes, but only in the minority of cases	Yes, in the majority of cases	Yes, always
Identity parade	1	3	5	4
Confrontation	—	—	6	7
Reconstruction of events	—	1	7	5

d) Documenting the notification and attendance of the counsel

The interviews with the police officers have shown that **the obligations imposed by Joint Decree 23/2003 concerning the documentation** of the notification and attendance of the defence counsels **are mostly complied with**. Six respondents stated that they record the exact time (hour and minute) of the notification via phone call, which can be regarded as good practice. It is however a practice that contradicts Article 12(1) of Joint Decree 23/2003 and hinders the reconstruction of whether the right to defence has been ensured adequately that if the defence counsel tells that he/she will attend the questioning, then no record of the notification is made, or at least not always – which has been said by three interviewed officers.

The **results of the case file research were less favourable**: for instance, the documentation concerning the notification of the – actually attending – defence counsel about the first interrogation could not be found in the case file in 57.1% of the cases, while in 11.4% of the cases, it was absolutely impossible to conclude whether the lawyer had been notified, because the file did not contain any documentation in this regard, and no defence counsel was present at the interrogation.

Figure 5 – Was the defence counsel notified about the first interrogation?



Out of the 59 cases with regard to which it was possible to know that the lawyer had been notified, only in 20 did the case file contain information on the date of the notification, and only in five did the file contain information about its exact time too. In addition, only nine case files contained information about how (via telephone, etc.) the defence counsel had been notified about the client's first interrogation as suspect.

Documentation of the notification about subsequent interrogations was also missing from the majority of the researched case files.

Table 5 – Was the lawyer notified about the subsequent interrogations?

	N	Percentage
Yes. Basis for the response: the notification is documented.	12	32.4%
Yes. Basis for the response: the defence counsel was present (but the notification is not documented).	14	37.8%
No conclusion is possible (no documentation and the defence counsel was absent).	11	29.7%

These data refer to a practice that is contrary not only to Joint Decree 23/2003[222] but also to Decision no. 8/2013. (III. 1.) of the Constitutional Court, which declares that the appointed counsel shall be notified about the time and place of the interrogation in a "verifiable manner". Based on the case file research it seems that the Constitutional Court's decision did not bring about improvement in the documentation of notifications about the suspect's first interrogation: while notification about interrogations that took place before 1 March 2013 was documented in 28.6% of the cases that the researchers looked into, the percentage for interrogations after this date was only 21.4%. It must be pointed out though that while the notification about subsequent interrogations that took place before the date of the Constitutional Court's decision (29 interrogations) was documented in 27.6% of the cases, this proportion was 50% for subsequent interrogations that took place after 1 March 2013 (altogether eight interrogations).

e) The possibility of consultation (confidential face to face communication)

The interviewed officers stated that defence counsels are always allowed to consult with their clients before the first interrogation for 5–20 minutes. It is claimed that the time spent on consultation is not limited. (Only one officer said that the consultation may not be longer than 30 minutes.) Out of the 14 lawyers asked in the JUSTICIA research five said that the time allowed for consultation is always sufficient, and seven were of the view that it happens only rarely that not enough time is provided for consultation.

The police officers have said that if the suspect does not speak Hungarian, they allow the interpreter who is there to interpret during the questioning to also assist the consultation between the suspect and the lawyer. This was confirmed by the defence counsels responding to the JUSTICIA survey, however, some of them are of the view that this is not a favourable solution, as "in most cases, the interpreter is one of the police", "he/she is loyal to the police officer", so neither lawyers nor clients trust the interpreters provided by the police, and some bring their own interpreters.

The communication between defence counsels and clients who are in pre-trial detention is of crucial importance. It is a long existing problem[223] that in terms of the respective legal provisions,[224] defence counsels may not charge for the time spent travelling to the place where the client is and the hourly rate for consulting detained clients is only half of the rate payable for all other activities.[225] Although – after a decade

222 Cf. Article 12(1) of Joint Decree 23/2003: "The document certifying the receipt of the written summons or notification of the note made of the fact that the summons (notification) was served through another suitable means (telephone, fax, e-mail) […] must be placed in the file of the investigation."

223 See for instance: Bánáti, János: Szabadságkorlátozások [Forms of Detention]. *Fundamentum*, 2005/2., p. 51. Available at: http://fundamentum.hu/sites/default/files/05-2-03.pdf.

224 Since 1 January 2018, Decree 32/2017. (XII. 27.) of the Minister of Justice on the Fees of Patron Attorneys, Trustees and Ex Officio Appointed Defence Counsels (hereafter: Decree 32/2017) and before that Decree 7/2002. (III. 30) of the Minister of Justice on the Fees of Patron Attorneys and Ex Officio Appointed Defence Counsels (hereafter: Decree 7/2002)

225 Decree 32/2017, Article 7(5), in force since 1 January 2018; Decree 7/2002, Article 6(6), in force until 31 December 2017

of stagnation[226] – the hourly rate for appointed counsels was raised to HUF 4,000 (ca. EUR 13) plus VAT as of 1 January 2014[227] and HUF 5,000 (ca. EUR 16) plus VAT as of 1 January 2015,[228] **the fee of appointed counsels is still way below market rates**.

The fees of appointed counsels were regarded as low by the participants of the focus group discussions. They said that **they rarely visit their clients in penitentiary institutions –** exactly because only half of the general hourly fee is paid for such consultations. Furthermore, they criticised the fact that they cannot claim a fee for all activities that are necessary for effective defence. For instance, **the time they spent travelling and waiting cannot be remunerated**, although sometimes they have to wait half an hour in the penitentiary institution for the client to be escorted to the consultation room, the required administration to be taken care of and the fees and costs of the lawyer to be certified. It must be added that the Curia's jurisprudence-analysis group also recommended that counsels be paid for the time they spend travelling with the aim of consulting with their detained client.[229] It is an additional problem that in some penitentiary institutions the number of consultation rooms is insufficient compared to the number of inmates, and it often happens that – even on the day of a court hearing or a hearing on coercive measures – the lawyer cannot consult his/her client in time to discuss the case in person before the procedural act.

f) Contacting the detained defendant

The participants of both focus groups mentioned that **contacting a detained client poses severe difficulties** irrespective of whether they act as retained or appointed counsels. Registering the counsel in the data base of the penitentiary system is a bureaucratic procedure that takes very long (in the county seat where one of the focus group discussions took place, it is claimed to be two weeks on average). Until the lawyers are registered in the data base, they cannot visit the client, nor can they contact him/her in any other way, although the proceeding may be progressing in the meantime.

The degree of problems in contacting detained defendants is indicated by the fact that the Budapest Bar Association prepared a special report about the issue in 2016 under the title "*Performing the functions of attorneys in penitentiary institutions (Analysis of the practice and legal framework based on reports by defence counsels, first half of 2016)*". The special report also mentions that the penitentiary institutions make contact between the lawyer and the client dependent on the registration of the power of attorney in the penitentiary data base, although – as pointed out in October 2017 by the prosecutorial department of the Chief Prosecutor's Office overseeing the penitentiary system in its response to the HHC's petition – if the proceeding authority does not for any reason notify the penitentiary institution about the person and availabilities of the retained counsel or notifies the institution with a delay,[230] "but the defence counsel presents the retainer stamped by the proceeding court or authority", the defence counsel "shall [on the basis of Decree 44/2007. (IX. 19.) of the Ministry of Justice and Law Enforcement] be allowed to enter the institution and consult with his/her client without oversight in accordance with Article 47(2) of the CCP".[231]

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226 Under Article 1(2) of Decree 32/2017 (in force since 1 January 2018) and before that under Article 1(4) of Decree 7/2002 (in force until 31 December 2017), the hourly fee of appointed counsels is determined in the law on the annual budget of Hungary. Between 2004 and 2013, the fee was HUF 3,000 (ca. EUR 9.6) plus VAT (VAT in Hungary is at present 27%).

227 Act CCXXX of 2013 on Hungary's Central Budget for the Year 2014, Article 56(4)

228 Act C of 2014 on Hungary's Central Budget for the Year 2015, Article 63(4)

229 *Védői jogok a bírósági eljárásban – Összefoglaló vélemény [Defence rights in the court proceeding – Summary opinion].* Curia, Criminal Division, Jurisprudence-analysing Group, 2014.EL.II.E.1/10.VÉDŐ-50., p. 94.

230 Cf. CCP, Article 47(3).

231 Response of the Independent Department for the Overview of the Lawfulness of Penitentiary Matters and the Defence of Rights at the Chief Prosecutor's Office to the petition of the HHC, 18 October 2017, Bv. 819/2017/2.

The Budapest Bar Association's report also touches on the problem that **certain penitentiary institutions limit the time they allow for the counsel and the detained client to discuss the case and sign the retainer** (the report refers to this issue as the "10-minute rule", since the concerned institutions allow the lawyer to spend only this long in the institutions to have the retainer signed). However, as it was pointed out by the HHC in its August 2017 letter to the prosecutorial department of the Chief Prosecutor's Office overseeing the penitentiary system, the time required for clarifying the content of the retainer may differ from case to case, and no time limit shall be set for exploring the facts of the case and defining the conditions of the retainer. In its October 2017 response, the Chief Prosecutor's Office expressed its agreement with this stance: "if the defence counsel visits the inmate in the penitentiary institution to have the retainer for the defence signed, the time to be spent on getting acquainted with the facts of the case and work out the details of the retainer shall not be limited".[232]

Article 4 – Confidentiality

From the point of view of the confidentiality of the communication with the defendant it is problematic that – based on the interviews with the police officers – it seems that **not every police building has premises where the requirements of both confidentiality and security, including the security of guarding detained suspects, can be met simultaneously**.[233] Therefore, in the absence of any better solution, consultations often take place in the interrogation room, the officer's office or even out on the corridor, the police officers often remaining within sight (sometimes standing in the door of the office, while the consultation is going on inside). There was only one respondent who said that the consultation can take place in the consultation room of the jail, whereas another stated that they solve the problem by allowing consultations to take place in the interrogation room behind closed doors, while the shutters of the window between the interrogation room and their office is rolled up so they can see what is happening, but cannot hear anything. A third respondent claimed that in the local police station there is a part of the premises used for custody where it can be guaranteed that the suspect can have a confidential consultation with his/her defence counsel.

Although according to the interviewed police officers **confidentiality is never breached** (they stay out of hearing, they cannot hear what the counsel and the defendant say), it is unfortunate that police officers are in the suspect's sight during the consultation.

The participants of one of the focus groups emphasised that it was not so much police stations, but penitentiary institutions where they have doubts about the confidentiality of consultations. The HHC – which conducted prison monitoring visits between 2002 and 2017 on the basis of an agreement of cooperation with the National Penitentiary Headquarters – has received only few complaints about this from inmates. In the course of its January 2016 visit to the Szabolcs-Szatmár-Bereg County Penitentiary Institution, it was found that "due to the way the consultation rooms are constructed (they are upwardly open and the parties must talk very loudly because of the plexiglass wall separating the lawyer and the client), the consultation could be heard very clearly in front of the rooms (and also in the adjacent consultation rooms), whereas for the parties it was very difficult to hear each other".[234] Agreeing with the observation of the HHC, the National Penitentiary Headquarters called the warden to pay increased attention to transforming

232 Response of the Independent Department for the Overview of the Lawfulness of Penitentiary Matters and the Defence of Rights at the Chief Prosecutor's Office to the petition of the HHC, 18 October 2017, Bv. 819/2017/2.

233 The interviews were made in county police headquarters.

234 *The Hungarian Helsinki Committee's report of its visit to the Szabolcs-Szatmár Bereg County Penitentiary Institution on 27–28 January 2016*, p. 15. Available at: http://www.helsinki.hu/wp-content/uploads/MHB_jelentes_Sz-Sz-B_Megyei_Bv_Intezet_2016.pdf.

the consultation rooms.[235] The 2016 report of the Budapest Bar Association called attention to a problem concerning the Hajdú-Bihar County Penitentiary Institution: "In Debrecen, the airspace of the consultation room is not partitioned in any way, everyone can hear and listen to the consultation – sometimes the co-defendant too."[236]

Also in the Szabolcs-Szatmár-Bereg County Penitentiary Institution as well as in the Vác Maximum and Medium Security Prison, it was raised by inmates that **since prison mobile phones were introduced** (as a result of which they are no longer escorted to the phone booths on the corridors, but must make the phone calls from their cells), **they have been compelled to consult with their defence counsels in front of their cellmates** – which is especially problematic for pre-trial detainees whose proceedings are still in progress. According to the management of the Szabolcs-Szatmár-Bereg County Penitentiary Institution, this was also raised at the detainees' forum, as a result of which inmates were provided with the possibility to – upon request – conduct their phone calls with their lawyers in other premises, e.g. the library or the cultural hall.[237] As opposed to this, the Vác prison informed the HHC that this restriction was needed for security reasons, to reduce vandalism and the theft of mobile phones. They claimed that since pre-trial detainees are as a rule placed in small cells with few cellmates, they are the least concerned by the problems raised by this practice.[238]

Article 5 – The right to have a third party informed upon deprivation of liberty

Six police respondents said that the notification of third parties nominated by defendants (mostly relatives) when they are taken into 72-hour detention **is always successful**, the remaining two officers claimed that it can almost always be performed. Notification is usually done **via telephone**, and – as a good practice – three officers indicated that if the third person does not pick up, or there is no phone number, they send a patrol officer or the local officer to the nominated person's address and the notification is given in person. One respondent however said that if the suspect does not know the nominated person's number, they record that the suspect waived his right to have a third person informed or that he/she did not request the notification: in his view, in principle the notification could be done in person by a patrol officer sent to the address, however, suspects usually do not "request" this.

According to officers, the notification usually takes place when the decision to take the suspect into 72-hour detention is communicated or shortly thereafter, and so **it is usually done way before the 24-hour deadline expires**. (In the researched cases only five suspects nominated a person to be notified, so no general conclusions may be drawn from the case file research with regard to the general practice, but in four of these cases the notification was successfully carried out, and in both of those cases when the time that passed between the beginning of the deprivation of liberty and the notification could be established, this was well under 24 hours: in one of the cases the nominated person was notified eight hours, in the other 6 hours and 8 minutes after the suspect had been arrested.)

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235 *The Hungarian Helsinki Committee's report of its visit to the Szabolcs-Szatmár Bereg County Penitentiary Institution on 27–28 January 2016*, p. 20.

236 *Az ügyvédi feladatok ellátása a büntetés-végrehajtás objektumaiban (Joggyakorlati és normakritikai feltárás védői beszámolók alapján, 2016. első félév) [Performing the functions of attorneys in penitentiary institutions (Analysis of the practice and legal framework based on reports by defence counsels, first half of 2016)]*. Budapest Bar Association, Budapest, 2016, p. 1.

237 *The Hungarian Helsinki Committee's report of its visit to the Szabolcs-Szatmár Bereg County Penitentiary Institution on 27–28 January 2016*, p. 15.

238 *The Hungarian Helsinki Committee's report of its visit to the Vác Maximum and Medium Security Prison on 29–30 August 2016*. p. 21. Available at: http://www.helsinki.hu/wp-content/uploads/Jelentes_Vac_2016-honlapra.pdf.

Since the data concerning the notification of the nominated third person constitute a part of the decision on the 72-hour detention, which decision is served on the defendant, he/she is usually informed about whether the notification could be performed.

Article 12 – Remedies

The interviewed officers unanimously stated that they **do not receive complaints** concerning the timeliness of the counsel's notification about procedural acts or the notification of third persons about the deprivation of liberty. (There was not any among the researched cases in which a complaint had been submitted in relation to these issues.)

In contrast, participants of one of the focus groups claimed that they often submit complaints concerning problems of notification about procedural acts, but **the authorities reject such complaints in close to 100% of the cases**. Lawyers attending the other focus group confirmed that their complaints are rejected on a regular basis, so they do not see the point in submitting complaints about delayed notifications. Out of the 14 lawyers asked in the framework of the JUSTICIA research, six had submitted no complaint at all in the preceding year because they had not been notified about an interrogation or had been notified with delay, another six had only submitted complaints in a minority of their cases. All the responding lawyers were of the view that these complaints yield no results.

The former judge the HHC interviewed said that **in the court phase, it is of fundamental importance to examine whether the statement that the defendant made during the investigation is admissible as evidence**. In this regard, judges look into whether the defendant had a counsel, if defence was mandatory, and if the defendant had an ex officio appointed counsel, whether the authorities provided the counsel with the realistic possibility of carrying out his/her tasks [cf. Decision no. 8/2013. (III. 1.) of the Constitutional Court]. She confirmed that courts as a main rule will not declare inadmissible the defendant's statement on the basis that the appointed counsel's performance was substandard.

As far as breaches of the right to defence in the first instance court proceedings is concerned, the jurisprudence-analysing group of the Curia concluded the following: "first instance court decisions were generally not or very rarely quashed due to breaches (limitations) of the rights of the defence counsel, what is more, in the jurisprudence of many courts there were no cases of cassation due to relative procedural violations at all".[239] (Under Article 373 of the CCP, quashing the first instance decision and referring the case for a retrial is mandatory if certain procedural violations are committed by the first instance court, e.g. the court hearing was held in the absence of a person whose presence is mandatory under the law. As defined by Article 375, relative procedural violations are those that must result in cassation only if they cannot be remedied in the second instance procedure and have a substantial impact on the procedure, the conviction or the sanction imposed.)

239 *Védői jogok a bírósági eljárásban – Összefoglaló vélemény [Defence rights in the court proceeding – Summary opinion].* Curia, Criminal Division, Jurisprudence-analysing Group, 2014.EL.II.E.1/10.VÉDŐ-50., p. 92.

II. THE IMPLEMENTATION OF THE RECOMMENDATION ON LEGAL AID IN PRACTICE

Statistical data, the documentation of the reason for appointment

The assessment of the enforcement of the right to legal aid is hindered by the lack of data. For instance, in response to a 2014 request for information by the HHC, the National Police Headquarters said that they do not have data on ex officio appointments broken down according to the reasons for appointment.[240] The National Police Headquarters provided us with the following figures in relation to suspects and the total number of appointments:[241]

Table 6

Year	Number of suspects	Number of ex officio appointments	Appointments compared to the number of all suspects, %
2011	64,619	27,244	42%
2012	92,317	35,043	38%
2013	129,944	47,906	37%
2014	123,815	44,453	36%
2015	119,020	41,220	35%
2016	115,025	41,132	36%

As to the amount spent on the costs and fees of appointed counsels in the investigation phase, the National Police Headquarters provided the following data:

Table 7 – The amounts spent on appointed defence counsels' fees and the reimbursement of their costs

Year	Amount
2011	HUF 231,379,000
2012	HUF 235,033,000
2013	HUF 170,954,000
2014	HUF 389,324,480
2015	HUF 1,532,961,500
2016	HUF 1,711,324,636

As far as the court stage is concerned, the National Judicial Office informed the HHC in relation to a previous request for information that they do not have data on either the number of cases in which defence counsels are appointed or how much is paid to appointed counsels as fees and costs.[242]

Thus, statistical data concerning appointments are very difficult to access. In our view, in order to adequately assess the practice of appointments, state authorities ought to collect data about, for instance, the number and the exact reasons of appointments in the different phases of the proceeding as well as the amounts spent on the fees of appointed defence counsels and the reimbursement of their costs, or the fines imposed on defence counsels for failing to attend court hearings.

240 Response of the National Police Headquarters to the HHC's request for information, 29000/39537-5/2014.ált., 27 October 2014

241 Response of the National Police Headquarters to the HHC's request for information, 29000/14356-9/2017.ált., 4 May 2017. The percentages have been calculated by us.

242 Response of the National Judicial Office to the HHC's request for information, 2014.OBH.XXIV.E.2.3/9., 21 October 2014

The collection of such detailed data would make sense if in the course of the proceedings **the reasons for appointment** were **accurately documented** in all cases – the research however shows that **this is not always the case**. The researchers for instance found a number of cases when the actual reason for appointing the counsel had not been documented, and there were some cases where the reason recorded in the file was obviously wrong: in one case for example instead of Article 46(a) of the CCP (the offence is punishable with five years or longer imprisonment), Article 46(b) was indicated in the file (the defendant is detained), although the suspect was not deprived of his liberty. Another decision [concerning a case when the reason for the appointment was Article 46(a), i.e. the prospective punishment] contained the following reasoning:

> *"Due to the outstanding severity of the offence that is the subject of the suspicion and to the type and length of the prospective punishment, the participation of a defence counsel has become necessary, so I have made the decision set forth in the operative part."*

The researchers frequently found that **not all the reasons for appointment had been identified in the appointing decision**: in one of the cases defence was also mandatory because the suspect was detained, but the decision only referred to the fact that the suspect did not speak Hungarian.

The practice reported by the interviewed police officers was also diverse: three interviewees said that they refer to all the relevant reasons for appointment in the appointing decision (and one of them mentioned that the practice was different from officer to officer), whereas two officers were of the view that the reason set forth in Article 46(a) of the CCP "overrides" all other reasons, so if the offence is punishable with five years or longer imprisonment, only this is referenced in the appointing decision.

The collection of statistical data and the assessment of the practice of appointments are made even more difficult by the fact that appointing decisions and appointing authorities do not reflect on the changes in the circumstances of the case of the suspect, so **if the reason for appointment changes during the procedure, this is not recorded in the file**. There were a number of cases in the sample, in which a counsel was originally appointed because the suspect did not speak Hungarian [in one of these cases, this circumstance could be identified only from the file, whereas the appointing decision erroneously referred to Article 46(c) of the CCP, according to which defence is mandatory if the defendant is hard of hearing, deaf and blind, blind, unable to speak or has a mental disability], but when the court procedure was conducted in the absence of the defendant (which is also a reason for mandatory defence), this new reason for mandatory defence was not expressly mentioned in the files. (It is a relevant question though in what form such a change may be indicated in a case file, as no new appointing decision is necessitated by the change of the ground for mandatory defence.)

Finally, it must be mentioned that the sample contained two cases in which the appointment of the counsel had not been withdrawn although the ground for mandatory defence (the detention of the defendant) ceased to exist in the course of the procedure.

The case file research also showed **that the appointment of defence counsels and its documenting in fast-track procedures differ from authority to authority**. A fast-track procedure may take place in two cases under the CCP. The prosecutor *may* take the defendant before a court within 30 days from his/her first interrogation as a suspect if (a) the criminal offence is punishable with a maximum of eight years of imprisonment, (b) the case is simple, (c) the evidence is available and the defendant has confessed to committing the criminal offence. The prosecutor is obliged to take the defendant before the court if the above conditions are in place and the defendant has been caught in the act.[243] If the conditions of the

[243] CCP, Article 517

fast-track procedure are in place and the prosecutor decides to conduct such a procedure, he/she shall inform the suspect about the criminal offence and the evidence, and sees to it that the suspect may retain a defence counsel. If the suspect does not have a defence counsel, the prosecutor shall appoint one, and if the suspect is detained, the prosecutor sees to it that the defence counsel and the detained suspect can consult with each other before the hearing.[244]

Although under the CCP the prosecutor shall appoint the defence counsel in such proceedings, the case file research shows that the counsel is often appointed in the investigation phase (i.e. before the prosecutorial decision about taking the suspect before the court is issued), so **in practice it is not the prosecutor, but the investigating authority that performs the appointing function**. In some cases, the fact that the defence counsel is appointed with a view to the fast-track procedure to be initiated in the future is expressly mentioned in the files.

> *Appointing decision: "Since a fast-track procedure will be conducted in the case, defence is mandatory under Article 46(f) of the CCP[245] – read in conjunction with Article 518(2) of the CCP –, therefore, I have delivered the decision set forth in the operational part."*

> *Police report written after the interrogation of the suspect: "Today I contacted dr. F. Gy., whom I informed that a fast-track procedure would be conducted in the present case, so I had appointed him as defence counsel, furthermore, I informed him that I wish to present the evidence. The lawyer stated that he did not wish to attend the presentation of the evidence."*

In a number of cases the ground given for the appointment was Article 46(e) of the CCP, i.e. that the defendant is "unable to defend himself/herself in person for any other reason", although the researchers thought that the actual reason for the appointment was the prospective fast-track procedure. In those cases, where the perpetrator is caught in the act, and therefore the prosecutor is under the obligation to carry out a fast-track procedure, it is indeed a much more practicable solution if the police appoints the defence counsel (although if the prosecutor runs out of the 30 days, the appointment may have to be withdrawn – something that we also found examples of in the case file research). However, the above outlined practice is not in line with the CCP, and the harmonisation of the practice and the legal framework seems necessary.

Section 2 – Applying for legal aid

The situation of the police officers interviewed in the framework of the research is specific in the sense that they all serve at county police headquarters, and defence is mandatory in most of those cases which fall under the competence of these headquarters. This means that suspects will get a counsel if they do not retain one, and since the State advances the fees of these appointed defence counsels, most suspects would not realise at this point (only at the end of the case) that they will have to repay the advanced amounts, which inevitably leads to a situation where they do not pay too much attention to personal cost exemption.

It is however still interesting that the interviewed officers were of the view that **appointment of a defence counsel based on cost exemption happens very rarely**, some of them said that in about **10% of the cases**, and some of them had **never had a case** in their professional career, when appointment was based on cost exemption. Two respondents said that this issue becomes important in the court phase after the

244 CCP, Article 518

245 Under Article 46(f) of the CCP, defence is also mandatory if a particular provision of the law (i.e. the CCP) requires so.

bill of indictment is submitted – one said that the reason for this is that this is when defendants realise how much the legal costs can be, and that eventually it may fall on them to pay these costs. It raises concerns that eight of the lawyers participating in the JUSTICIA research had not been appointed in the preceding year on the ground that the defendant had been granted personal cost exemption, and out of the five lawyers who had had such appointments in the preceding year said that such appointments were extremely rare.

The interviews made around the turn of 2015–2016 revealed **significant shortcomings concerning the information of defendants about personal cost exemption** (although the possibility of legal aid is now included in the template-warnings generated by "RoboCop NEO", so the responses described below must be seen in the light of this fact):

- only two officers stated that they always inform suspects about the possibility of personal cost exemption,
- three officers only do so if "it is justified" or "the issue arises",
- three respondents expressly said that they do not inform defendants about the possibility of cost exemption.

Furthermore, information about the possibility of personal cost exemption does not necessarily mean that the defendant is informed about the conditions for granting cost exemption or the way to submit a request for it: one respondent refers suspects to the defence counsel with questions on the matter, another said that he can inform the suspect about the relevant provisions of the law, but he himself is also somewhat "at a loss" with regard to personal cost exemption as such. Participants at one of the focus groups also said that the police usually do not inform suspects about personal cost exemption, it is usually the defence counsel who feeds information about it to his/her client. (This practice is particularly problematic, because if defence is not mandatory in a given case, a defence counsel will be appointed ex officio to a suspect if he/she is granted cost exemption. So if he/she does not ask for cost exemption, he/she will not have an appointed defence counsel either, who could inform him/her about what cost exemption is and how it can be requested.) The majority of the lawyers talking in the framework of the JUSTICIA research about their experience in 2017 also said that defendants were not generally informed about the possibility of requesting personal cost exemption. To sum it up, it can be concluded that – as one police respondent put it – personal cost exemption is not "over-advertised" in the investigation stage. This is substantiated by the fact that in the course of the case file research we found **only one case where the defence counsel had been appointed because of the defendant's personal cost exemption**, and defendants or their counsels **applied for cost exemption in altogether four cases** – but in all of the four cases only **in the court phase**.

With regard to the court phase, the lawyers attending the above focus group also voiced the opinion that courts do not pay extra attention to inform the defendants about personal cost exemption, although in the form attached to the summons there is information about it. It is their experience that although it does not happen too frequently, in the court phase there are cases when a defence counsel is appointed ex officio, because the defendant has been granted personal cost exemption. The former judge respondent admitted: doubts can be raised as to how much accused persons can grasp from the information provided about cost exemption on the form attached to the summons, and whether this information is lost in the abundance of information that they have to take in. In her view, not even many defence lawyers are fully aware of the possibility of personal cost exemption.

Out of the above mentioned four cases found in the case file research, there were two in which the personal cost exemption was not granted due to non-compliance with the procedural rules, while the third case illustrates how the procedural, formal rules can prevent indigent defendants from being granted with cost exemption.

In this case the defendant requested the court to grant him personal cost exemption in a handwritten letter: "I would like to ask for defence by a lawyer (I already did on [date]). I would like to ask for the cost exemption too, because I am a pensioner, I have a mortgage amounting to millions, which I am proving with the attached document." It does not transpire from the case file that the court had informed the defendant about how she should properly request personal cost exemption, and there is no sign in the file from which it would seem that the defendant was granted cost exemption (the file does not contain a formal decision on cost exemption). At the same time, a defence counsel was appointed for the defendant in the court phase, but the appointing decision does not contain the ground for the appointment.

The researchers came across several cases in which the defendants might have been eligible for cost exemption, however, based on the documentation it seemed that the investigating authority had failed to inform them about this possibility. (In these cases the investigation was closed before the warning about personal cost exemption had been inserted into the template provided by the RoboCop NEO system.) Some examples for such cases are listed below:

- *The suspect is unemployed, has no property, he receives unemployment benefit in the amount of HUF 22,800 (ca. EUR 75).*
- *The suspect is unemployed, has no property, he receives no unemployment benefit or the allowance of job-seekers.*
- *The suspect is homeless (according to the records of the interrogation too), he has no income.*
- *The suspect lives in a rehabilitation institution, he is unemployed.*
- *The suspect provides for six minor children, she is on maternity allowance, her total monthly income is HUF 84,000 (ca. EUR 265), she has no property (no information about the income of the husband).*
- *The suspect is detained in relation to another criminal proceeding, he does not work in the penitentiary, so he does not have any income, neither has he any property.*
- *The suspect is single, she provides for a minor and an adult (but unemployed) child from a monthly income of HUF 40–60,000 (ca. EUR 125–190).*
- *The suspect provides for four (at the time of the interrogation: three) minor children from a monthly income of HUF 90–95,000 (ca. EUR 285–300).*

There was a case, in which the defendant had become indigent by the court phase of the proceeding.

The defendant had a job during the investigation, but had lost it by the time the court phase started, he was homeless, had no income (he was not eligible for unemployment benefit or the allowance of job seekers), nor property. Upon his request, he was allowed to pay the costs of the criminal procedure in instalments.

The above accounts seem to confirm the HHC's experience that **if there is a ground for mandatory defence, it is much more likely that a counsel will be appointed on that basis, even if the defendant is indigent and his/her eligibility for personal cost exemption could be examined**. As pointed out in Section C., this is detrimental to indigent defendants, since if a lawyer is appointed for them on the basis of cost exemption, the State will bear all the costs of the defence, whereas in cases of mandatory defence, these costs are only advanced, and if convicted, the defendant must reimburse them.

Section 2 – The merits test

In relation to the merits test (or – in the Hungarian system – whether the grounds for mandatory defence or other grounds for appointing a defence counsel are in place) it is worth looking into the distribution of the grounds for the appointment of the defence counsel in the cases in the sample of the case file research, while remembering the above indicated problems regarding the documentation of the ground for appointment. (It must also be emphasised that the researched proceedings fell under the jurisdiction of local courts, which means that they were conducted into less serious offences.)

Table 8 – Distribution of the grounds for the appointment of the defence counsel at the time of the first appointment

	Frequency	Percentage of responses[246]	Percentage of cases[247]
Personal cost exemption	1	0.8%	0.9%
The offence is punishable with five years or longer imprisonment	26	20.8%	23.4%
The defendant is detained	25	20.0%	22.5%
The defendant is hard of hearing, deaf and blind, blind, unable to speak or has a mental disability	3	2.4%	2.7%
The defendant is unfamiliar with the Hungarian language or the language of the procedure	26	20.8%	23.4%
The defendant is unable to defend himself/herself in person for any other reason	9	7.2%	8.1%
Fast-track procedure	26	20.8%	23.4%
Procedure in absentia	1	0.8%	0.9%
The defence counsel was appointed upon the defendant's request, because it was deemed necessary in his/her interest	1	0.8%	0.9%
The defence counsel was appointed ex officio, because it was deemed necessary in the defendant's interest	6	4.8%	5.4%
The prosecutor attended the hearing and the defendant requested the appointment of a defence counsel	1	0.8%	0.9%
Total	**125**	**100.0%**	**112.6%**

As it can be seen from the table, the four most frequent grounds for appointment were the following: the prospective punishment of the offence, the detention of the defendant, fast-track procedure, the defendant does not speak Hungarian. It is important for the present Country Report that the authorities appointed a defence counsel for the defendant ex officio in seven cases within their discretion based on Article 48(3) of the CCP, because they found it necessary in his/her interest.

It must be pointed out though that at one of the courts, the researchers found four cases, in which **no defence counsel had been appointed before the first interrogation of the suspect in spite of the fact that defence would have been mandatory under the CCP**, and in a fifth case at the same court the data seemed contradictory in that regard.

In another court, the sample also contained two cases in which the appointment of the counsel had been unlawfully delayed.

246 This shows what percentage of all the responses the individual response options amount to, so the total adds up to 100%.

247 This shows in what percentage of the cases (i.e. case files) the individual categories occurred, therefore the total may exceed 100%.

In one of the cases the suspect was told during the first interrogation that a defence counsel had been appointed for him, but the lawyer could not attend the interrogation, however, the date on the appointing decision is from two days after the date of the interrogation.

In the other case, the suspect was informed at the first interrogation about his right to a lawyer, but at this point of the procedure defence was not mandatory in the case. During his third subsequent interrogation the suspicion of additional criminal offences was communicated to him, as a result of which the prospective punishment made defence mandatory in the case, however, on this occasion he was not informed about his rights concerning the access to a lawyer, and only three days later was a counsel appointed for him.

Some cases in the sample show that **the authorities' practice is rather diverse in relation to certain grounds for appointment**, including Article 46(c) of the CCP (the defendant has a mental disability, irrespective of his/her criminal liability) and Article 46(e) of the CCP (the defendant is unable to defend himself/herself in person for any other reason). Some authorities insist on having some written document substantiating that these circumstances are in place, whereas others are more flexible in their approach to these two grounds (which is the adequate approach in our view).

One of the defendants had lived in a social care home before the proceeding was started, and after he was caught in the act of committing the offence, he was taken to hospital, where he was placed in the psychiatric ward. The police appointed a forensic psychiatric expert, and only after the expert had provided an opinion, did the investigator appoint a defence counsel. According to the researcher, it would have been necessary to appoint a defence counsel for the defendant at the outset, if not due to his mental status, then for the need to protect his/her interests. It must also be mentioned that the defendant had minimal income (HUF 20–25,000, ca. EUR 65–80, that he received for cleaning in the social care home), however, he was not informed about the possibility to apply for personal cost exemption.

In another case, a defence counsel was appointed for the suspect before the interrogation on the basis of Article 46(c) of the CCP, but the lawyer failed to show up (the file contains no reference to whether the defence counsel was duly notified). The appointing decision contains the following: "Since there is evidence that [the suspect] spent several weeks under psychiatric treatment in the period of committing the offence, defence is mandatory in the proceeding in terms of Article 46(c) of the CCP." The appointment was later revoked: "In the course of the proceeding, [the defendant] was examined by the forensic psychiatric expert, who concluded that he does not suffer from mental illness, debility, dementia, mental or personality disorder, so no participation of a defence counsel is mandatory in the proceeding […]." After the indictment had been filed with the court, another defence counsel was appointed – again on the basis of Article 46(c) of the CCP, but without any additional reasoning.

A third case highlights the problem that the authorities are not always informed about or do not always try to find out whether the defendant is under guardianship – which may be a reason for mandatory defence and the appointment of a defence counsel –, although the police has direct access to the register of persons under guardianship.[248]

The defendant had been under guardianship since April 2009. He was first interrogated by the X Town Police on 30 May 2010, when he confessed to the offence. Neither his guardian, nor a defence counsel was present at the interrogation (at this point in the proceeding the suspect had no appointed

[248] Under Article 6(2)(a) of Act CLXXV of 2013 on the Registry of Persons under Guardianship and Preliminary Legal Statements, the investigating authority is authorised with a view to conducting a criminal procedure to access the registry of persons under guardianship and process the concerned person's personal identification data and the data related to his/her guardianship.

defence counsel). It can be established from the record of the interrogation that the police officer was informed about the fact that the suspect lived in a rehabilitation home. The records also contain the following: "I wish to state that I do not have any psychological illness, nor am I disabled, I only have a speech impairment."

The defendant was also interrogated on 11 October 2010 in Sz. Town in another proceeding that was conducted by the Y Town Police. In the request for interrogation that the Y Town Police sent to the Sz. Town Police on 13 September 2010, the Y Town Police informed the Sz. Town Police that the suspect was under guardianship, so the acting officer appointed a defence counsel for him, and informed the defence counsel about the date and time of the interrogation, however, the lawyer did not show up. The defendant confessed to this offence too. In this case, the police report about his arrest of 6 June 2010 indicates that when he was taken into custody, he told the officers of the Y Town Police that he was under guardianship, whereas in the first case, he did not share it with the officers of the X Town Police, when they arrested him on 30 May 2010.

Section 3 – The effectiveness of legal aid provided in the framework of cost exemption

As we have pointed out in relation to the defence counsels' willingness to attend procedural acts, several empirical researches have identified shortcomings concerning the effectiveness of the appointment system and the performance of appointed defence counsels,[249] which – in the HHC's opinion – are due to the following reasons: **the problems of how the selection is made, the lack of individual and general quality assurance, and the problems concerning remuneration**.[250]

The participants of both focus groups acknowledged: no matter how fairly lawyers try to proceed, and how much they strive to pay the same amount of attention to cases where they are retained and appointed, making ends meet is an important factor, so **low remuneration has an impact on their level of activity**, and so it happens frequently (although there are exceptions) that different efforts are made in cases taken on the basis of a retainer and cases where the lawyer is appointed. They prioritise, and may spend less time on communicating with clients represented on the basis of an appointment, or may not go after irregularities that they do not regard to be strictly related to the client's defence (e.g. if the police take a client to court in handcuffs). At the same time, they are of the view that the lawyer's personality can have a great impact on these differences: there are some attorneys whose attitudes are completely different in the two types of cases, e.g. they are reading a newspaper at the court hearing if they are not acting upon a retainer.

Both focus groups emphasised that it is not the low hourly fee that causes the problem in itself, but rather the fact that **certain defence activities are not compensated at all**, such as time spent with preparation for and travelling to the trial, writing petitions and the closing argument. As the Commissioner for Fundamental Rights formulated it in his Report No. AJB-3107/2012: "The enforcement of the fundamental right to defence and the effectiveness of the system of appointments are negatively impacted by the legal framework that creates an altogether unfair environment hindering appointed defence counsels in conducting at an acceptable quality their work, which is aimed at safeguarding the constitutional rights of

249 For a summary see for example: Kádár, András Kristóf – Novoszádek, Nóra – Selei, Adrienn: *Ki rendelt itt védőt? Egy alternatív védőkirendelési modell tesztelésének tapasztalatai [Who Ordered a Counsel Here? – The Experiences of Testing an Alternative Model of Appointing Defence Counsels]*. Hungarian Helsinki Committee, Budapest, 2012, pp. 7–9.

250 For more details see: Kádár, András Kristóf –Tóth, Balázs – Vavró, István: *Without Defense – Recommendations for the Reform of the Hungarian Ex Officio Appointment System in Criminal Matters*. Hungarian Helsinki Committee, Budapest, 2007, pp. 18–28.

defendants." The participants of both focus groups raised that the fees should be differentiated according to the complexity of the cases, or the tasks of defence counsels should be defined and remunerated in a much more specified manner. Furthermore, in their view it would be necessary to rationalise and simplify the administration of the certificates concerning the fees and costs of appointed defence counsels.

While they agreed on the assessment that appointed counsels are less willing to attend procedural acts, our police respondents had more diverging views on whether there are significant differences between retained and appointed lawyers in relation to their activity levels in posing questions, putting forth motions and making comments during the investigation. Only three respondents said that appointed counsels are less active in these regards, and – as one interviewee put it – defend their clients "less vehemently". (It must be noted that this type of activity can be indicative of the quality of defence work to only a limited extent.[251]) Our former judge respondent was of the view that **there still are differences between the activity levels of retained and appointed defence counsels**.

This is substantiated in relation to the court phase by the case file research: retained counsels submitted proportionally more written petitions, appeals, observations or complaints. [In the investigation phase, these proportions were generally low: out of the 117 cases with regard to which the researchers recorded related data, in only 6 (5.1%) did the counsels file such written submissions.]

Table 9 – Did the counsel submit written petitions, appeals, observations or complaints (not counting submissions concerning coercive measures) in the court phase?

	Yes		No	
	N	Percentage	N	Percentage
All cases	20	15%	113	85%
Cases in which only appointed counsel(s) defended the defendant	2	2.2%	90	97.8%
Cases in which only retained counsel(s) defended the defendant	14	42.4%	19	57.6%

Furthermore, the case file research shows that there is a difference – although only minimal – between the levels of activity of retained and appointed defence counsels already during the first interrogation of the suspect.

Table 10 – If the counsel was present at the first interrogation did he/she pose a question / make an observation / put forth a verbal motion?

	Yes		No	
Did the defence counsel pose a question?	**N**	**Percentage**	**N**	**Percentage**
Appointed defence counsel	2	6.7%	28	93.3%
Retained defence counsel	2	12.5%	14	87.5%
Did the defence counsel make an observation?	**N**	**Percentage**	**N**	**Percentage**
Appointed defence counsel	0	0%	30	100%
Retained defence counsel	3	18.8%	13	81.3%
Did the defence counsel put forth a verbal motion?	**N**	**Percentage**	**N**	**Percentage**
Appointed defence counsel	1	3.3%	29	96.7%
Retained defence counsel	1	6.3%	15	93.8%

251 For more details see: Iván, Júlia – Kádár, András Kristóf – Moldova, Zsófia – Novoszádek, Nóra – Tóth, Balázs: *A gyanú árnyékában. Kritikai elemzés a hatékony védelemhez való jog érvényesüléséről. [A Critical Account of Enforcing the Right to Effective Defence]*. Hungarian Helsinki Committee, Budapest, 2009, pp. 26–27.

In addition, the case file research demonstrates that retained lawyers are somewhat more likely to attend the presentation of the evidence after the closing down of the investigation than appointed counsels (57.1% and 51.3% respectively).

All this implies that **indigent defendants represented by appointed defence counsels are still often provided with less effective defence than those who can afford to retain a lawyer**, and this inequality can be made even more severe by the practice of appointments presented below.

This is all the more concerning, because according to the results of the case file research, the outcome of the proceedings is influenced – although to a restricted degree – by whether the defendant has a retained or an appointed counsel. In 96.6% of those cases where the defendant had only appointed counsel(s) in the investigation phase (altogether 89 cases), the defendant was found guilty, whereas **the proportion of convictions was somewhat lower** (90.9%) in those 22 cases, **where only retained counsel(s) represented the defendant during the investigation**. The proportion of convictions was 96.2% in those 78 cases where the defendant had only appointed defence counsel(s) throughout the entire procedure (including the court phase), whereas the defendants were found guilty in only 90.5% of those 21 cases, where retained defence counsel(s) provided defence throughout the whole procedure.

Section 3 – The selection of lawyers to be appointed

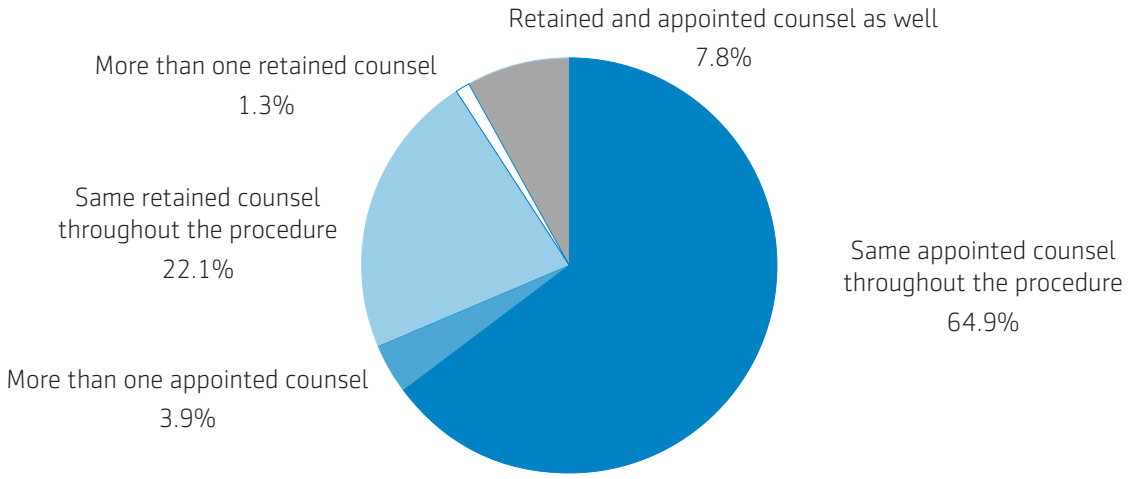
a) Continuity of defence provided by the same lawyer

Police respondents unanimously stated that **in the investigation stage very rarely is an appointed counsel replaced by another one** (in less than half or significantly less than half of the cases). One of the scenarios due to which this might happen is when the qualification of a criminal offence is changed to a more serious one and therefore it is referred from a local police station to the county headquarters. In such cases appointed lawyers may ask to be replaced because the county headquarters' seat is far away from the town where their office is located.

This was mentioned as a problem by focus group participants in relation to second instance court proceedings: when the regional courts of appeal acts as the second instance court, this might mean that the case will be conducted in a different county (there are five regional courts of appeal in Hungary, each covering more counties) than the one where the lawyer is seated, and in such cases many lawyers ask to be replaced. The focus group participants were of the view that in such cases the appointment of a new lawyer might violate the right to defence, as it often happens that the defence counsel appointed for the second instance procedure does not go through the case file, does not prepare thoroughly for the hearing and gives only a short, template closing speech. Budapest lawyers said that if a case is moved from the capital, the countryside courts often withdraw the Budapest counsels' appointment, which, in their view, is a breach of the right to – effective – defence.

As far as the cases included in the case file research sample are concerned, the same appointed or retained counsel defended the defendants in 87% of the cases throughout the entire investigation (not counting fast-track procedures). In the first instance court proceedings this ratio was even higher: 93.4% (the same appointed counsel throughout the entire procedure: 68.4% – 93 cases, same retained counsel: 25% – 34 cases).

Figure 6: The number of counsels and whether they were retained or appointed in the investigation phase



In other words: only in three of the researched cases was a new counsel appointed during the investigation. In two of these cases, the lawyer asked for the appointment of a new counsel: one of them retired, the other one notified the police after the appointment that he no longer worked as an attorney (it may be raised why he was still included in the list of lawyers who could be appointed). In the third case, the circumstances of the change were less ordinary.

> *In this case a counsel was appointed because of the severity of the prospective punishment of the offence. The counsel attended the interrogation in spite of the fact that by all probability both the appointment and the notification took place during the night (the interrogation started at 1:22 a.m. on 18 December 2011, neither the fact nor the method of the notification was documented in the case file). At the first interrogation the defendant provided someone else's name and data (later he said that he had been under the influence of alcohol and medication at the time of the perpetration of the offence – that he did not confess to –, and that he had had no idea how he had ended up at the police station). This was only revealed at the subsequent interrogation, when the person whose name and data the defendant had provided appeared at the police, and told the investigator that he had never been questioned in that case. The actual defendant thus could not be interrogated, and his whereabouts were unknown to the police, so an arrest warrant was issued against him. Since the case was continued as an in absentia procedure, the participation of a lawyer was mandatory, however, instead of continuing the case with the original lawyer, another counsel was appointed by the police.*

There was a fourth case, in which a new appointment took place during the investigation, but in this case there was no change in the person of the lawyer: after the ground for the original appointment (*in absentia* proceeding) was not in place any more (as the defendant was found), the same lawyer was appointed for the defendant (without defining the ground for the appointment in the new decision).

In the court phase, a new counsel was appointed for the defendant in only seven cases (twice in one of the cases). In two out of the eight occasions, a new lawyer had to be appointed because the originally appointed counsel failed to attend the court hearing. In a third case, the lawyer notified the court that he had suspended his practice.

> *In a fourth case, the counsel first appeared in the proceeding at the presentation of the evidence on 14 July 2008 (he was not present at either the interrogation or the confrontation, although it cannot be concluded whether he was at fault for the absence). He examined the case file for 20 minutes, after which he said: "I request that from now on I would be exempted from my duties as counsel." However,*

his appointment was not revoked, and on 22 September 2008 it was again him who attended a second presentation of the evidence. Here again he examined the case file – this time for 10 minutes. The bill of indictment dated 27 October 2008 was also sent to him. Finally, on 7 November 2008, he filed a written request with the court, asking that a "lawyer with a local seat be appointed to perform the duties of the defence counsel". (The originally appointed defence counsel's office was located 34 kilometres from the seat of the court.)

In only one case did the defendant ask for the appointment of another defence counsel. He justified his request as follows:

"I request that another defence counsel be appointed for me, as my present counsel does not defend me adequately, we have just met in the hallway, and he has asked me whether I am the defendant, but other than that, he has not communicated with me, so I believe that he cannot really defend me in this case."

It must be pointed out though that it may be an obstacle to effective defence if no new counsel is appointed when there is a significant change in the circumstances.

In one of the cases, the procedure commenced in the town of Gy., and the Gy. Town Police appointed a local attorney for the suspect. Later the case was joined with other cases which were conducted in towns B1 and B2, both about 120 kilometres from Gy., however no new defence counsel was appointed for the defendant, although it could be assumed that the geographical distance would make it difficult for the lawyer to provide effective defence. For instance, during the first interrogation that took place in town B1 after the defendant's arrest at 6:19 a.m., the investigating officer recorded in the minutes that the defence counsel had been notified but could not attend due to other obligations, whereas it was not realistic at all to expect the lawyer to be able to attend on a short notice a procedural act taking place so far from where his office is seated.

According to nine of the lawyers asked in the framework of the JUSTICIA research, a new counsel is appointed during the investigation in only a minority of the cases, five lawyers said that it practically never happens. With regard to the court phase, one lawyer said that new counsels are practically never appointed and 13 were of the view that this only happens in a minority of the cases. They listed diverse reasons for why a new lawyer may be appointed: the defendant requests so, because he/she is not satisfied with the counsel; the lawyers requests so because of the distance between the court and his/her seat, if the court is located in a town that is different from where the investigation is carried out; the judge decides so, because he/she believes that there is a conflict of interest between the defendants represented by the same lawyer, or because he/she regards the lawyer to be "incompetent", etc.

b) The system of appointments

How the lawyer to be appointed is selected is one of the most neuralgic points related to effective defence in Hungary – the 2014 report of UN WGAD identified it as one of the most severe problems of the ex officio appointment system, pointing out the fact that the wishes of the defendant are not considered in any way, which is relevant from the point of view of § 24 of the Recommendation.[252] As we pointed out in Section C. describing the legal framework, **the authority conducting the criminal procedure is completely free to choose the lawyer to be appointed from a register compiled by the regional bar association**, as a result of which **many police units keep appointing the same couple of attorneys or law firms in the**

[252] *Report of the Working Group on Arbitrary Detention. Addendum. Mission to Hungary*, 3 July 2014, A/HRC/27/48/Add.4, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/072/58/PDF/G1407258.pdf?OpenElement, § 77

majority of cases – which sometimes means such a high number of cases which in itself poses a serious obstacle to high quality defence (even if we suppose that trainee lawyers also take their share in providing defence in these cases). In the table below we see some examples for this from a 2012 research of the HHC (the data are from 2008).[253]

Table 11 – Number of cases taken by the most often appointed attorney/law firm in 2008

Number of cases	Police unit	Percentage of appointments for attorney compared to all appointments
453	Nyíregyháza Police Headquarters	23%
372	Kecskemét Police Headquarters	54%
295	Kiskőrös Police Headquarters	82%
289	Győr Police Headquarters	37%
276	Siófok Police Headquarters	70%
265	Miskolc Police Headquarters	29%
232	Tatabánya Police Headquarters	58%
207	Székesfehérvár Police Headquarters	31%
205	Gödöllő Police Headquarters	45%
200	Miskolc Police Headquarters	22%

The above system leads to a situation where "some of the defence lawyers are forced to base their living on appointments, which raises the *possibility* that the defence counsel will not oppose the authorities that help him/her making ends meet through the appointments even when it is necessary".[254] In its report on the 2013 Hungarian country visit, the CPT concluded the following: "A number of allegations was heard about ex officio lawyers acting in the interests of police officers rather than in the interests of the persons to whom they had been assigned. It is noteworthy in this context that police officers interviewed by the delegation indicated that they would choose themselves a lawyer from a list of lawyers known to the police authorities." Therefore, the CPT recommended that the system of appointments be modified (in a way that that ex officio lawyers are not chosen by police officers or prosecutors) and stated that "ex officio lawyers should be reminded, through the appropriate channels, of their duty to represent to the best of their ability the interests of the persons to whom they have been assigned".[255]

The above was confirmed by the participants of both focus groups: they think that the distribution of appointments between the lawyers is far from even, the authorities work with a small circle of lawyers, who build their practices on appointments. In one focus group it was expressly mentioned that this creates a relationship of dependence between the lawyers and the authorities, which was considered by the participants to be worrisome from the point of view of ensuring defendants' rights. The lawyers attending the focus group were of the view that besides personal nexus and "visibility" (i.e. a permanent presence at the police station), the authorities also take into account factors such as the distance between the police station and the lawyer's office as well as the manner in which the lawyer provides defence. Counsels regarded as "problematic" by the police, because they play an active role when defending a client are appointed less frequently than "passive" lawyers who are willing to cooperate with the authorities.

253 See in detail: Kádár, András Kristóf – Novoszádek, Nóra – Selei, Adrienn: *Ki rendelt itt védőt? Egy alternatív védőkirendelési modell tesztelésének tapasztalatai [Who Ordered a Counsel Here? – The Experiences of Testing an Alternative Model of Appointing Defence Counsels]*. Hungarian Helsinki Committee, Budapest, 2012, pp. 10–32.

254 Report No. AJB-3107/2012 of the Commissioner for Fundamental Rights (emphasis added in the original)

255 *Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 3 to 12 April 2013*, Strasbourg, 30 April 2014, CPT/Inf (2014) 13, https://rm.coe.int/1680696b7f, § 24

One participant recalled that an investigator he was acquainted with warned him not to "cause trouble", because he would not be appointed any more. Some lawyers believe that "in-house" lawyers are appointed especially if there are shortcomings in the investigation.

That investigators tend to appoint lawyers whom they know, and whom they worked together with on previous cases has been confirmed by the interviewed police officers. **Six out of the eight respondents said that they work with set circle of lawyers** (although if the respective bar association operates a duty lawyer scheme, they first try to reach the lawyer(s) on the bar's list). When the lawyer to be appointed is selected, personal connection and previous experience are taken into account, but not in the way the focus group participants claim: our police respondents say that they appoint lawyers about whom they know that they are available, they attend procedural acts in the night as well, they are experienced, reliable, have the necessary expertise, will not ask to be exempted from the appointment before the court phase, and do not burden the police with "silly things" (which, the respondents emphasised, does not mean that they are expected to persuade the suspect to confess). Other aspects to be taken into consideration are the type of offence and the specialisation of the lawyer, the personality of the suspect and the seat of the lawyer's office (if the suspect is to be detained, a lawyer from the county seat will be appointed, because pre-trial detention is implemented in penitentiaries located in the county seat). There are usually only a handful of lawyers whose offices are in the town where the local police station is seated, and the suspect may not be better off if a lawyer who is not a local, whose office is in another town is appointed for him/her. It must be added that participants of one of the focus groups also raised that certain lawyers are appointed regularly because they do appear at interrogations.

Our former judge interviewee also confirmed that when she had to appoint a lawyer, she chose lawyers that she knew. Her priority was that the lawyer should be competent (with knowledge of the given legal field) and have a professional ethos (even between two trial days the defendant must feel that he/she has a counsel). Furthermore, the lawyer had to be reliable in the sense that if he/she is summoned, he/she attends the hearing or arranges his/her substitution. Besides these factors, she tried to take into account the defendant's personality.

Hence, many factors may play a role in the selection of the lawyer who is to be appointed. One police respondent described very aptly the conflicting considerations and interests that arise in such situations: "There was a lawyer who complained why we kept appointing the same lawyers, who do not do everything for their clients, so we asked him: would you be willing to attend a questioning at 2:00 a.m. on a weekend? Well, he said, his phone is turned off at such times. OK, then what are we talking about?"

It is difficult to take sides in the above issues, but it is for certain that the current system of appointments is non-transparent, opens room for abuses, and does not adequately ensure the right to effective defence. In the HHC's view – coinciding with the pertaining provision of the New CCP – the solution is if the lawyers to be appointed are not selected by the proceeding authorities. Until the law comes into force, the general application of **duty lawyer systems** as set up by certain regional bar associations may improve the situation (currently bar associations are only obliged to operate such systems on weekends and banking holidays).[256]

As Table 12 below shows, regional bar associations apply different methods when compiling the register of attorneys who can be appointed as defence counsels: in some regions all members of the bar can be appointed in criminal cases, while many bar associations compile their lists on the basis of voluntary applications. (Unfortunately the register is not available on the websites of all the regional bar associations.) The picture is also very diverse when it comes to which bar associations run duty lawyer schemes, and if

[256] New Attorneys Act, Article 36(3)

they do, in what form – every day or only on weekends and banking holidays, in every town or only in county seats, how many lawyers per day, and so on.

The participants of the focus group held in one of the county seats (where a duty lawyer scheme has been operated for some time) were of the view that the introduction of the new, duty lawyer system could be regarded as a positive step toward a less "protectionist" arrangement (while some of the participants were complaining that the number of their appointments had decreased).

Based on what has been found in the research, it seems that the duty lawyer schemes need fine tuning in several counties. The head of a regional bar association reported that at many police units, "instead of calling the lawyers on the duty list, the investigators keep appointing those who they usually »like to« work with. And the bar association cannot do anything about it." At the same time, police respondents raised the following issues:

- There are lawyers, who say that they do not take criminal cases or refuse appointments, although they are in the register of attorneys who can be appointed and are on the duty lawyers' list.
- There are more suspects in a case than attorneys on the duty list.
- The attorney on duty does not always pick up the phone or his/her phone is turned off during the night, and there is no sanction envisaged for such cases. It happens that the lawyer on duty is on a holiday or has consumed alcohol by the time he/she is notified.

In the above situations, officers call their "usual" lawyers: "In such cases, there are obviously those attorneys who are available and can be appointed at any time. The police's working relationship with them is much smoother. But this does not necessarily mean that this good relationship with the police is also good for their clients – if I try to put myself in the position of the defendant. Obviously I will opt for the easier option, and choose somebody who will not cause me too much trouble", said one of the interviewed officers. The problem is well illustrated by the following case.

> *The following police report was prepared in the case before the first interrogation of the suspect: "I report that on the above day, I tried to call dr. K. I., the duty lawyer for today according to the schedule issued by the X Bar Association at all the phone numbers indicated in the schedule, but he did not pick up any of the phones, so I could not talk to him about the appointment concerning [the defendant's] case. Therefore, I called dr. K. P., who told me that he would be willing to act as the appointed defence counsel, so he will be appointed in the case." The defence counsel who was appointed this way did not say anything throughout the entire criminal procedure with the exception of his closing speech, and he examined the case file at the closing of the investigation for no more than 10 minutes.*

It can be mentioned as a good practice that in Békés County, in the court stage, defence counsels are appointed on the basis of a lottery, and in Csongrád County, the authority selects the lawyers to be appointed with a "computerised lawyer-lottery program".

The solution that the counsels to be appointed shall be selected by regional bar associations as prescribed by the New CCP (which was a proposal by Bill T/13972 at the time of the focus group discussions) was welcomed by the participants of both focus groups as a more favourable and transparent system, however, lawyers in one of the groups did not support fully randomised selection (due to the differences in the capacities of the attorneys), while participants of the other group said that they would opt for a combination of a computerised system and a duty scheme, where a certain number of lawyers would be on duty every day, and the computer program would select from among them as this would ensure a randomised, but to some extent foreseeable selection.

Table 12 – Compiling the register of attorneys who can be appointed as defence counsels and duty lawyer schemes in the practice of regional bar associations[257]

Bar association	On what basis do attorneys get included in the register?	Is the register available on the bar association's website?	Number of members of the bar association / number of attorneys who can be appointed	Is there a duty lawyer scheme?	How are attorneys assigned in the duty scheme?	Other relevant information
Budapest Bar Association		Yes				
Bács-Kiskun County Bar Association*	Based on the attorneys' declarations	Yes	426 / 180	Yes	Distribution by towns for every day of the year, two lawyers per day	The register is sent to the authorities and the attorneys.
Pécs Bar Association*	On a voluntary basis, upon request	Yes	336 / 114	No		
Békés County Bar Association*	On a voluntary basis	Yes	174 / 92	No		The need to set up a duty lawyer scheme has not been raised in the county yet. Appointment demands can be satisfied without such a scheme, as the bar association's geographical area of competence is relatively small. Those attorneys who are in the register are willing to take appointments in the weekends as well.
Borsod-Abaúj-Zemplén County Bar Association		Only the duty scheme		Yes	Five lawyers per day	
Szeged Bar Association*	Upon application	No	376 /135	No		The register of attorneys who can be appointed is updated and sent to the authorities on a monthly basis. The register also refers to which attorney is willing to take what types of cases (criminal, civil, etc.) and whether he/she takes appointments in the nights and/or weekends. The authority selects the attorneys to be appointed with a "computerised lawyer-lottery program".

257 Source of the information:
* information provided by the regional bar association and website of the regional bar association (in May 2017)
** website of the regional bar association (in May 2017)
Both the request for information and the responses thereto were sent before the coming into force of the New Attorneys Act.

Bar association	On what basis do attorneys get included in the register?	Is the register available on the bar association's website?	Number of members of the bar association / number of attorneys who can be appointed	Is there a duty lawyer scheme?	How are attorneys assigned in the duty scheme?	Other relevant information
Fejér County Bar Association		Only the duty scheme		Yes	Two lawyers per day, one with an office in Székesfehérvár, and one with an office in Dunaújváros	
Győr-Moson-Sopron County Bar Association*	Based on the attorneys' declaration	Yes	369 / 157	Yes	In the county seat (Győr), the local attorneys are assigned alphabetically for weekends and banking holidays. (In other towns of the county, no duty scheme is operated.) The duty scheme is prepared for three months in advance.	The participating lawyers and the Győr authorities (courts, prosecution, police and the tax authority) are informed about the scheme in an e-mail.
Debrecen Bar Association*	Based on application	Only the duty scheme	401 / 163	Yes	Attorneys are assigned into the duty scheme for every day of the year and for every town of the county where a court is seated.	In the duty scheme it is indicated with regard to each attorney (along his/her name, office address and phone number) on which days of the year he/she is on duty. This list can be found on the bar association's website and therefore it is accessible to all criminal justice and law enforcement authorities of the county.
Heves County Bar Association		No				
Jász-Nagykun-Szolnok County Bar Association*	All members of the bar association can be appointed as defence counsels[258]	Only the duty scheme	Between 215–225	Yes	For weekly periods, two lawyers are assigned for Szolnok (the county seat), and one for cases outside Szolnok. In Szolnok a sufficient number of lawyers applied to be included in the duty scheme, but for the cases outside Szolnok, the number of applicants was insignificant, so all the lawyers from out of Szolnok were assigned into the duty scheme.	The scheme is compiled once every year (at the beginning of the year, or at the end of the preceding year), and it is sent to all concerned authorities, courts and investigating authorities.

258 The bar association's president informed the HHC that the number of the association's members at a given time is between 215–225, and since not enough members applied to be in the register of attorneys who can be appointed as defence counsels, to guarantee the undisturbed provision of defence in criminal cases conducted by the investigating authority, the prosecution and especially the courts, all members had to be included in the register.

Bar association	On what basis do attorneys get included in the register?	Is the register available on the bar association's website?	Number of members of the bar association / number of attorneys who can be appointed	Is there a duty lawyer scheme?	How are attorneys assigned in the duty scheme?	Other relevant information
Komárom-Esztergom County Bar Association		Yes				
Nógrád County Bar Association		No website				
Pest County Bar Association		No				
Somogy County Bar Association		No				
Nyíregyházi Bar Association		Yes		Yes[259]	For banking holidays, the bar association is trying to provide a duty service.	
Tolna County Bar Association*	Based on application or being requested	Yes	106 / 56	Yes	18 lawyers participate in the duty scheme, which is compiled every six months.	
Vas County Bar Association		No				
Veszprém County Bar Association*	On a voluntary basis	Yes	209 / 78	Yes	24 lawyers participate in the duty scheme.	
Zala County Bar Association		Yes				

259 Source: one of the police interviews.

F.

Recommendations

I. RECOMMENDATIONS IN RELATION TO THE IMPLEMENTATION OF DIRECTIVE 2013/48/EU

Article 3 – Right of access to a lawyer

- The right to defence should be fully ensured in the case of those who are – under Article 33(2)(b) of the Police Act – taken into police custody on the basis that they are "suspected of having committed an offence".

- For Articles 3(1) and 3(4) of Directive 2013/48/EU to be fully implemented, we propose the following amendments:
  - In accordance with the New CCP, the possibility provided by the current CCP, according to which the suspect may decide to wait for three days before actually retaining a lawyer, should be eliminated, and if the suspect declares that he/she does not wish to retain a lawyer immediately, then the authority should be obliged to appoint a defence counsel until the suspect makes a decision on retainer.
  - In cases of mandatory defence, the presence of defence counsels should be made mandatory (probably with very strictly defined exceptions).
  - It would be necessary to define a concrete deadline for notifying the defence counsel about the suspect's interrogation which makes it realistically possible for the defence counsel to appear at the questioning and also prepare for it (similar to what is set forth by the New CCP, but leaving more time for the defence counsel than the two hours prescribed by it).
  - It would be important to define in what cases a procedural act can be qualified as "urgent", and prescribe for such acts a deadline for notification that is shorter than the general one, but would still realistically allow the defence counsel to actually attend the act.
  - It would be necessary to accurately regulate in what ways defence counsels may be notified about investigative acts, and when the counsel can be regarded as adequately notified. In this regard it would be advisable to prescribe – especially in relation to detained suspects – that counsels shall be notified via telephone about the suspect's first interrogation.
  - The exact time of the defence counsel's notification should be clearly indicated in the case file.
  - We recommend that it should be prescribed in bylaws – especially in relation to detained defendants – that if the defence counsel indicates that he/she can appear at the first interrogation only with some delay, the investigating authorities should within reasonable limits be obliged to take this into account when deciding about when to commence the questioning.
  - In cases when the presence of the defence counsel is mandatory in the court phase, it would be necessary to determine the minimum time with which before the hearing the counsel should notify the court that he/she cannot attend and arrange for his/her substitution. Missing this deadline should be sanctionable unless the lawyer can demonstrate that he/she was not in the position to meet it due to unsurmountable external circumstances.
  - If defence is mandatory and the attorney fails to appear, it should not be possible to immediately nominate a substitute counsel or appoint another defence counsel on the spot.
  - Interpretation should be available for client and defence counsel consultations not only in direct relation to procedural acts.

- In order to ensure compliance with Article 3(3)(a) of Directive 2013/48/EU and Paragraph (23) of the Preamble, the CCP should be amended to expressly stipulate that the detained suspect shall be provided with the possibility to consult his/her defence counsel via telephone before the first interrogation if the defence counsel cannot attend the questioning. (The New CCP should also be amended to reflect this requirement.)

- In order to ensure compliance with Article 8(2) of Directive 2013/48/EU, the CCP should be amended to prescribe that not only upon the request of the defendant or the defence counsel shall the authority deliver a formal resolution on refraining from the notification of the defence counsel about the questioning of the expert, the inspection, the reconstruction of events and identity parades, but that it would be an automatic obligation if such a decision is made.

- Based on the focus group discussions it seems necessary to speed up the registration of the defence counsels in the records of penitentiary institutions and to prescribe that if the defendant is transferred to another penitentiary, his/her defence counsel shall be notified.

Article 4 – Confidentiality

- Based on the research, it seems necessary to provide premises in each and every police station where the full confidentiality of communications between defendants and their defence counsels can be guaranteed, while the requirements of safety and security can also be met.

- Based on the lessons learnt from the HHC's prison monitoring visits, it would be necessary to guarantee (if needed, in a legal norm) that detained defendants who are placed in multi-occupancy cells could make phone calls to their lawyers outside their cells, without the presence of their cellmates.

Article 5 – The right to have a third person informed of the deprivation of liberty

- In order to ensure compliance with Article 5(1) of Directive 2013/48/EU, it would be required to significantly decrease the 24 hour-term within which authorities must notify relatives and other third persons about the 72-hour detention of the suspect (for instance to eight hours as envisaged by the New CCP).

- In light of the research results the HHC suggests more detailed regulation (in bylaws) of how the notification of third persons nominated by persons in 72-hour detention should be carried out and what measures the investigating authority is obliged to take with a view to notifying these persons (e.g. priority of phone calls, contacting the third person at his/her address if no phone contact can be made).

Article 6 – Right to communicate, while deprived of liberty, with third persons in criminal proceedings

- It would be justified to amend the rules pertaining to communication between pre-trial detainees and third persons with a view to comply with what is implied in Paragraph (36) of the Preamble of Directive 2013/48/EU: „when the competent authorities envisage limiting or deferring the exercise of the right to communicate in respect of a specific third person, they should first consider whether the suspects or accused persons could communicate with another third person nominated by them".

- The HHC suggests that specific safeguards should be put in place to ensure that communication with third persons can be guaranteed "without undue delay", as required by Article 6(1) of Directive 2013/48/EU.

Article 9 – Waiver of rights

- In order to ensure full compliance with Articles 9(1)(a) and 9(3) of Directive 2013/48/EU, it would be necessary to inform suspects about the content of the right of access to a lawyer and the possible consequences of waiving it, as well as the fact that may revoke that waiver subsequently at any point during the criminal proceeding.

Article 12 – Remedy

- In order to increase the efficiency of Article 196(1) of the CCP with a view to fulfilling the requirement set forth in Article 12(1) of Directive 2013/48/EU, we suggest that at least an exemplificative list should be provided by the CCP on what might the actual consequences be if a complaint regarding access to a lawyer and communication with third persons is found to be well-grounded.

II. RECOMMENDATIONS IN RELATION TO THE IMPLEMENTATION OF THE RECOMMENDATION ON LEGAL AID

Section 2 – Personal cost exemption as right to legal aid

- Steps must be taken to ensure that personal cost exemption be granted to all indigent defendants irrespective of whether defence is otherwise mandatory in their cases. In this regard the introduction of "partial personal cost exemption" may be considered. In addition to that, we have the following recommendations to the legislator and criminal justice authorities:
  - In order to comply with § 10 of the Recommendation, the strict formal conditions of personal cost exemption should be reconsidered so that it would not fall on the defendants to prove "beyond all doubt" their indigence.
  - Steps should be taken to provide both the members of the proceeding authorities and the defendants as well as the defence counsels with more accessible and understandable information on the conditions of personal cost exemption and the ways in which it may be requested.
  - Defendants should be informed automatically and fully about the possibility of personal cost exemption and the conditions of applying for it at the beginning of each procedural stage, and if need be, they should be assisted by the authorities in putting forth an application.
  - With a view to provide defendants with satisfactory information about the conditions of personal cost exemption as required by Articles 3(1)(b) and 3(2) of Directive 2012/13/EU and § 5 of the Recommendation on legal aid, a review of the following documents should be made:
    (i) the template for the questioning of the suspect in the central template-collection of the RoboCop NEO system,
    (ii) those written information notes (Letters of Rights) that defendants are provided with in police jails and penitentiary institutions,

(iii) those forms that are sent by the courts to accused persons after the bill of indictment is submitted.

Defendants should be provided with sufficient information on "the possibilities to complain in circumstances where access to legal aid is denied or a legal aid lawyer provides insufficient legal assistance".

- With a view to ensuring that the practice of ex officio appointments could be adequately assessed, the concerned state authorities should be obliged to collect relevant data about e.g. the number of and grounds for appointments in the different stages of the proceeding, the amounts paid to cover the fees and costs of appointed counsels, the fines imposed on counsels for not attending court hearings, etc.

Section 3 – Effectiveness and quality of legal aid

- In light of the research results, we recommend that the legislator and the bar associations take steps with a view to ensuring that appointed defence counsels provide their clients with quality legal aid. To this end, we recommend the following:
  - In accordance with § 19 of the Recommendation, a system of accreditation for legal aid lawyers should be put in place and maintained.
  - In accordance with § 17 of the Recommendation, a general system to ensure the quality of the services provided by legal aid lawyers should be in place, based on the regular monitoring and evaluation of the appointment system.[260]
  - The hourly fee of appointed counsels should be raised to bring it closer to market rates.
  - The system of remuneration should be reviewed to make sure that appointed counsels can be paid for activities that are necessary for effective defence (e.g. preparation for procedural acts, writing of petitions, time spent travelling even if within the same settlement, consultation with non-detained clients). A fee should be paid for the intervals in the court hearings, and the full hourly fee should be paid for consultation with detained clients. The participants of the two focus groups raised that the fees should be differentiated according to the complexity of the cases, or the tasks of defence counsels should be defined and remunerated in a much more specified manner.
  - The focus group participants also raised that it would be necessary to rationalise and simplify the administration of appointed defence counsels' fees and costs.

Section 3 – Appointment of legal aid lawyers

- In order to ensure effective defence, the system of selecting the attorneys to be appointed should be amended to a great extent.
  - We support the New CCP's solution, in terms of which the system of selection will be amended in a way that instead of the proceeding authority, the lawyer to be appointed will be selected by the regional bar association.
  - The new system of selection – which shall be computerised in terms of the New Attorneys Act – should be transparent and should ensure the randomised but even distribution of appointments among the lawyers.

260 For detailed recommendations see: Kádár, András Kristóf –Tóth, Balázs – Vavró, István: *Without Defense – Recommendations for the Reform of the Hungarian Ex Officio Appointment System in Criminal Matters*. Hungarian Helsinki Committee, Budapest, 2007, pp. 135–137.

- Until the laws and other norms on the system of appointments are amended, in order to guarantee effective defence, regional bar associations and appointing authorities should strive to promote the randomised and proportionate selection of lawyers. One way to achieve this could be the application of duty schemes in periods other than weekends and banking holidays, as well as the improvement of the efficiency of such schemes (e.g. by compiling the list of duty lawyers with a view to their specialisation, the sanctioning of failure to be available when one is on duty; and monitoring whether the authorities respect the obligation to make a selection in line with the duty scheme).

► It seems necessary to look into how "the continuity in legal representation by the same lawyer" as required by § 25 of the Recommendation can be ensured, with special regard to second instance court proceedings.

Annex

Comments made during the trainings organised in the framework of the project

The HHC organised three trainings in the framework of the project "Strengthening Procedural Rights in Criminal Proceedings: Effective Implementation of the Right to a Lawyer/Legal Aid under the Stockholm Programme" (JUST/2015/JACC/AG/PROC/8630) – primarily for attorneys.

The trainings took place at the following places and times: (1) Budapest, 26 January 2018, (2) Miskolc, 2 February 2018, (3) Szeged, 27 February 2018. Altogether 47 persons, including 40 attorneys, attended the trainings.

The trainings served two purposes: (1) the transfer of information about obligations under international and European Union law concerning the right of access to a lawyer and legal aid; and (2) the promotion of an exchange of ideas about relevant problems identified in the domestic legal framework and practice. The first topic was covered by HHC staff, who gave presentations focusing on EU acquis and the jurisprudence of the European Court of Human Rights. The second topic was covered in the framework of moderated, but free discussions which touched – among others – upon the country report prepared as a part of the project. The present Annex provides a brief summary of the comments and observations made by the training participants during these discussions. The summary was prepared by Eszter Kirs and Alida Szalai.

1. Informing the suspect about the right of access to a lawyer

In relation to the information provided to the suspect before the interrogation, several participants mentioned that police officers are unlikely to read out the full warning as it is included in the RoboCop NEO system. Some participants were of the opinion that in the old days, when the protocols were really written on the basis of the actual warnings as they were provided by the investigators, the records painted a more truthful picture of what really happened, whereas now "the suspect can't stop wondering that he is supposed to have been told many things". The warning about the rights included in the minutes printed out by the investigator after the interrogation is in most cases different from what is actually said at the beginning of the questioning. In many instances, the duration of the interrogation (which is recorded in the minutes) makes it obvious that in such a short time it was impossible for the officer to provide all the information included in the template of the RoboCop NEO system.

The participants were unanimously of the opinion that even if the investigator reads out the entire text of the warning, the suspect does not fully understand its contents. It depends on the investigator whether or not he/she explains the rights to the suspect. Furthermore, the police often delegate the task of informing the suspect about his/her rights to the defence counsel, although this is not the lawyer's task under the CCP, the counsel is only there to assist the client in interpreting the information provided by the police.

Some participants shared the experience that even if the suspect is duly informed about the right to a lawyer, and the investigator is willing to wait for the counsel to show up, the police officers very frequently talk to the suspect before the counsel's arrival and try to convince him/her that he/she is better off if he/she confesses to the charges. This shows that the truly effective right to defence may be breached even if the right of access to a lawyer is formally guaranteed.

The practical significance of the information about rights before the interrogation is severely undermined by the fact that trial judges control what happened during the police questioning to only a limited extent. When the minutes of the interrogation as signed by the suspect are presented to the judge, he/she usually asks the defendant whether it is his/her signature in the minutes. If the answer is affirmative, the court is satisfied that the warnings were provided – according to the participants, the court does not examine whether the information about the rights was actually given.

2. Information about personal cost exemption and the process of deliberation

Many participants claimed that they had never heard an investigator or a judge ex officio inform the defendant about the possibility of cost exemption – they usually expect the defence counsel to provide information about this issue.

It was also mentioned that the form for requesting personal cost exemption is not easy to fill out, and it is also difficult to acquire the annexes and certificates that must be attached. As a related proposal, it was put forth that the collection and provision of certificates could be done in an automatized manner by the state authorities, in order to save the indigent defendant from the additional burden.

It is not only the defendant and the counsel who are burdened by the administration of requests for cost exemption. One lawyer told that once he had been asked by the police to take the request for exemption to the prosecutor's office, because "they had no clue what they should be doing with it".

Another participant gave an account of an ongoing case where 10 years had passed since the perpetration of the offence. In the beginning, the defendant was wealthy, however, at the time of the discussion he was on the verge of homelessness. This shows that the financial status of the defendant, and with it the need for cost exemption may change during the procedure, so it would be important to inform the defendant about this possibility at different points of the proceeding.

Finally, it was mentioned as a problem that the cost exemption extends only to the fees and costs of the counsel. However, the involvement of forensic experts may cost millions of forints, and in the case of a conviction, this may impact the defendant's life for decades after he/she serves the sentence and is released.

3. Retaining a defence counsel and contacting the suspect

The discussions at the trainings revealed that the penitentiary institutions' practice of administering retainers and the requirements pertaining to them is not unified. One of the participants complained that he had not been allowed access to his detained client because the retainer mentioned his law firm and not himself personally. Others were refused entry because the institution's stamp was missing from their retainer. Some institutions do not prevent lawyers' access to their clients if the institution has not yet stamped the retainer: they accept if the retainer is stamped by the authority conducting the criminal procedure. But maintaining contact with the detained client may be problematic in such institutions too: trainee lawyers for instance often face obstacles in entering even if they can prove that they work for the retained law firm.

Participants had several unpleasant experiences with regard to the consultation preceding the signing of the retainer. It happens that the member of the penitentiary personnel is within sight and hearing distance, he/she can hear the consultation, and limits the consultation to a few minutes, saying that "the lawyer should go over to the police and bring back the stamped retainer as soon as possible, and after that they will have plenty of time to talk to the client".

4. The appointment of the defence counsel

The training participants reported that in cases of mandatory defence it happens that the suspect is duly informed about the fact that if he/she does not retain a lawyer within three days, a counsel will be appointed for him/her, however, if he/she does not retain a lawyer right away, he/she is interrogated

immediately without either waiting for three days or appointing a defence counsel, i.e. in the absence of a lawyer, which severely compromises the fairness of the procedure. (It must be noted that this can only happen if the suspect is not detained, since if the suspect is deprived of his/her liberty, then the counsel must be appointed before the interrogation.)

It is also a problematic practice that if the appointment has been made, but the lawyer cannot attend the questioning because of conflicting duties, then the police will usually ask the suspect whether he/she is accepts that although he/she has a counsel, the counsel is absent. Most suspects accept this, and the interrogation commences. According to the participants, investigators do not adequately inform the suspects that they have a choice and could refuse to testify in such cases.

Some participants think that even in the new system of appointment introduced by the New CCP for smaller regional bar association it will remain difficult to find active and diligent lawyers within a reasonable geographical proximity to be appointed in mandatory defence cases.

Remarks were made in connection with how lawyers are notified about the appointments. Participants are of the view that notification via fax and telephone is not sufficient – it might happen that they do not pick up the phone if the call is from an unknown number. One participants suggested to solve this issue through the central online administrative interface for firms (*cégkapu*). If it was indicated that the document sent to the lawyer through this interface concerned an appointment, then he/she could go to his/her office to open it through the interface.

Several participants had questions about how their respective associations would solve the task of maintaining a duty system. Some thought that the bar association would create a roster of duty lawyers, which is not ideal according to many of them.

The participating lawyers believe that appointed counsels are expected to attend all procedural acts in the court phase, otherwise a new lawyer will be appointed. One participant told an extreme story about a complex, three-year long case, in which the appointed lawyer died one day before the court hearing, but the court refused to postpone the hearing and appointed a new lawyer. Concerning complexity issues, another participant shared his own case involving eleven defendants, in which the counsel for the main defendant terminated the retainer because the client could not pay any more. The defendant requested the court to appoint the same lawyer for him, but when it turned out that the lawyer could not attend one of the hearings, the court refused to postpone the hearing and appointed a brand new counsel for the defendant – not only for that particular hearing, but for the whole procedure.

Other individual stories were by the participants:

- The lawyer was attending a family celebration, he was slightly tipsy. The police called him in relation to an appointment, although he was not on duty. He told the officer that he was unable to drive. The officer sent a car for him, and appointed him to be the counsel for 10 defendants. However, by the time he got to the police station, the interrogations had been accomplished, the minutes had been prepared, he only had to sign them.
- A suspect with mental disability was arrested on the charge of rape. A relative contacted the lawyer, but by the time he made it to the police station with the retainer, the suspect had been questioned and confessed to the crime. It turned out that in the meantime the police appointed a counsel, who was called via phone, and accepted the appointment, but told the police that he could not attend the interrogation. The minutes contained all the necessary warnings, but the vulnerable suspect for whom it took hours to read even one simple page, evidently could not have understood the consequences of a confession. Later he withdrew the confession, but the court did not take that into account, since the suspect had been "informed".

5. The notification of the counsel about procedural acts

According to the participants' experience, the notification about procedural acts is documented only if the police actually attempt to notify the lawyer. In his view, a missing notification document means that the authorities have failed to notify the defence counsel.

The following story shows the practical problems of notification from the lawyer's point of view. On a Thursday evening the investigator called the counsel that the suspect would be confronted with the victim on the next morning at 9.30. According to the concerned lawyer, the police officer was clearly surprised by the lawyer's answer that she would be present at the interrogation.

6. Consultation, confidentiality, maintaining contacts

Many complaints were made at the trainings about the physical conditions of consultation rooms and the lack of adequate confidentiality. For example, in some penitentiary institutions the consultation conducted through a plexiglass wall via a microphone "echoes", and "only those can't hear it who do not want to hear it". In those penitentiaries which maintain few consultation rooms compared to the number of inmates, it may happen that the counsel cannot talk to the client because the rooms are occupied even if he/she books the time slot in advance. There are institutions that limit the time for consultation even if the lawyer is late for the agreed time of the consultation because he/she travels to the institution from another town and the delay is caused by the traffic conditions.

It also happens that the time spent on allowing the lawyer's entry is deducted from the time of the consultation. After the counsel checks in it is checked whether the retainer is registered in the institution's internal data base, and if the reintegration officer has not introduced the retainer stamped by the criminal justice authorities into the internal data base, the guard walks up to the head of the unit to check whether the lawyer can be allowed access on the basis of the stamped retainer. Even if the head of the unit allows the entry, the counsel has already been waiting for an hour even to enter the institution. Where the number of personnel is small, it may happen that the counsel cannot consult the client, because there is no staff member who could escort him/her to the consultation room.

One of the participants shared a case, when – relying on the new provisions allowing this form of contact – he tried to make a phone call to his detained client. He was assured that the competent reintegration officer would tell the inmate to return his call. The client called half a day later, and said that the reintegration officer had notified him about the lawyer's call only then. Another lawyer shared her experience concerning foreign defendants: her Greek client had been detained for over a month when finally his currency was exchanged to Hungarian Forints and he could call the lawyer.

It was mentioned as a regular problem that the lawyers are not notified when their client is transferred into another penitentiary. Sometimes in takes days to "investigate" where the client ended up. When a detained defendant is transferred with a view to the court hearing, it regularly happens that the counsel can only consult the client for a couple of minutes before the trial in the hallway of the court building.

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